EXCESSIVE FORCE IN SELF-DEFENCE: A COMMENT.

In *Masnec*,[1] the Tasmanian Court of Criminal Appeal refused to accept what for convenience may be referred to as the *Howe*[2] principle, as being applicable in Tasmania. It is the way in which the Court reached and justified this refusal that has drawn Mr. Baker's criticism. He argues that the Court could as well have held that the proposition was applicable but it did not wish to, and having decided to reject the principle, it then so interpreted the Criminal Code as to support this decision, "ignoring arguments against its view . . . that it could not satisfactorily dispel."

In the main, Mr. Baker's attack is directed, as the title of his article suggests, at the judicial process. He relies on the rejection of the *Howe* principle in the *Masnec* case merely to exemplify his point. I propose to concentrate on the example, first by taking a closer look at the proposition itself, and then by seeing whether it can be fitted into the framework of the Australian Codes.

It has been said that the Australian courts in cases like *McKay*[3] and *Howe*[4] "made a major contribution to the law of homicide by developing a new qualified defence to murder."[5] And it is true that there is a dearth of reported modern English or Australian cases (prior to *McKay* in 1957) in which the defence has been considered. So much so that late in 1963 in *Hassin*[6] when it was submitted by counsel that the trial judge should have directed the jury that if the accused had exceeded the bounds of self-defence the proper verdict would have been manslaughter, the Court of Criminal Appeal referred to the submission as "a novelty in present times," adding that it "may have existed in the days of chance medley." In the short report of the case in the Criminal Law Review there is no indication of whether the

1 [1962] Tas. S.R. 254. The report had not been published when Mr. Baker wrote his article.

2 (1958) 100 Commonwealth L.R. 448 (High Court of Australia), [1958] State R. (South Aust.) 95 (Supreme Court of South Australia).

3 [1957] Victorian R. 560, [1957] Argus L.R. 648.

4 *Supra*, note 2.

5 MORRIS AND HOWARD, STUDIES IN CRIMINAL LAW, (1964) 113; See also Morris, *A New Qualified Defence to Murder*, (1960) 1 ADELAIDE L. REV. 23; Howard, *An Australian Letter—Excessive Defence*, (1964) CRIM. L. REV. (Eng.) 448.

6 [1963] CRIM. L. REV. (Eng.) 852.

Australian cases were cited to or considered by the Court. There had also been at least one other English case earlier in the century in which the question had been considered but of which the court was apparently unaware.

The case was *Biggin*,[7] tried in 1919. The accused charged with murder, claimed that he had acted in self-defence and was convicted of manslaughter. His appeal was allowed on the ground of the improper admission in cross-examination of questions relating to another offence committed by him, but in delivering the judgment of the Court of Criminal Appeal, the Earl of Reading C.J. referred to and, it would seem, accepted as a correct statement of the law, the trial judge's direction to the jury "that if the appellant used more violence than was really necessary in the circumstances that would justify a verdict of manslaughter."[8]

The principle can certainly be said to have existed in the days of chance medley but it is not related to that concept[9] other than casually. It was rather a consequence of the concept of malice aforethought. In the medieval era of English law, all homicide had been capital unless authorized, justified or excused.[10] Capital homicide had thus constituted the category of residual homicide. The apparent harshness of the law was however mitigated somewhat by the doctrine of benefit of the clergy. After the statutes of 1532 and 1547[11] which excluded benefit of clergy in cases of "murder of malice prepensed" had established the distinction between murder and manslaughter, manslaughter became the category of residual homicide. Previously any homicide which did not qualify for exoneration because one of the elements required for justification or excuse was wanting, had been capital. Now it had to be decided whether the homicide in such a case was murder or manslaughter. If the killing was with malice prepensed or aforethought, it was murder: if not, it was manslaughter.

7 [1921] 1 K.B. 213.

8 *Ibid.*, at 219.

9 "Homicide" said Coke (III COKE, INSTITUTES, (1809 ed.) 56) "is called chance medley or chancemelle, for that it is done by chance (without premeditation) upon a sudden brawle, shuffling or contention; for meddle or melle (as some say) is an ancient French word, and signifieth brawle, or contention." *Cf.* LAMBARD, EIRENARCHA, (1614 ed.) 248; IV BLACKSTONE, COMMENTARIES, (15th. ed. 1809) 183. Chance medley was sometimes used as a synonym for manslaughter: see III REEVES, HISTORY OF ENGLISH LAW, (2nd ed. 1787) 537.

10 The category of "excused" homicide developed out of the practice of the granting of pardons in cases of killing *per infortunium* and *se defendendo*.

11 23 Hen. VIII c. 1 sec. 3 and 1 Ed VI c. 12 sec. 10.

Thus although killing in the prevention of felony or the taking of felons was justifiable, if the felon could have been "taken without severity," said Hale,[12] writing in the mid-seventeenth century, the slaying would have been *"at least* manslaughter"; and in cases of domestic correction, where the chastisement was immoderate, "either in the measure of it or in the instrument made use of," said Foster,[13] about a hundred years later, it was "either murder or manslaughter according to the circumstances of the case."

In *Cook*[14] (1639) the earliest of the cases usually cited in support of the *Howe* principle, the accused had shot and killed a sheriff's officer who was attempting to break into his house to effect an arrest on a civil warrant. The court held that the killing was not justified or excused because though the attempted breaking in was in the circumstances unlawful[15] "he might have resisted him without killing him": nor was it murder, because "the bailiff was slain in doing an unlawful act in seeking to break open the house." The accused was therefore guilty of manslaughter.

But "[b]arbarity will make malice in many cases," as Lord Holt is reported as having said.[16] And in *Rogers*[17] (1735) when the accused with "the help of a gang of desperate fellows" resisting the execution of process in a chancery suit killed three of the sheriff's posse, this was held murder. Thus the question in each case of unlawful homicide was whether or not there was that degree of heinousness or brutality required to establish the malice aforethought required for murder. Unless there was, the homicide was manslaughter.

Through the nineteenth century the principle persisted and in the reports are to be found numerous cases in which it was applied. When a plea of self-defence failed the verdict was frequently man-

12 1 HALE, PLEAS OF THE CROWN, (Sollom Emlyn ed. 1736) 489, emphasis added. See also 1 HAWKINS, PLEAS OF THE CROWN, (Orgl. ed. 1716) 69.

13 FOSTER, CROWN CASES, (3rd. ed. 1809) 262. See also LAMBARD, *op. cit. supra* note 29, at 254; and I HAWKINS, *op. cit. supra* note 13, at 73-74.

14 (1639) Cro. Car. 537, 79 E.R. 1063.

15 Much of the law of homicide of this period developed around the technicalities of the law regarding arrest and impressment for military and naval service.

16 In Keate, (1697) Comb. 406, at 408, 90 E.R. 557, at 559, citing Holloway, (1628) Cro. Car. 131, 79 E.R. 715.

17 See FOSTER, *op. cit. supra* note 14, at 311-312. See also Richard Curtis (1756) Fost. 135, 168 E.R. 67. The law regarding homicide in resistance of judicial process seems by the early eighteenth century to have hardened somewhat.

slaughter and not murder, though there generally was considerable confusion between the issues of self-defence and provocation.

The only two reported English cases of the twentieth century have already been referred to. In Australia since *McKay* and *Howe* the principle has been accepted by the Court of Criminal Appeal in New South Wales in *Haley*;[18] considered further by the Supreme Court of Victoria in *Enright*[19] and in the two *Tikos*[20] cases; and been held not to be applicable not only in Tasmania (in *Masnec*[21]) but in Queensland as well (in *Johnson*[22]).

In those jurisdictions in which the qualified defence does apply, there is some difference of opinion as to its limits. Perfect self-defence involves elements both of necessity and of proportion. First, the force used by the accused must have been reasonably necessary to prevent the threatened harm: where the accused "exercises more force than a reasonable man would have, but no more force than he honestly believes to be necessary in the circumstances"[23] he does not qualify for perfect self-defence but is to be given the benefit of the qualified defence and convicted only of manslaughter. This aspect of the qualified defence suggests either that the accused continued to use force when a reasonable man would have desisted or that he had a choice, and selected a more forceful means of defence than the reasonable man would have.[24] If he used more force than he himself believed necessary this would of course provide the element of malice aforethought required to make the homicide murder.

There is in addition (for perfect self-defence) the element of proportion: the force used must not be out of proportion to the harm which the accused was seeking to prevent. A man believing himself to be threatened with no more than a cuff across the ear could hardly be justified in shooting his assailant, even if he had no other way of defending himself. But though not justified, should he not be given

18 (1959) 76 Weekly Notes (N.S.W.) 550.

19 [1961] Victorian R. 663.

20 Tikos No. 1, [1963] Victorian R. 285; Tikos No. 2, [1963] Victorian R. 306.

21 *Supra*, note 1.

22 [1964] Queensland R. 1. This case had not been heard when Mr. Baker delivered his paper.

23 Howe, [1958] State R. (South Aust.) 95, at 122.

24 In earlier times the failure to retreat before striking the fatal blow in the chance medley situation would have had a similar effect. See *e.g.*, Odgers, (1843) 2 M. & Rob. 479, 174 E.R. 355. The present common law position regarding retreat is well explained by Dixon C.J. in Howe, (1958) 100 Commonwealth L.R. 448, at 462-464.

the benefit of the qualified defence? Provided the dis-proportion was not sufficiently great to warrant an implication of malice, on the authority of the earlier case the answer would be "yes." As Baron Parke put it in *Patience*:[25] "If a person receives illegal violence [it was an attempted unlawful arrest in the case in question] and he resists that violence with anything he happens to have in his hand [it was a knife] and death ensue, that would be manslaughter." And there were several other cases[26] in which it was accepted that homicide resulting from the use of a dangerous weapon in retaliation to a simple assault would be manslaughter and not murder. In *Howe* the Supreme Court of South Australia did not pursue this aspect of self-defence in their discussion, but in their statement of the rule they restricted the qualified defence to cases in which there had been "a violent and felonious attack."[27] In *Enright*,[28] the Supreme Court of Victoria did consider the issue squarely and they took a categoric stand. They said:

> "in a case . . . in which an intention to kill or do grievous bodily harm is one of the elements of the crime charged, no issue of self-defence arises at all unless there is evidence of an attack, or threat of attack, of sufficient gravity to make it a question for the jury whether action involving at least some intentional infliction of grievous bodily harm would not have been justifiable in self-defence. If there is no evidence of an attack, or threat of attack, of that degree of gravity then there is something standing in the way of an acquittal on the ground of self-defence apart from the amount of force in fact employed by the accused. That something is, that what he was defending himself against was not of sufficient gravity to provide any foundation for a plea of self-defence to the kind of charge laid, because it was a charge in which an intention to kill or to do grievous bodily harm was one of the elements."

If the accused had "honestly and reasonably feared an assault which merely threatened him with some minor form of violence or injury," the Court continued, then the trial judge should withdraw the issue of self-defence, including presumably qualified self-defence,

25 7 Car. & P. 775, at 776, 173 E.R. 338.

26 See *e.g.*, Smith, 1837) 8 Car. & P. 441 (a bayonet); Weston, (1879) 14 Cox C.C. 346 (a rifle); Symondson, (1896) 60 J.P. 645 (a pistol). In each of these cases there is, however, some confusion between the qualified self-defence and the issue of provocation.

27 [1958] State R. (South Aust.) 95, at 121.

28 [1961] Victorian R. 663, at 668-669.

from the jury. In *Tikos No. 1*,[29] Sholl J. confirmed that in his view the *Howe* principle was "limited to cases in which a genuine occasion has arisen which would justify the person concerned in defending himself (a) against an actual and unlawful threat of death or serious bodily injury, or (b) against what he honestly believes on reasonable grounds to be such a threat," and in *Tikos No. 2*,[30] the Full Court of the Supreme Court of Victoria approved of the statement in *Enright*. They said:

> "We feel no misgivings about what was said by the Court in *Enright* and consider it a useful and correct guide to a judge when charging a jury in a case such as this.
>
> Accepting the *Enright* test, we think it would, in a case like this, be proper to tell the jury that if they considered that the particular occasion warranted the infliction of some form of grievous bodily harm—but was not such as to warrant the firing of a gun at and in close proximity to the deceased so as very likely to cause his death (though the accused's intention may have been only to do grievous bodily harm)—then the accused should not be wholly acquitted on the ground of self-defence but he would be guilty of the crime of manslaughter.
>
> But if the occasion did not call for the infliction of any degree of grievous bodily harm, he would be guilty of murder."

If, however, the "underlying rationale" of the principle depends, as the Supreme Court of South Australia stated in *Howe*,[31] on the absence of malice aforethought, the fact that the accused's "state of mind is not fully that required to constitute murder,"—and history certainly supports this point of view—then the limitation of the Victorian Supreme Court is unnecessary and could be inhibiting. The statement of the law in *Howe*[32] by Dixon C.J. in his judgment (in which McTiernan and Fullagar JJ. concurred) is more in keeping with the earlier authorities and with the rationale of the principle. His Honour put it thus:

> "it is assumed that an attack of a violent and felonious nature, or *at least of an unlawful nature,* was made or threatened so that the person under attack or threat of attack reasonably feared for his life or *the safety of his person from injury, violation or indecent or insulting usage.*"

29 [1963] Victorian R. 285, at 289-290. See also Monahan J. at 302, and *cf.* Smith J. at 297-298.

30 [1963] Victorian R. 306, at 312-313.

31 [1958] State R. (South Aust.) 95, at 122.

32 (1958) Commonwealth L.R. 448, at 460. Emphasis added.

It is not suggested that every violent killing should be reduced to manslaughter merely because it was preceded by an unlawful assault by the victim. "Barbarity will make malice"[33] if anything more readily today than it did in Lord Holt's time. But the question should be whether or not there is the malice aforethought required for murder, and the *Enright* test will not invariably provide the answer to this question.

To turn now to the Codes. In rejecting the *Howe* principle in *Masnec*,[34] the Tasmanian Court of Criminal Appeal did so, they said, "as a matter of necessary construction."[35] The reasons of the Court, delivered in a joint judgment, may be summarized as follows. The principle is not provided for in any of the "no less than twenty sections covering comprehensively the occasions on which the use of force is justified." [But to interpose, the qualified defence—and Mr. Baker makes this point forcefully—does not raise a claim to justification: it merely seeks to reduce a homicide from murder to manslaughter.] Under section 52,[36] the reasons of the Court continue, the use of more force than is "authorized" makes a person "criminally responsible for any excess according to the nature and quality of the act which constitutes such excess." "[T]he 'nature' of homicide proceeding from excessive force is that it is unlawful and therefore

[33] See note 16 *supra*.

[34] [1962] Tasmanian S.R. 254.

[35] *Ibid.*, at 265. For some reason which is not apparent and could hardly have made any difference to the construction of the relevant sections the Court seem to have considered that a preliminary explanation was called for (See 261-262). The "formal acceptance" and "full statement" of the principle by the High Court, they pointed out, had not come until after the enactment of the Code: moreover, there was "still no precise agreement as to its [the principle's] scope." It was therefore "permissible", they concluded, to examine the Code "without any preconceived idea" that the principle would be "found to be included or that it should be searched for until found."

[36] Mr. Baker's somewhat tentative suggestion that the provisions declaring the use of excessive force unlawful should be confined to the sections giving protection to the performance of surgical operations in good faith, cannot be sustained. The juxtaposition of the sections alone can hardly be authority for so interpreting them. And the fact that in the 1908 Crimes Act of New Zealand the two provisions appear as subsections of the same section (sec. 86) adds little if anything at all in the light of the fact that the two provisions had appeared as separate sections (secs. 69 and 70) in the earlier Criminal Code Act of 1893. The sections in the Western Australian and Queensland Codes were taken from the 1880 Bill for the proposed English Criminal Code (secs. 68 and 69) and there is no suggestion in that Bill, or by Stephen who was largely responsible for drafting it (See STEPHEN: A DIGEST OF THE CRIMINAL LAW 138), or in the historical development of law, to support Mr. Baker's suggestion.

culpable. Its 'quality' is determined by the mental element which accompanies it." And so, having used excessive force, provided the accused "knew or ought to have known" that his act was "likely to cause death in the circumstances," he must, under section 157(1) (c), be guilty of murder.

In *Johnson*[37] in Queensland, each of the three judges of the Court of Criminal Appeal delivered separate reasons for judgment. Stanley J. rested his decision on an interpretation of the self-defence sections: as the *Howe* principle did not fall within the language of those sections of the Code it had to be disregarded. Philp A.C.J., it is submitted with respect, provided the short and conclusive answer:[38] the principle "depends upon the concept that at common law malice aforethought is an essential ingredient of murder and that that malice cannot be imputed to a person who intentionally kills in defending himself but whose plea of self-defence fails only because he used excessive force in defending himself. The concept or requirement of malice aforethought is no part of the law of Queensland." The principle would therefore need express inclusion and there is no section in the Code "which could be regarded as incorporating [it]." Lucas A.J.[39] expressed his opinion in somewhat similar terms.

It could also be argued, and as a matter of strict interpretation the argument is irrefutable, that under the Queensland and Western Australian Codes the sections[40] defining wilful murder and murder would preclude the qualified defence because they provide that "[e]xcept as *hereinafter* set forth, a person who unlawfully kills another" is guilty of wilful murder or murder as the case may be. And the only relevant subsequent exception is killing under provocation.

There is much to be said in favour of codification of the criminal law. But codification has its shortcomings. Concepts and principles do not readily lend themselves to reduction to short verbal formulae. Of necessity interpretation becomes the prime concern of the courts and notwithstanding statements like that of Sir Stanley Burbury in *Murray* referred to by Mr. Baker,[41] the courts are often preoccupied with questions of semantics. But however one looks at it, the rejection

37 [1964] Queensland R. 1.

38 *Ibid.*, at 7.

39 *Ibid.*, at 25.

40 Secs. 301 and 302 in Queensland and secs. 278 and 279 in Western Australia. Emphasis added.

41 [1962] Tasmanian S.R. 170, at 172, and see note 2 on 449 *supra*.

of the *Howe* principle under the existing provisions of the several Codes is unavoidable. And this is primarily because of the statutory definitions of murder and wilful murder. Since the beginning of the nineteenth century the tendency has been to try to redefine malice aforethought in terms of objectively determinable criteria and emphasis has been laid on intention to kill or do grievous bodily harm as the required state of mind. In the Criminal Code Indictable Offences Bill of 1878 and the Draft Code appended to the Report[42] of the Royal Commission appointed to consider the Bill, murder is defined[43] but the expression "malice aforethought" is not used at all. The Codes of New Zealand, Tasmania, Queensland and Western Australia were based on the English Draft Code of 1879 and through Sir Samuel Griffith in his draft, (which became the Queensland Code from which the Western Australian Code was copied) varied the homicide provisions very considerably, he too avoided the expression. It is these statutory definitions of murder (and wilful murder) which are fatal to the qualified defence. They have been written—to use Windeyer J.'s fascinating metaphor[44]—on a *tabula rasa.* The concept of malice aforethought having been blotted out, with it the qualified defence has been erased. It is true, as Mr. Baker points out, that the text books define murder in terms similar to those used in the Codes, but the fact is that in common law murder is still killing with malice aforethought, and if the malice is negatived then there can be no murder. Indeed, the definitions which avoid the expression are inadequate.

It might be argued that the legislatures, when enacting the Codes, could not have intended to exclude the qualified defence. And it cannot be denied that had the matter been in contemplation in all probability the defence would have been preserved. It would seem objectionable to include within the category of the most culpable homicides, those in which there are extenuating circumstances.[45] Should not the Courts therefore strain the language of the statute? This has been done before, for example, in *Callaghan.*[46] It is submitted however, that statutory amendment would be preferable to any strained interpretation even if such an approach to the problem

42 C. 2345 (1879).

43 In sec. 174 of the Draft Code.

44 (1961) 35 AUST. L.J.R. 182, at 191-192.

45 There are however other types of homicide committed in extenuating circumstances—mercy killings for example—which are also included within the categories of murder and wilful murder.

46 (1952) 87 Commonwealth L.R. 115.

were open.[47] While I agree with Mr. Baker that the "qualified defence" should be available, in my opinion this would best be done by amending the Codes expressly to include the defence, or better still, by amending the definitions of murder and wilful murder.

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[47] The Callaghan case is but an example, and even as such, it is distinguishable.

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