sequence that the section did not depend for its operation upon the arrangement being a 'sham', though if it were such then it was to be disregarded without section 260.[9]

It appears from the case that it would be possible to 'avoid' taxation with respect to future income within the meaning of the section, but it has not been necessary up to the present time for the courts to consider the situations in which this might arise. It would not seem in view of other statements of Lord Denning that this section would apply in very many cases. He said, 'In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax.'[10] In the case of future income it would probably be more difficult to do this and even if it could be done, there is still real doubt as to whether the section would apply. Lord Denning makes a rather curious statement about *W. P. Keighrey Pty Ltd v. Commissioner of Taxation:*[11] 'Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax.'[12] In view of the facts in that case, this statement would either represent a restrictive approach to the circumstances in which such predication could be made or else it is a recognition that the section was not intended to prevent the exercise of powers of choice given by the other parts of the Act.[13]

Finally there remains to be considered the issue of the importance of the 'purpose' of avoiding taxation in the arrangement. It seems to have been generally accepted that there may be other purposes while section 260 applies, but the limits are in doubt. In the instant case the existence of such other purposes has been over-emphasized as there is little doubt that the avoidance of tax was a condition precedent to the complete fulfilment of the other aims. The shareholders did not wish to bring in outside capital and so their conduct was centred around the problem of tax avoidance. Thus, it is submitted, it is quite reconcilable with the case to say that the 'purpose' or 'effect' of avoiding tax must be at least the dominant purpose or perhaps even a condition precedent to the satisfaction of other aims, as it appears to have been here.

F. H. VINCENT

THE QUEEN v. HOWE[1]

Criminal Law—Homicide—Murder or Manslaughter—Self-Defence—Excessive Force

The respondent was charged with and convicted of the murder of one M, but the Court of Criminal Appeal of South Australia quashed the con-

[9] This approach had been previously adopted by the High Court in *Jacques v. Federal Commissioner of Taxation* (1924) 34 C.L.R. 328. [10] [1958] 3 W.L.R. 195, 202.
[11] [1958] Argus L.R. 97. [12] [1958] 3 W.L.R. 195, 202.
[13] N.E. Challoner, 'Arrangements to Avoid Income Tax: A Consideration of the Effect of Newton's Case' (1958) 32 *Australian Law Journal* 109.
[1] [1958] Argus L.R. 753. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Taylor and Menzies JJ. *Cf.* succeeding case note.

viction and ordered a new trial. The Crown applied to the High Court for special leave to appeal on the important question of law relating to self-defence in homicide, but this was refused.

The respondent, H, was said by the Crown at the trial to have murdered M by shooting him and then to have robbed him of £81. The Crown therefore claimed that it was simply a case of murder to rob. The defendant, however, claimed that he shot the deceased in a fit of temper and in self-defence when the deceased attempted to attack him sexually. He fired only one shot. On these facts the defendant pleaded provocation to reduce the degree of guilt, but this was rejected by the jury and was disregarded by the High Court on appeal. The main issue arose out of the plea of self-defence.

The trial judge, in directing the jury as to self-defence, stressed two points, saying that the plea of self-defence could not succeed unless:

(i) the accused had retreated as far as possible having regard to the attack, and

(ii) the accused had used no more force than was reasonably necessary.

It is point (ii) that has caused the difficulty. If a man is defending himself in a situation that does call for such action, but uses more force than the occasion reasonably demands, is he guilty of murder or manslaughter? The High Court was of the opinion that the law, although not definite, established the answer that in such a case the crime was reduced to manslaughter. This was the decision of the Supreme Court of Victoria in *The Queen v. McKay*[2] where Lowe J. said:

> If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of a felon but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter—not murder.[3]

This view was taken by the Supreme Court of South Australia in quashing H's conviction and ordering a new trial.

That court also took the view that the point about retreating before resorting to violence is no longer an imperative one of law in making out a plea in self-defence. In many circumstances it had been so regarded.[4] The exception to the rule was that a person did not have to retreat when warding off an attacker in his own house. But in this case the High Court[5] stated that at this day the question whether a retreat could and should have been made is merely an element for the jury to consider as entering into the reasonableness of the accused's conduct. It is an element in deciding whether the accused went farther than he was justified in doing—it is not a categorical proof of his guilt.

These, then, were the two main points discussed by the High Court in relation to self-defence and as a result the decision of the Court of Criminal Appeal of South Australia to order a new trial was upheld and the special leave to appeal sought by the Crown was refused.

[2] [1957] V.R. 560; [1957] Argus L.R. 648.
[3] [1957] V.R. 560, 563; [1957] Argus L.R. 648, 649.
[4] *Stephen's Digest of the Criminal Law* (9th ed. 1950) art. 305 (d).
[5] [1958] Argus L.R. 753, 759, *per* Dixon C.J.

This decision will help to clear up a very difficult point in the law of homicide, a point which was thrust forward in *The Queen v. McKay*.[6]

THE QUEEN v. BUFALO[7]

Criminal Law—Homicide—Murder or Manslaughter—Excessive Force in Self-Defence—Onus on Crown

B was presented on a charge of murder by stabbing, but at the trial Counsel applied for a ruling that there was no evidence to support a charge of murder as distinct from manslaughter. Smith J., in giving this ruling, stated that, to establish the accused as guilty of murder, it is necessary for the Crown to prove that he killed the deceased intentionally and not by accident and that in killing him he had an intention either to kill or to do grievous bodily harm. Here the accused raised a plea of justified self-defence. In such a case the onus is on the Crown to prove that the case is not one of reasonable self-defence. Smith J. then went on to give some of the limits to the doctrine:

1. The accused must act while protecting himself from injury.
2. He must not exceed the limits which the law regards as reasonable.

These limits depend on consideration of necessity and protection.[8] Smith J. stated that he was forced to accept the ruling of Lowe J. in *The Queen v. McKay*[8a] in which it was said that where an accused person has acted in self-defence but has exceeded the limits of reasonable self-defence, he cannot be guilty of murder but may be guilty of manslaughter.

This was the law stated by Smith J., but he continued that it was his opinion in this case that there was no evidence to show that the accused was not acting in self-defence. The accused had stabbed the deceased when the latter was attacking him with a bottle. The Crown attempted to show that the stabbing was done with a desire for revenge but no evidence, according to the trial judge, was proffered to uphold such a claim. The trial judge added that, on the contrary, there seemed to him to be ample reason why the accused should have feared that he would be killed or seriously hurt. For these reasons, he thought that there was no evidence at all to support any claim of excessive force used whilst the accused was defending himself.

Although this ruling by Smith J. is of little importance in establishing the law it helps us to understand more readily this difficult point relating to excessive force in self-defence, recently settled by the High Court in *The Queen v. Howe*.[9]

J. S. WINNEKE

[6] *Supra*, n. 2.
[7] [1958] Argus L.R. 746. Supreme Court of Victoria; Smith J. *Cf.* preceding case note.
[8] *The Queen v. McKay* [1957] V.R. 560; [1957] Argus L.R. 648.
[8a] *Supra*, n. 8.
[9] [1958] Argus L.R. 753.