THE DEFENCE OF PROVOCATION.

By the Honourable MR. JUSTICE BARRY of the Supreme Court of Victoria.

Lawyers who have had occasion to consult that compendium of information upon the criminal law, Archbold's *Criminal Pleading, Evidence and Practice*, now in its 31st Edition, may have been puzzled by the passage relating to the defence to a charge of murder that the killing was in chance-medley. According to Archbold,[1] the proper direction for a judge to give to a jury, where that defence is raised, is that given by Bosanquet J., in *R. v. Smith*.[2] That direction was as follows :

" Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon ? for if he did, it will amount to murder. But, if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him ? If he did, then it will be manslaughter. But there is another question,—did he use the weapon in defence of his own life ? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he will be justified."

It will be seen that this direction has nothing to do with chance-medley. Actually, it purports to be a statement of the law with respect to—

(*a*) an unprovoked and deliberate killing, which is murder ;
(*b*) a killing under provocation, which is manslaughter ; and
(*c*) a killing in self-defence, which is excusable homicide.

Even in respect of these matters, the direction no longer represents the law. It is not correct, since *Woolmington's Case*,[3] that the prisoner must satisfy the jury of the elements of self-defence ; except where the defence is insanity, it is for the Crown to satisfy the jury beyond all reasonable doubt that the killing is murder.

Error in the use of the expression " chance-medley " seems to have crept into the law before 1762, for in Sir Michael Foster's *Discourse of Homicide*, which was published in that year, the caption of Chapter 1 of the Discourse runs, " Homicide occasioned by Accident, which human Prudence could not foresee or prevent, improperly called ' Chance-Medley ' ".[4]

The English Court of Criminal Appeal has recently decided that the doctrine of chance-medley has no longer any place in the law of homicide.[5] The expression " applied only where the killing was *se defendendo*, that is in defence of a man's person or property upon some sudden affray, and,

1. 31st ed., 1943, p. 869.
2. (1837) 8 C. & P. 160, at p. 162.
3. [1935] A.C. 462 ; *Cf. The Defence of Insanity and The Burden of Proof*, 2 *Res Judicatae*, 42 ; *Packett v. The King*, (1937) 58 C.L.R. 190.
4. Foster's *Crown Law*, 3rd ed., 1809, p. 258.
5. *R. v. Semini*, [1949] 1 All E.R. 233 ; [1949] 1 K.B. 405.

probably also where the killing was *per infortunium*, and, in either case, where the law would attach some degree of blame for the killing but would excuse it. It was excusable as opposed to justifiable, homicide."[6]

Archbold[7] sets out the difference between justifiable and excusable homicide thus:

"Justifiable homicide is of three kinds: 1. Where the proper officer executes a criminal, in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible or atrocious crime: as, for instance, if a man attempt to rob or murder another, and be killed in the attempt, the slayer shall be acquitted and discharged. See 24 H.8, C.5, Bract. 155, 1 Hale, 488.

"Excusable homicide is of two kinds: 1. Where a man, doing a lawful act, without any intention of hurt, by accident kills another; as, for instance, when a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunium*, or by misadventure. 2. Where a man kills another, upon a sudden rencounter, merely in his own defence, or in defence of his wife, child, parent or servant, and not from any vindictive feeling: which is termed homicide *se defendendo*. If the defendant be found guilty of excusable homicide merely, he shall have a pardon and a writ of restitution of his goods, as a matter of right. And, indeed, to prevent the expense of a pardon, etc., in cases where the death has notoriously happened by misadventure or in self-defence, the judges usually permit (if not direct) a general verdict of acquittal. Fost. 288, 4 Bl. Comm. 188."

For reasons indicated in *R. v. Semini*,[8] the distinction ceased to be of importance when forfeiture was abolished, but before that abolition, as Lord Goddard C.J., shews, the consequence of a finding of killing in chance-medley was a forfeiture. "Some degree of blame attached to the man who killed another whom he was fighting, though the killing was in his own defence, for he ought not to have engaged in a fight."[9] Where there was room for a verdict that the killing was in chance-medley the judges sought a special verdict, and if the facts found by that verdict enabled a verdict of killing in chance-medley to be entered, the Court by its judgment ordered the forfeiture of the accused's goods and, as a deodand, of the thing by which the killing was effected. But section 7 of the *Offences Against the Person Act* 1861, replacing and re-enacting section 10 of the *Offences Against the Person Act* 1828, provides, "No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony," and as a result there is no longer room for the doctrine of chance-medley. Section 5 of the *Crimes Act* 1928 (Victoria), is in the same terms as section 7 of the English Act of 1861. The Lord Chief Justice observed, "*Holmes v. Director of Public Prosecutions*, [1946] A.C. 588 . . . , lays down rules on the subject which are authoritative

6. [1949] 1 All E.R., at p. 234; [1949] 1 K.B., at p. 407.
7. *A Summary of the Law relative to Pleading and Evidence in Criminal Cases*, 2nd ed., 1825, pp. 212-213.
8. *(Supra)*.
9. *Ibid.*, p. 235; [1949] 1 K.B., at p. 408.

and are to be followed by all courts when the question of provocation becomes an issue in relation to killing as the outcome of a quarrel or a fight."[10]

Speaking of Devlin J.'s charge to the jury in *R. v. Duffy*, Lord Goddard C.J. observed that it contained " as good a definition of the doctrine of provocation as it has ever been my lot to read, and I think it might well stand as a classic direction given to a jury in a case in which the sympathy of everyone would be with the accused person and against the dead man and it was essential that the judge should see that the jury had an opportunity of vindicating the law, whatever the consequences might be."[11] The charge which received the approbation of the Court of Criminal Appeal (Lord Goddard C.J., Oliver and Cassels JJ.) was as follows:

" Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here—the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. What matters is whether this girl had the time to say : ' Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill.' That is what matters. Similarly, as counsel for the prosecution has told you, circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation . . . Provocation being, therefore, as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection. Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation—that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation."

10. *Ibid.*, p. 236 ; [1949] 1 K.B., at p. 409.
11. [1949] 1 All E.R. 932, at p. 933.

In a note to the report to my charge to the jury in *R. v. Newman*,[12] I pointed out that there seemed to me to be an inconsistency between two passages in the speech of Viscount Simon in *Holmes' Case*. At p. 598, Viscount Simon said, " The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill . . . or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies." At p. 601, however, he concluded his speech thus, " The remaining reflection is as follows: the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic. In the case of the lesser crimes, provocation does not alter the nature of the offence at all: but is allowed for in the sentence. In the case of felonious homicide, the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty."

It is submitted with great deference that the true view is embodied in the latter passage, and that the proposition contained in the former is not sound. The law admits provocation as a defence where murder is charged because it is recognised that in some situations there may be aroused an impulse to kill which may be forthwith translated into action, but that the situation may be such that the sense of justice of the community would be outraged if the ultimate penalty of death were exacted. Such a killing " is owing to a sudden transport of passion, which, through the benignity of the law, is imputed to human frailty,"[13] and, " it is to human frailty, and to that alone, the law indulgeth in every case of felonious homicide."[14] " Provocation is concerned with the measure of guilt involved in unpremeditated, if intentional, homicide when attributable to overpowering emotions of resentment or other loss of self-control . . . Fear and apprehension may be elements entering into . . . loss of self-control."[15]

Mr. P. A. Landon, in a review of Cross & Jones' *Introduction to Criminal Law*,[16] seeks to justify the first passage from Viscount Simon's speech by regarding " malice " in the context as meaning a " premeditated intention to kill." He arrives at that view by interpreting the passage *secundum materiam*. The word " malice " has given rise to more than enough misunderstanding in the criminal law, however, and it is clear that " malice aforethought " in the definition of murder does not " necessarily imply premeditation, but it implies an intention that must necessarily precede the act intended."[17] In the definition of " malice " given by his Lordship there is no reference to premeditation. It may be that what his Lordship had in mind was that the occasions when the defence of provocation can be effective where the evidence establishes

12. [1948] V.L.R. 61, at p. 70.
13. Foster, *Discourse of Homicide*, p. 255.
14. *Ibid.*, p. 291.
15. *Packett v. The King*, (1937) 58 C.L.R., at p. 217, *per* Dixon J.
16. (1949) 65 *L.Q.R.*, at p. 104.
17. *R. v. Doherty*, (1887) 16 Cox C.C. 306, *per* Fitzjames Stephen J., at p. 307.

an actual intent to kill must be very rare, because the provocation that will excuse such an intent must be of the grossest kind. If this conjecture is right, the earlier passage from his Lordship's speech is not intended as a definition of the essential features of the defence of provocation, but is really a cautionary observation upon the strength of the evidence required to support that defence when an intent to kill is shewn. Recognition that the true view of provocation is embodied in the latter passage from the speech, however, avoids the difficulties to which the former passage gives rise.

Expressed another way, that view is that it is not that malice, as the formation of the intent to kill or inflict grievous bodily harm, is not present, but that the formation of that intent in the particular circumstances is excusable to the extent that the act, though criminal, should not be regarded as punishable by death.

The language of some of the enactments to which reference will later be made bears a striking resemblance to the earlier passage from Viscount Simon's speech, however, and it may be that in order to give effect to the manifest intention of the legislative provisions they should be interpreted in accordance with Mr. Landon's suggestion, so that the defence is excluded when a premeditated intent to kill, which must really mean an intent to kill not primarily aroused by the provocation, is established.

What was actually decided in *Holmes' Case* was that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter. It was not decided, however, that words could not amount to provocation sufficient to reduce the crime. Foster had stated,[18] " Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive of contempt or reproach, without an assault upon the person." Viscount Simon's observations are seen on examination to be less absolute than Foster's. The judge should direct the jury, he said, " that in no case could words alone, *save in circumstances of a most extreme and exceptional character*," (my italics) " reduce a homicide to manslaughter. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly."

This qualification may be compared with the English *Draft Code* prepared by the Criminal Code Commission of 1878-9, where the following appeared :

> " 176. Provocation—Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> " Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before their has been time for his passion to cool.
>
> " Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, or whether the person provoked was actually

18. *Discourse*, p. 290.

> deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be deemed to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person: Provided also, that an arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation."[19]

There are interesting features in this proposal. Firstly, an oral insult is placed upon the same basis as a provocative act. Secondly, it adopts the common law view that the provocation must be of the kind that would affect an *ordinary* person. Thirdly, the decision whether the conduct relied upon really amounted to provocation, and whether, if it did, it deprived the accused of self-control, is to be made by the tribunal of fact, the jury. There is no specific requirement that the force used must be proportioned to the insult, but it appears to be a legitimate assumption that the framers had in mind that the judge in directing the jury upon the facts would bring clearly to their minds that in considering the defence, they should have regard to the nature of the weapon or other means of inflicting injury used by the prisoner.

The English *Draft Code* is still a law reformer's dream, but in Australia when responsible lawyers still held the belief that it was possible to express the law briefly, comprehensively and lucidly in an enactment, there were legislative codifications of the criminal law which dealt with the subject of provocation.

In his memorandum to the Attorney-General, dated 29th July, 1897, Sir Samuel Griffith, then Chief Justice of Queensland, wrote, " With respect . . . to provocation as an excuse for an assault I have ventured to submit a rule " (now sections 268 and 269 of the Queensland *Criminal Code*) " which is not to be found in the *Draft Code* of 1879, nor, so far as I know, in a concrete form in any English book. At Common Law an assault is regarded as an offence committed not against the individual person assaulted, but against the peace of Our Lady the Queen, Her Crown and Dignity. It is not, therefore, excused by anything short of the necessity for self-defence against actual violence, or some other positive conditions justifying the application of force. Provocation may, however, operate as a practical, if not in all cases as a formal, answer to a civil action for an assault. There is no doubt that in actual life some such rule as that stated in (section 269) is assumed to exist, although it is probably not recognised by law. The subject of provocation as reducing the guilt of homicide committed under its influence from murder to manslaughter is covered by authority, but I apprehend that it is of at least equal importance as applied to other cases of personal violence."[20]

These observations may not command universal assent; it may be felt by some that it would be unwise to admit provocation as a defence generally because to do so might result in recourse to violence in cases where the common law denial of such a defence has, presumably, a restraining effect. Sir Samuel Griffith's proposal has been the law in Queensland for half a century and for over thirty years in Western

19. Stephen, *Hist. Crim. Law*, Vol. 3, pp. 81-2.
20. *Criminal Code of Queensland*, Introduction, p. xiv., By Authority, Brisbane, 1901.

Australia, however, and it may be inferred that it has not had any marked undesirable consequences.

As they may not be readily accessible, it may be of use to set out the provisions of the Codes. The relevant sections of the Queensland *Criminal Code* 1899, appear to be as follows:

> *Section* 268. *Provocation*: The term 'Provocation,' used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control, or to induce him to assault the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
>
> A lawful act is not provocation to any person for an assault.
>
> An act which a person does in consequence of incitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
>
> An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.
>
> *Section* 269. *Defence of Provocation.* A person is not criminally responsible for an assault committed upon a person who gives him provocation for an assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
>
> Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.
>
> *Section* 270. *Prevention of Repetition of Insult.* It is lawful for any person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to him for an assault; provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
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> *Section* 272. *Self-Defence Against Provoked Assault.* When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous bodily harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
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> This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun (*sic*) the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself arose; nor in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Section 304. *Killing on Provocation.* When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

In the *Criminal Code Act Compilation Act* 1913, of Western Australia, the equivalent sections are sections 245, 246, 247, 249 and 281.

The provisions of the *Criminal Code Act* 1924, of Tasmania, differ in some respects. They are as follows :

Section 46. *Self-Defence against unprovoked assault :*

(1) A person unlawfully assaulted, not having provoked such assault, is justified in repelling force by force if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

(2) A person so assaulted as aforesaid is justified in causing death or grievous bodily harm to his assailant if, from the violence with which the assault was originally made, or with which the assailant pursues his purpose, he acts under a reasonable apprehension that his assailant will cause death or grievous bodily harm to him, and if he believes on reasonable grounds that he cannot otherwise preserve himself therefrom.

Section 47. *Self-Defence against provoked assault* :

(1) A person who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under the reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm.

(2) This section shall not protect any person who—

(I) Assaults, or provokes an assault from, another person—

(*a*) with intent to cause death or grievous bodily harm ; or

(*b*) unless, before the necessity for preserving himself arises, he declines further conflict and quits or retreats from it as far as practicable.

(II) Endeavours to cause death or grievous bodily harm before the necessity for preserving himself arises.

Section 48. *Provocation.*

Provocation within the meaning of sections 46 and 47 may be given by blows, words or gestures.

Section 49. *Prevention of Assault with Insult.*

(1) Everyone is justified in using force in defence of his own person, or of the person of anyone under his protection, against an assault accompanied with insult, if he uses no more force than is necessary to prevent such assault or the repetition of it.

(2) This section shall not justify the wilful infliction of any hurt or mischief disproportionate to the (assault) which it was intended to prevent.

The word " assault " was substituted for " insult " by the *Criminal Code Act* 1934, section 3 (iii).

Section 160. *Provocation.*

(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

(3) Whether the conditions required by sub-section (2) hereof were or were not present in the particular case is a question of fact, [and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law].

(4) No one shall be held to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(5) Whether or not an illegal arrest amounts to provocation depends upon all the circumstances of the particular case, and the fact that the offender had reasonable grounds for believing and did, in fact, believe, that the arrest was illegal, shall be taken into consideration in determining the question whether there was provocation or not.

The words in square brackets were added to sub-section (3) of this section by the *Criminal Code Act* 1934, section 3 (vi.).

The Tasmanian Code does not seem to have adopted Sir Samuel Griffith's view that provocation should be a defence generally to assault. Except in the instances covered by section 47, provocation appears to be available as a defence only where a killing is involved. If the provisions of section 304 of the Queensland Code have to be read in the light of section 269 of that Code, the effect may be to exclude provocation where there is an actual intention to cause death by force likely to do so, unless the interpretation is adopted that the intention meant is a premeditated intent to cause death or grievous bodily harm by force likely to produce those results. Section 160 of the Tasmanian Code is so expressed as not to give rise to this question. Because of the words added to sub-section 3 of section 160 by the *Criminal Code Act* 1934, the observations of Viscount Simon in *Holmes' Case*[21] upon the respective functions of the judge and the jury would seem to be applicable in Tasmania. These Tasmanian provisions are very similar to the sections 73, 74, 75, 76, 184 and 185 of the *Crimes Act* 1908 of New Zealand, except that the words added to section 160 (3) of the Tasmanian Code do not appear. Those sections were originally enacted in New Zealand by the *Criminal Code Act* 1893. The *Criminal Code Bill* was submitted to the New Zealand Parliament in 1883 and was thus earlier in time than Sir Samuel Griffith's Code. The report on that bill is of considerable interest, and may be found in Vol. 3 of the *Public Acts of New Zealand* at pp. 176 et seq.

The reported decisions on the interpretation of these provisions of the Codes are not numerous. I shall mention those relevant to provocation. The Full Court of Queensland, in *R. v. Nakayama & Ors.*,[22] held that cheating at cards is a wrongful act of such a nature that in some circumstances it is " likely when done to an ordinary person to deprive him of the power of self-control, and to induce him to assault that other."

However, where the prisoner and a woman had lived together in an illicit sexual relationship, but the cohabitation had come to an end, and he accused her of carrying on with another man, receiving the reply, " Yes, and I intend to. I am done with you," there is no basis for a defence of provocation under the Western Australian *Criminal Code* sufficient to reduce a killing of the woman from murder to manslaughter.[23]

21. *Supra*, at p. 597; *Packett v. The King*, (1937) 58 C.L.R. 190.
22. [1912] Q.S.R. 287, at p. 289.
23. *R. v. Scott*, (1909) 11 W.A.L.R. 52.

According to Parker C.J., assuming the words amounted to an insult, the information they conveyed to the accused, having regard to his suspicions, could not be said to have the characteristic of suddenness. In the opinion of McMillan J. (as he then was), if there is any evidence of insult, whether by words or gesture, the judge is bound to leave it to the jury to say whether the particular insult is such as is likely to deprive an ordinary person of the power of self-control.[24] As he put it, " a judge is (not) entitled to enquire into the nature of the insult if he is once satisfied there are any facts from which an insult can be inferred . . . if there is any evidence of insult, whether by words or by some gesture, the judge is bound to leave it to the jury to say whether that particular insult is such as is likely to deprive an ordinary person of the power of self-control."[25] Burnside J. considered that before an insult could be relied upon as a ground of provocation, it must be an unlawful insult; the word " wrongful " in the phrase, " any wrongful act or insult," means " unlawful " and attaches itself both to the word " act " and the word " insult." In his view, " words alone, mere idle words " could not be held to amount under any circumstances to provocation. " When words are of an abusive nature they may amount to provocation, not by reason of the fact that they are words, but by reason of the fact that abusive language is by the law of the land an offence, and consequently it is not the mere words themselves, but the infringement of the law, the unlawful act, which gives rise to provocation."[26] I am disposed to think that Burnside J. took an unduly narrow view of the provisions of the Code. The framers of the *Draft Code* and the legislative bodies that enacted the Queensland and Western Australian Codes and the New South Wales *Crimes Act* 1900, and the New Zealand *Crimes Act* 1908, would seem to have recognised that some utterances are just as likely—indeed more likely—to deprive a man of self-control as some unlawful acts, and to have intended that the question whether any particular utterance should support a defence of provocation should be determined by the good sense of the jury.[27] I am inclined to think that the word " wrongful " does not attach to " insult," but only to " act," for the reason that words of insult are usually not so clearly wrongful, in the sense of unlawful, as are acts that may amount to provocation. Moreover, I doubt the generality of Burnside J.'s proposition that " abusive language is by the law of the land an offence," and, in any event, " abusive language " and " insult " are not synonymous.

There are some observations of McMillan C.J. in *Dunstan v. The Crown*,[28] upon the Code that bear a resemblance to those of Viscount Simon on the common law, and, if they are sound (which, with respect, I take leave to doubt), they put a limit upon the provisions of the Code, however accurately they may state the common law, that deprives the introduction of " insult " as a basis of provocation of any real significance. After quoting section 281, and observing that the definition of provocation is found in section 245, McMillan C.J. continued, " Those sections are

24. *Cf.* hereon *Holmes' Case* (*supra*), at p. 597; *Packett v. The King*, (1937) 58 C.L.R. 190.
25. (1909) 11 W.A.L.R., at p. 62.
26. *Ibid.*, at p. 69.
27. *Cf. Rex v. Jackson*, [1918] N.Z.L.R. 363; *R. v. Withers*, (1925) 25 S.R. (N.S.W.) 382, at p. 390.
28. (1931) 33 W.A.L.R. 118.

taken *verbatim* from the Queensland Code, and Sir Samuel Griffith, in his introduction, points out that they are covered by authority, and therefore introduce no change into the law which had been well settled in a number of cases. It has been decided that the sight of an act of adultery committed with his wife is provocation to the husband of the adulteress on the part of both the adulterer and the adulteress, but as a general rule no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter if the killing is effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm is otherwise manifested." If the learned Chief Justice meant these observations as an exposition of the provisions of the Code on the subject, they are inconsistent with—

(i) the opinion he expressed in *R. v. Scott* ;[29]
(ii) the judgment of the Full Court of New South Wales in *R. v. Withers* ;[30] and
(iii) the words of the Code.

Moreover, the observations of Griffith C.J., which McMillan C.J. had in mind, seem to be those I have quoted above, and, properly understood, they do not bear the meaning he assigns to them.

No criticism can be made of the actual decision in *Dunstan v. The Crown*[31] because on the evidence the view was open, perhaps inescapable, that the accused acted with deliberate intention to take revenge upon a wife he believed to have been unfaithful. The case really fell within the principle which McMillan C.J. expressed as follows,[32] " . . . in all cases in order to reduce homicide upon provocation to manslaughter, it is essential that the wounding appears to have been inflicted immediately upon the provocation being given ; for if there is sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other this is a deliberate revenge, and not heat of blood, and accordingly amounts to murder."

In New South Wales, section 23 of the *Crimes Act* 1900 (re-enacting a provision of the New South Wales *Criminal Law Amendment Act* 1883) deals with provocation. It is in the following terms :

> (1) Where on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased the jury may consider the provocation offered, as in the case of provocation by a blow.
>
> (2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly : Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find :
>
> (*a*) That such provocation was not intentionally caused by any word or act on the part of the accused ;
>
> (*b*) That it was reasonably calculated to deprive an ordinary person of power of self-control, and did in fact deprive the accused of such power, and

29. (*supra*).
30. (1925) 25 S.R. (N.S.W.) 382.
31. (*supra*).
32. at p. 120.

(c) That the act causing death was done suddenly, in the heat of passion caused by the provocation, without intent to take life.

The concluding words " without intent to take life " may be compared with the concluding words of the proviso of the first paragraph of section 269 of the Queensland Code. As has been pointed out, these words, if strictly interpreted, might deprive the defence of substance in some cases. Often the killing under provocation is intended because of the provocation, but that intent, if the provocation be gross enough, is, in the particular circumstances, regarded as excusable to the limited extent that the killing is not treated as a capital offence.

That section was considered by the Full Court of New South Wales in *R. v. Withers*,[33] but the matter to which I have referred does not seem to have been present to the mind of the Court. Street C.J. reviewed the English authorities concerned with provocation as a defence, and held that the effect of section 23 was to alter the common law rules and to place killing upon provocation arising from grossly insulting language or gestures on the part of the person killed in the same position as killing upon provocation arising from a blow.[34] In New Zealand, it has been held that the effect of the *Crimes Act* 1908, section 184, which is set out below, is to make the sufficiency of provocation, whether it be by acts or words, a question of fact to be determined by the jury.[35]

There is general agreement by judges and legislators that the test should be the effect of the conduct relied upon as provocation upon an ordinary man. In *R. v. Withers*,[36] Street C.J. laid stress upon this aspect: " In considering in any case whether the provocation offered was sufficient to justify a reduction of the crime it is important to bear in mind, as was pointed out in *R. v. Lesbini*, that the test is not whether it was sufficient to deprive the particular person charged with murder of his self-control, but whether it was sufficient to deprive a reasonable man of his self-control. Provocation acting upon the mind of a person of deficient mental balance is not sufficient to justify a reduction of the offence, if it would not have been sufficient to rob a reasonable man of his self-control."[37]

Mr. J. W. C. Turner in his article, *The Mental Element in Crimes at Common Law*,[38] points out that the limited excusability of killing under provocation developed from the recognition that killing in self-defence was excusable homicide. " Here, it must be noted, we have to consider the mental state of the wrongdoer, not in relation to *mens rea* (for the blow was voluntary, and he intended to kill by means of it), but in relation to the criminality of the *actus* itself. It is therefore not surprising that our Courts have adhered to the objective standard by which to decide if the provocation was, or was not, sufficiently serious to amount to an excuse. The question is not whether the wrongdoer himself regarded the provocation as excessive, but whether an average man in the same circumstances would, in the opinion of the judge, have so regarded it.

33. (*supra*).
34. 25 S.R. (N.S.W.), at p. 389.
35. *R. v. Jackson*, [1918] N.Z.L.R. 363; *Cf. Holmes' Case* (*supra*), at p. 597.
36. (*supra*).
37. at p. 392.
38. *The Modern Approach to Criminal Law*, 194, at p. 224.

Therefore a man who is by nature defective in intellect or self-control is not allowed the benefit of his inherent infirmity for the present purpose."

Adherence to the objective standard sometimes produces results that offend the sense of justice. A half-wit is made the butt of practical jokes by youths. He strikes and kills one of his tormentors. The provocation was intended to and did deprive him of his self-control, but it was of a kind insufficient to unbalance an ordinary man. Or a man who is in liquor is subjected to a deliberate provocation insufficient to cause an ordinary man to act in passion, but in fact leading him to do so, and a killing results. In England or Victoria, the judge should direct the jury in such cases that the defence of provocation is not open. In a trial where these facts emerged, however, the judge would probably leave the question to the jury, telling them they should decide whether in all the circumstances the prisoner should be permitted to avail himself of the defence, and the jury would regard the mental deficiency, or the self-induced impairment of self-control, as a circumstance to be considered. But it must be recognised that the Courts have always shewn a marked reluctance to permit personal peculiarities falling short of insanity within the definition of *McNaghten's Case*[39] to be availed of as a defence. In *R. v. Lesbini*,[40] Lord Reading C.J. expressed the general judicial attitude when he said, " This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts."

In this field, often it is the jury that makes the law tolerable, for as they are not required to give reasons, in most instances they may be relied on to avoid an over-harsh application of the law. Though this may be unsatisfactory from the standpoint of legal theory, it is a compromise of a kind that is common in human affairs. The provisions found in the Codes, that whether any wrongful act or insult constitutes provocation, and whether it had that effect are questions of fact, are a recognition of the desirability of leaving the matter to the jury as the body expressing the sense and feeling of the community.

Some judges have been inclined to interpret the Codes restrictively and so far as possible to treat their provisions as doing no more than expressing neatly the effect of the decisions with which they are familiar. Such an inclination is a product of judicial conservatism and is to be deplored. The correct approach to the interpretation of a Code is stated, in *The Bank of England v. Vagliano Bros.*,[41] by Lord Herschell thus, " I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

Curiously enough, there are to be found in the utterances of the same judge examples of the right and the wrong approach. In *R. v. Scott*,[42]

39. (1843) 10 Cl. & F. 200.
40. [1914] 3 K.B. 1116, at p. 1120. But *Cf. Lesenock*, (1917) 12 Cr. App. R. 221; Kenny, *Outlines of Criminal Law*, 15th ed., 70, on drunkenness and provocation.
41. [1891] A.C., at pp. 144-5.
42. (*supra*).

McMillan J., as he was in 1909, considered the defence of provocation under the Western Australian Code. He stated correctly the manner in which the Court should apply itself to the interpretation of the Code, and, as has already appeared, concluded that where the defence was raised, and there was any evidence of an unlawful act or insult, it should be left to the jury to decide the question. In New Zealand, Chapman J. adopted a similar approach.[43] But as will be seen from the passage quoted above from *Dunstan v. The Crown*,[44] decided in 1931, McMillan C.J. then read the provisions of the Code as to provocation as doing little more, if anything, than embodying the common law.

In 1905 a *Crimes Bill* was introduced into the Victorian Legislative Assembly by Mr. (later Sir John) Mackey and Sir Samuel Gillott. It was to declare, consolidate and amend the law relating to Crimes, and it provided that " no person shall be tried or punished for a crime except under the provisions of this or some other Act of Victoria, or under the provisions of some Act of the Commonwealth of Australia or of the United Kingdom in force in Victoria." It was a Criminal Code which obviously owed much to Sir Samuel Griffith's pioneer Code. Clauses 43 and 44 were in substantially the same terms as section 268 and section 269 of the Queensland Code. Clause 45 was the equivalent of section 270 of that Code, and clause 47 an abbreviated version of section 272. The Bill did not adopt the distinction, found in the Queensland Code, between wilful murder and murder, and clause 194 was in the same terms as section 304 of the Queensland Code except that it referred to "murder " and not to " wilful murder." The proposal was never carried to legislative finality, however, and Victoria still lacks a Criminal Code.

Jeremy Bentham, whose influence upon the reform of English law has been enormous, devoted his genius to the cause of " codification," a word he himself invented. " To be without a code is to be without justice," he asserted.[45] There seems no valid reason why the criminal law of Victoria should not be enacted in the form of a Code, because in the field of the criminal law especially it is of the essence of justice that the law shall be defined and ascertainable.[46]

If legislators could be diverted from what is, on a broad view, all too often a profitless preoccupation with the day-to-day problems of political expediency, it should be possible to bring forward legislation based on the 1905 Bill with the improvements that later experience has shewn to be desirable.

My personal opinion is that provocation should be admitted generally as a defence, and that Sir Samuel Griffith's view accords with the common sentiment of the community. Conceding there is room for a difference of opinion upon that matter, there should be general agreement, however, upon the desirability of adopting the essence of the provisions found in the legislation of Queensland, New South Wales, Western Australia, Tasmania and New Zealand upon the effect of provocation in reducing a killing that would otherwise be murder to manslaughter. Section 184

43. *R. v. Jackson*, [1918] N.Z.L.R. 363.
44. (*supra*).
45. *Jeremy Bentham and the Law* (Stevens & Sons, 1948), at p. 38.
46. *Cf. The Concept of Legal Certainty*, by H. W. R. Wade, (1941) 4 *Mod. L.R.*, at p. 187.

and 185 of the New Zealand *Crimes Act* 1908 appear to be the most satisfactory expression of the concept. They are practically the same as section 160 of the Tasmanian Code, the draftsman of which must have had them before him, but without the amendment made to that section in 1934. For convenience I set out the text of the New Zealand provisions :

> 184. *Provocation.*
>
> (1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> (2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.
>
> (3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact.
>
> (4) No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.
>
> 185. *Illegal arrest may be evidence of provocation.*
>
> An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal ; but if the illegality was known to the offender it may be evidence of provocation.

These sections confide to the jury the determination of the whole question of the sufficiency of the provocation by wrongful act or insult.[47] They are a statutory direction that effect shall not be given to the judicial mistrust of juries to which Dixon J. refers in *Thomas v. The King*,[48] and in my view amount to a satisfactory solution of the problems to which the defence of provocation often gives rise.

47. *R. v. Jackson*, [1918] N.Z.L.R. 363, at p. 364, *per* Chapman J.
48. (1937) 59 C.L.R., at p. 309.