and wounding with intent. He pleaded duress: that his father had ordered him to kill his mother. The Court of Appeal *held* that duress was not a defence to attempted murder and his appeal was dismissed. There was no verdict on the count relating to wounding with intent.

The decision of the Court of Appeal was affirmed by the House of Lords (see *R* v *Gotts* [1992] 1 All ER 832).

560 *R* v *Hudson* [1971] 2 All ER 244

Two girls aged 17 and 19 were the main witnesses for the prosecution on a charge in Manchester of wounding. At the trial they both failed to identify the defendant Wright. He was acquitted as a result of this. The girls were tried for perjury and put in the defence of duress. They had been approached by a group of men who threatened to 'cut them up' if they 'told on' Wright in court. They were nevertheless convicted and appealed. The appeal turned on the trial judge's direction to the jury that duress can only arise where there is a threat of death or serious personal injury at the moment when the crime is committed. The threat here was to do something in the future. The Court of Appeal said that their convictions must be quashed. Lord Parker, CJ said that the threats in this case were none the less compelling because they could not be executed in the court room if they could be carried out on the streets of Salford the same night.

561 *R* v *Sharp (David)* [1987] 3 WLR 1

David Sharp was involved in the armed robbery of a post office. He participated in the robbery. He was charged with aiding and abetting murder but he was in fact convicted of manslaughter. He claimed that he had not wished to go on with the robbery but had been forced to because a member of the gang to which he belonged which had masterminded the robbery had held a gun to his head to make him proceed. He appealed because the trial judge rejected the defence of duress. The Court of Appeal dismissed the appeal. The defence of duress was not available where, as here, a person had voluntarily and with knowledge of its nature joined a gang which he knew might put pressure on him to commit an offence.

562 *R* v *Shepherd* (1988) 86 Cr App R 47

Shepherd and other persons entered retail premises and stole goods. He was charged with burglary. He said that he had participated willingly at first but later lost his nerve but stayed on because a member of the gang threatened him and his family with violence if he did not continue. The trial judge ruled that the defence of duress was not available because he had voluntarily participated in a criminal act. He appealed and the Court of Appeal *held* that his conviction must be quashed. The defence of duress was available if at the time he joined the gang he did not contemplate that violence would be used against him if he did not continue to participate.

Duress of circumstances

563 *R* v *Martin* [1989] 1 All ER 652

Mr Martin was found guilty of driving whilst disqualified. He appealed on the basis that his wife had suicidal tendencies, and that on the day in question his stepson had overslept and was bound to be late for work and, it was said, at risk of losing his job unless Mr Martin drove him to work. Mr Martin was disqualified from driving but his wife started screaming and beating her head against the wall and threatening suicide unless he drove the stepson to work which he then did. He was stopped and later prosecuted for driving whilst disqualified. His defence was necessity and the Court of Appeal accepted it in this case though referring to the situation as 'duress of circumstances'.

Comment It was held by the Court of Appeal in *R* v *Pommell*, *The Times*, 22 May 1995 that the duress of circumstances defence, though developed in relation to road traffic offences, also applied to other crimes, but not murder, attempted murder and some forms of treason. A person was permitted to break the law to prevent a greater evil from happening to himself or others. P had appealed against conviction for possessing a firearm. The police, having a search warrant, had found him in bed holding a loaded gun which he said he had taken from a visitor to his house the previous night to prevent the visitor from carrying out his threat to kill persons whom he said had killed his friend. He claimed that he intended to take the gun to the police station in the morning. His conviction was set aside and a new trial ordered.

Necessity

564 *R* v *Dudley and Stephens* (1884) 14 QBD 273

A yacht was shipwrecked, and three men and a boy escaped in an open boat. They were adrift for eight days without food when the men killed the boy, who was by then very weak, in order to eat his body and keep themselves alive. They were rescued four days later by a passing ship. They were tried for, and convicted of, murder. It was *held* that there is no principle

of law which entitles a man to take the life of an innocent person to save his own. In any case, the death of the men would not have been inevitable, but only probable. Where the offence committed is not a capital offence, the defence of necessity might result in a mitigation of sentence.

Comment (i) It was held in *DPP* v *Harris*, *The Times*, 16 March 1994, that a police driver could not successfully plead the defence of necessity on a charge of driving without due care and attention when he failed to stop a car, being used for police purposes, at a red light. This would seem to stress the need for an element of threat or danger where the defence is put up (see also *A (children), The Times*, 10 October 2000: necessary to separate conjoined twins: court consents to inevitable death of one).

(ii) The reluctance of our courts to entertain the defence of necessity is also illustrated by *R* v *Altham*, *The Times*, 1 February 2006.

The defendant suffered pain from a road accident some 15 years before this prosecution was brought. He used cannabis to relieve the pain. He was later prosecuted for the offence of possession of a controlled drug, i.e. cannabis, contrary to s 5(2) of the Misuse of Drugs Act 1971. He was convicted of this offence in Preston Crown Court and appealed to the Court of Appeal. His appeal was dismissed.

His contention that notwithstanding that the cause of his condition was a road accident some 15 years before, the state had an Art 3 human rights obligation to allow him to take any steps necessary to alleviate his condition even though those steps involved breaches of the law was not accepted by the court. The state had done nothing to subject the defendant to either inhuman or degrading treatment and therefore Art 3 was not engaged. Article 3 did not require the state to take any steps to alleviate his condition.

The defence of necessity did not apply because, if it were applied, it would enable individuals to treat themselves by unlawful acts without medical intervention or supervision.

Accordingly, the trial judge was right to hold that the defence of necessity should not be left to the jury.

Note: since the prosecution the defendant has been prescribed another drug which alleviated his pain to such an extent that he no longer uses cannabis.

Mistake

565 *R* v *Kimber* [1983] 3 All ER 316

Kimber sexually assaulted a woman who was a patient in a mental hospital. He was charged with indecent assault. His defence was that he honestly believed that the woman consented. The woman had been diagnosed as schizophrenic. During the indecent act, which involved the touching of her private parts, she was mumbling all the time giving perhaps to a reasonable person evidence that she was a sick woman. Since the attack took place on the cricket ground near the hospital gardens, it might have led a reasonable person to believe that the sickness was mental and throw doubt upon her consent. The Court of Appeal decided that it was enough if the mistake which Kimber made was to honestly believe that she consented. However, his conviction must stand because no reasonable jury properly instructed that an honest belief was sufficient as a defence could have believed that Kimber could or did honestly believe she consented in the circumstances of the case.

566 *R* v *Bailey* (1800) 168 ER 651

Bailey, who was the captain of a ship, fired at another ship on the high seas without any justification and wounded one of the sailors on that other ship. He was charged under an Act of Parliament which made such a shooting on the high seas triable and punishable in this country. The following extract from the judgment of the court is relevant:

> It was then insisted that the prisoner could not be found guilty of the offence with which he was charged, because the Act of 39 Geo. 3, c. 37 upon which . . . the prisoner was indicted at this Admiralty Sessions, . . . only received the Royal Assent on 10 May, 1799, and the fact charged in the indictment happened on 27 June in the same year when the prisoner could not know that any such Act existed (his ship the *Langley* being at the time upon the coast of Africa). Lord Eldon told the jury that he was of opinion that he was, in strict law, guilty within the statutes . . . though if the facts laid were proved, though he could not then know that the Act of 39 Geo. 3, c. 37 had passed, and that his ignorance of that fact, could in no other wise affect the case, than that it might be the means of recommending him to a merciful consideration elsewhere should he be found guilty. . . .

Comment At the next Admiralty Sessions Bailey was pardoned.

Self-defence

567 *R* v *McInnes* [1971] 3 All ER 295

McInnes belonged to a group of youths called 'greasers'. There was a fight between a group of 'greasers' and another group of youths called 'skin-

heads'. It took place at Platt Fields, Manchester. A skinhead jumped on the defendant's back and his response was to stab the skinhead, which caused his death. The defendant was convicted of murder. He appealed to the Court of Appeal on two main points:

(*a*) that the trial judge had said that in self-defence cases it was necessary for the defendant to have retreated as far as he could before using the force in self-defence; and
(*b*) that even if the force used was unreasonable, as it clearly was in this case, a jury could be directed to return a verdict of manslaughter.

On these points it was decided that it was not essential that the defendant should have retreated. Whether he did or not was merely one factor in deciding whether the defence of self-defence succeeded or not. Furthermore, if the defence failed, as it did here, because of lack of reciprocity then it failed altogether. It was not possible for the jury to return a verdict of manslaughter. The defendant's conviction for murder must stand.

Comment (i) The fact that no retreat is merely a factor to be looked at in terms of a plea of self-defence was affirmed again in *R* v *Bird (Debbie)* [1985] 2 All ER 513, where following a house party the defendant hit the victim in the face with a glass after he slapped her while he was pinning her to the wall. She had not shown an unwillingness to fight but the Court of Appeal said this was not absolutely necessary. Incidentally, the force used here was totally lacking in reciprocity, but the defendant managed to satisfy the court that she did not know she had the glass in her hand and only intended to use her fist.

(ii) The issue of self-defence was raised before the House of Lords in *R* v *Clegg* [1995] 1 All ER 334. In that case the appellant was a British soldier stationed in Northern Ireland. He was at the relevant time on patrol at a checkpoint when a car drove through it without stopping and in spite of calls for it to stop by soldiers at the checkpoint. The car was stolen. The appellant, believing that the lives of his fellow soldiers were at risk from attack by what appeared to be terrorists in the car, opened fire on it killing the driver and a woman passenger. The evidence showed that the woman had been shot in the back at a time when the car was 50 feet down the road from the checkpoint and when the soldiers could no longer have been in any danger. The appellant was convicted of murder and his defence of self-defence failed. The House of Lords said that a soldier or police officer who, in the course of his duty, killed a person by firing a shot which constituted the use of excessive and unreasonable force in self-defence was guilty of murder and not manslaughter.

The decision states, in effect, that if the force used is unreasonable the defence fails and more importantly that the test of whether the force used was reasonable or not is *objective*. So if the prosecution shows that excessive force was used, the defence fails. The use of excessive force is not to be decided in terms of the defendant's perception of events, which would be a *subjective* test.

The Law Commission has proposed a test in which the key question would be, was the violence used 'reasonable' in the circumstances as the defendant believed them to be? This test is, of course, more objective. Using this test in the *Clegg* case the court would have to decide whether Clegg believed the soldiers still to be at risk. The House of Lords merely decided they were not and that was it. The defence failed. The House of Lords thought that any changes in the law, particularly in connection with the acts of soldiers and policemen, was a matter for Parliament and not the courts. The House of Lords also confirmed that it was no defence for Clegg to say that he was under orders. There is no defence of superior orders in English law.

There was a campaign by the tabloid newspapers in England which resulted in Clegg's release after serving only four years' imprisonment.

(iii) There is a need to look afresh at the law of self-defence. Crime against private property has increased and the police, perhaps because of inadequate funding, are increasingly perceived as ineffective against such crime, leading perhaps to individuals or groups being prepared to use force to defend their homes against crime.

568 *Attorney-General's Reference (No 2 of 1983)* [1984] 1 All ER 988

The defendant in this case had a shop in an area which had suffered riots and his store had been looted. He was in constant fear of further rioting. He boarded his shop up, bought fire extinguishers and made 10 petrol bombs which he kept upstairs to be used to repel rioters. This was an offence under the Explosive Substances Act 1883. He pleaded self-defence, the problem about that defence being that when he prepared the petrol bombs no attack was taking place. The Court of Appeal *held* on this point that the defence of self-defence was available to go to a jury at least. A person can make preparations for self-defence where there is an apprehension of imminent attack. The issue of reciprocity was not raised, since this was not a trial as such, although the defendant did say he did not intend to throw the bombs at people but to throw them on the pavement in front of his shop to keep the rioters away from it.

569 *R* v *Rose* (1884) 15 Cox CC 540

John Rose, who was a very powerful man, was killed by his son, a weakly young man aged 22 years. John Rose had frequently threatened to kill his wife, the

young man's mother. On this occasion he violently assaulted her, threatened to cut her throat and said he was going to a bedroom to get a knife which the family knew he kept there. He came back with the knife and grabbed his wife and held her in a position which could have been preparatory to cutting her throat. The son got a gun and shot him dead. He was indicted for manslaughter. He was found not guilty. The judge said that homicide was excusable if the fatal blow (or shot in this case) was necessary for the preservation of the life of another.

Comment (i) This case was decided on common-law principles. Today it provides an example of the possible use of s 3 of the Criminal Law Act 1967.

(ii) Where the defence is raised, as here, in relation to the taking of a person's life, the provisions of Art 2 of the Convention on Human Rights will now be applied. Article 2 is more stringent than s 3. Under Art 2 the force used must be absolutely necessary, and lethal force is likely to be permissible only when acting to defend another from unlawful violence not in the general prevention of crime. Article 2 could well have been satisfied in the *Rose* case.

GLOSSARY OF COMMONLY USED LEGAL WORDS AND PHRASES

accord and satisfaction A phrase used to indicate that a contract which has not been wholly performed is to be treated as discharged by agreement of the parties (*the accord*), this agreement being supported by consideration (*the satisfaction*).

agent A person who is employed by another (called *the principal*) to put that other into a contractual relationship with a third party.

bailment The transfer by one person to another of possession but not ownership of a tangible asset.

bill of exchange A form of credit under which a seller S who has sold goods to a buyer B will draw up a bill of exchange on B, the bill being payable, say, three months hence. If, as is usual, B accepts the bill, he will return it to S who may wait three months before presenting it to B for payment, or alternatively get a bank to pay him so that the bank will present the bill for payment at the end of three months. The price paid for the goods or by the bank for the bill will be adjusted to take into account interest during the waiting period of three months.

case stated An appeal from a magistrates' court to the Divisional Court of Queen's Bench on a point of criminal law. The magistrates state the facts and the Queen's Bench rules on the correctness or otherwise of the law applied by the magistrates.

caveat emptor 'Let the buyer take care' – this implies that the buyer should watch out for any defects in the goods he is buying since, in the absence of misrepresentation by the seller, he will bear the consequences of anything which he fails to notice.

chattel Personal property consisting of a tangible asset, e.g. a watch.

cheque Essentially, a bill of exchange but always drawn on a bank and payable on demand instead of at a fixed or determinable future time.

chose in action An intangible asset such as a claim to money as where A owes money to B. In such a case, the debt is a chose in action. Other forms of property are also included such as copyright in a book and a potential claim on an insurance policy. In essence, a chose in action is a piece of property which the owner has the right to recover by court action if it is withheld.

chose in possession A tangible physical object such as a pen or a book.

conveyance A method by which property, in the main land, is transferred or the document by which this is done.

covenant A promise set out in a deed.

demise The grant of a lease of land. According to the context, it can also mean *death*.

devise A gift of real property by will.

estoppel A rule of evidence by which a party may be prevented from proving what is true because he has previously suggested that it was false and another party has relied on that. Thus A and B who are not partners are present together when A asks X for a loan. X knows B but not A. So A says 'Lend me the money, it will be repaid: B is my partner'. B remains silent and X lends A the money which A cannot repay. B is obliged to repay it since partners are jointly and severally liable for the debts of the firm, and B's silence estops him from denying that he is not A's partner.

ex parte An application in judicial proceedings which as an exception is heard in the absence of an opponent. This is now called a without notice application under the Civil Procedure Rules 1998.

execution The carrying into effect of a court order, e.g. for debt by the bailiffs taking the property of the defendant to sell by public auction in order to pay the claimant what the court has decided he is entitled to.

indictable offence A crime triable by jury either because the law requires it, as in the case of murder, or at the option of the defendant where the offence is triable either summarily or on indictment.

insurable interest The interest which an insured party must have in the subject matter of the policy.

intestate A person is said to die intestate when the death occurs without leaving a will.

laches Unjustifiable delay in bringing a claim to enforce an equitable right.

legacy A gift of personal property by will.

liquidation A process under which a corporate body such as a registered company is dissolved by an administrative procedure laid down by law.

negotiable instrument Personal property in the form of a document the rights in which can be transferred merely by delivering it to another person or by delivery following endorsement. The most common example is a bill of exchange.

parol contract An agreement made by word of mouth.

per In the summary of a case the expression '*per* Bloggs J' may appear. The word '*per*' in this context means 'in the opinion of'.

personal representatives Executors and administrators being persons who deal with the estate of a deceased person.

pledge The giving-up of possession, but not ownership, of goods as security for the future payment of a debt or other obligation.

probate The official recognition by the court that executors have authority to deal with the estate under the will of a dead person.

quantum meruit This phrase is used to indicate an action at law for reasonable payment for work done.

realty Freehold or commonhold interest in land and buildings.

remainder An equitable interest which becomes effective in possession only when the estate of a previous owner expires. In a gift of property 'to A for life remainder to B', B's interest is in remainder and will become effective in possession on the death of A.

reversion If A owns the freehold of Greenacre and grants B a lease of, say, 25 years in Greenacre, the freehold will return to A or his estate if he is dead when the lease expires. Until then, A's interest in Greenacre is in reversion.

simple contract A contract made orally or in writing but not by deed.

specialty contract A contract made by deed.

surety A person who has given a guarantee or indemnity of a debt.

winding-up The liquidation or dissolution of a company.

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