and by the case of *Regina v. Harrington*.[5] The decision is also in agreement with the opinions expressed by Kenny[6] and other writers.

There were, however, certain decisions which seem in conflict with the decision in *The Queen v. Terry*.[7] In *Rex v. Duffy*,[8] Lord Goddard, quoting the direction of Devlin J. to the jury, said: 'Provocation is some act or series of acts . . . done by the dead man to the accused.'[9] Although these words might seem to exclude a situation such as that in *The Queen v. Terry*,[10] it is obvious that Lord Goddard was not really directing his mind to such a situation but was merely applying the words to cover the situation before him, in which the provocation was actually given by the deceased to his wife.

In the Victorian case of *The King v. Scriva (No. 2)*[11] the matter was briefly discussed but no conclusion was arrived at.

The decision in *The Queen v. Terry*[12] appears to be a good one. Pape J. leaves open for inquiry the question whether there may be provocation where the third person to whom the acts are done, is someone other than a relative. In the case of *The Queen v. Terry*,[13] of course, the acts were directed against the sister of the accused. This query throws into relief a criticism which can be made, not in relation to the decision itself, but as to the mode of reasoning which was employed to reach it. If the facts of the case, and cases similar to it, are looked at in a broader light, it can be seen that though the acts constituting provocation may in themselves be offered to a third person, when examined in the context of all the relevant circumstances, they may constitute provocation to any reasonable man.

If this formulation were used it would be unnecessary to inquire as to whom the acts were actually done. The only question required to be answered would be the usual one: would a reasonable man seeing these acts (no matter to whom they are done) be so provoked. This approach would resolve the question as to whether the third person to whom the acts of provocation are done need necessarily be a relative of the accused.

M. FORSTER

THE QUEEN v. FALLA[1]

Wounding with intent to murder—Provocation as a defence—Self-defence —Use of excessive force in wounding with intent to murder.

The case of *The Queen v. Falla*[2] deals with another question arising from the defence of provocation. The problem which arises is whether provocation is available as a defence only to the charge of murder, to reduce it to manslaughter or whether it is available as a defence to charges of lesser crimes, such as wounding with intent to kill. The attitude taken in the earlier case of *The Queen v. Cunningham*,[3] in which the accused ap-

5 (1866) 10 Cox. C.C. 370.
6 *Kenny's Outlines of Criminal Law* (18th ed. 1962) 172.
7 [1964] V.R. 248. 8 [1949] 1 All E.R. 932.
9 *Ibid.* 932. 10 [1964] V.R. 248.
11 [1951] V.L.R. 298; [1951] A.L.R. 733.
12 [1964] V.R. 248. 13 *Ibid.*
1 [1964] V.R. 78 Supreme Court of Victoria: Pape, J. 2 *Ibid.*
3 [1959] 1 Q.B. 288; [1958] 3 All E.R. 711.

pealed from a verdict of guilty of malicious wounding, was that provocation is only available as a defence to the charge of murder, and that in lesser crimes, the fact that the accused was provoked should only be taken into account in mitigation of sentence. This is the view taken by Pape J. in *The Queen v. Falla.*[4]

There were two earlier Victorian cases which Pape J. declined to follow. In the case of *The King v. Newman*[5] Barry J. directed the jury that, in order for a charge of wounding with intent to murder to be proved, it would be necessary to show that if the victim had died the accused would have been guilty of murder. Thus, if the accused were so provoked that had the victim died he would have been guilty only of manslaughter and not of murder, he could not be found guilty of wounding with intent to murder.

The reasoning here can be criticized on two grounds. As pointed out by Pape J. in *The Queen v. Falla,*[6] the necessary element of the crime as shown by section 11 (1) of the Crimes Act 1958 is an intent to murder, and not that the victim should be wounded in such circumstances that if he had died the accused would have been guilty of murder. If the accused did have this intent to murder it is surely irrelevant to consider what would have happened if the victim had died. The charge to be considered is one of wounding with intent to murder and not one of murder.

Despite these criticisms, the reasoning of the Court in *The King v. Newman*[7] was followed in *The Queen v. Spartels*[8] as far as the question of provocation in wounding with intent to murder was concerned. The Court there directed that if the jury thought the accused had an intent to murder but had been provoked he should be found guilty of unlawful wounding.

In *The Queen v. Falla,*[9] Pape J. points out the logical inconsistencies of these two latter cases, in particular the point mentioned earlier—that what must be proved is an intent to murder, and not that the result of the death of the victim should be a verdict of murder. He also supports his judgment by referring to the case of *Rex v. Whybrow,*[10] an English decision which held that for a charge of wounding with intent to murder to be sustained, it is necessary to show, not merely an intent to do grievous bodily harm, but an actual intention to kill. He reasons that since here is a case where the consequences of the act (that is, where the accused would have been guilty of murder if the victim had died) are irrelevant, the same reasoning can be applied to the defence of provocation. This is another way of stating the second criticism of *The King v. Newman,*[11] that it is irrelevant to look at what would have been the consequences had the victim died.

It can thus be seen that the decision in *The Queen v. Falla,*[12] is from a purely logical view, a more convincing one than decisions in *The King v. Newman*[13] or *The Queen v. Spartels.*[14] However, when a broader view

4 [1964] V.R. 78, 80. 5 [1948] V.L.R. 61; [1948] 1 A.L.R. 109.
6 [1964] V.R. 78, 80. 7 [1948] V.L.R. 61.
8 [1953] V.L.R. 194; [1953] A.L.R. 554. 9 [1964] V.R. 78, 79-80.
10 (1951) 35 Cr. App. R. 141. 11 [1948] V.L.R. 61.
12 [1964] V.R. 78. 13 [1948] V.L.R. 61. 14 [1953] V.L.R. 194.

of the situation is taken, the decision in *The King v. Newman*[15] and *The Queen v. Spartels*[16] seem to be the better ones. From the point of view of social policy it seems more just that greater allowance be made for human frailty; that if a man is provoked to wounding another with intent to murder him in a situation where any reasonable man would be so provoked, the court should take this provocation into account. Here, of course, it can be argued, as it was in *The Queen v. Cunningham,*[17] that a court will allow for the fact that the accused was provoked when it pronounces sentence on him. However, this answer is imprecise and leaves one important question unanswered.

If provocation is irrelevant to the guilt or innocence of the accused, then obviously questions of fact concerning the reality of the provocation cannot be put to the jury. Thus, if there is conflict as to whether there actually was provocation, how is the judge to decide this conflict in considering whether there ought to be mitigation of sentence. A classic example of this appeared in *The Queen v. Cunningham.*[18] The accused stated that he was provoked when he observed homosexual advances being made on another, whilst the victim of the attack denied this. What view was the judge to take in fixing the sentence, since, as stated above, the evidence could not be put to the jury?

Thus it would seem that the argument that provocation can be taken into account in fixing the sentence, and therefore that some allowance for it can be made, is not a satisfactory one, and the approach in *The Queen v. Newman*[19] and *The Queen v. Spartels*[20] might be more desirable.

The other question which *The Queen v. Falla*[21] deals with is the problem of the defence of self-defence in crimes less than murder. Pape J. lays down the conditions for the application of the doctrine of self-defence. They are that the accused should believe himself to be in danger of serious violence, that what he did would be for the purpose of protecting himself from this violence, that he honestly believed his actions were necessary for this purpose and that a reasonable man would regard his actions as not out of proportion to the magnitude of the attack. Pape J. refuses to apply the doctrine by which, on a charge of murder, the use of excessive force in self-defence will reduce the charge to manslaughter. He considers that this doctrine is inapplicable in crimes less than murder such as wounding with intent to murder. He gives little reason for this, except to justify his argument by making use of a *reductio ad absurdum:* if the doctrine were applied in crimes lesser than murder, a man guilty of common assault would be guilty of no crime since there is no crime of lesser magnitude to which the offence could be reduced.

This approach does not seem very satisfactory in reference to the use of excessive force in a case of self-defence to wounding with intent to murder. However, it is interesting to note that Pape J. did not make use of the refinement to the doctrine of self-defence laid down by Sholl J. in *Spartels'* case.[22]

15 [1948] V.L.R. 61.
16 [1953] V.L.R. 194.
17 [1959] 1 Q.B. 288.
18 *Ibid.*
19 [1948] V.L.R. 61.
20 [1953] V.L.R. 194.
21 [1964] V.R. 78.
22 [1953] V.L.R. 194.

Sholl J. distinguishes between the elements of a lawful excuse of self-defence in wounding with intent to murder, and the elements of a defence of self-defence to the charge of wounding with intent to cause grievous bodily harm. He considers that in wounding with intent to murder the accused must believe he was protecting himself from an attack dangerous to life. Whereas in wounding with intent to cause grievous bodily harm he must only believe that the action taken was necessary for his protection against an attack likely to cause serious injury. This approach seems to be an unduly complicated one, requiring the jury's involved conjecture into the minute details of what the accused believed. Therefore, although the approach of Pape J. in relation to the use of excessive force in self-defence to wounding with intent to kill is probably not a good one, he seems to have taken the more sensible view in not making use of the refinement to the doctrine of self-defence laid down by Sholl J. in *Spartels'* case.[23]

M. FORSTER

EASTGATE v. EQUITY TRUSTEES[1]

Joint tenancy—Personal representatives' right of re-imbursement—Notional estate in relation to Federal and Victorian Acts.

This case was an appeal from an order of Adam J. who was called upon to determine certain questions by virtue of an originating summons issued out of the Supreme Court of Victoria upon the application of the Equity Trustees (executors of Grace Eastgate).

The questions submitted to the Court related to certain real and personal property which Mrs Eastgate had held in a joint tenancy with her husband. She had also made some *inter vivos* distributions of her property within three years of her death. Both the interest in the joint tenancy and the gifts *inter vivos* came within the notional estate of the deceased (that is, property which is deemed to be part of the deceased person's estate for estate and probate duty purposes even though it is not actually part of the deceased's estate at the time of death).[2]

The issue involved was whether the personal representative had any right of re-imbursement after he had paid estate and probate duty on the whole of the estate including the notional estate. Thus in the question of who should ultimately pay the duty, the dispute was between the residuary beneficiaries under the will and the husband in his capacity as joint tenant or, alternatively, donee.

The problem arose over the meaning of the word 'pass' in section 122 (3) of the Administration and Probate Act 1958 (Vic.).[3] The section provided that:

> Where duty on any notional estate has become payable by the executor or administrator, he may recover the amount of the duty on that notional

[23] *Ibid.*

[1] (1964) 37 A.L.J.R. 479. High Court of Australia: Kitto, Owen and Menzies JJ.

[2] Probate Duty Act 1962 (Vic.), s. 7 (1) (d) (i). Estate Duty Assessment Act 1914-57 (Cth), s. 8 (4) (d).

[3] See now s. 26 of Probate Duty Act 1962 (Vic.).