VERDICTS OF MANSLAUGHTER — AN ADDENDUM

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In an article appearing in this Review[1] a year ago, the observation was made, with accompanying evidence, that the English and Commonwealth laws of homicide seem to be following separate paths of development which might lead, in time, to very dissimilar systems of criminal law.

The cases which have been decided in the ensuing year seem to support this prognosis. The English courts have not shown themselves any more inclined to follow the lead set by the Canadian, Australian and African courts. On the other hand, the Australian High Court has given very clear evidence that this divergence is likely to continue and widen, so long as the criminal law decisions of the House of Lords follow their present trend. *Parker* v. *The Queen*[2], a decision of the High Court of Australia, has some important implications for the law of provocation. Of more importance in the present context is the statement of the Chief Justice, Sir Owen Dixon, on the future policy of the High Court as to precedents set by the House of Lords. This statement of policy has been enthusiastically welcomed—at least by academic and criminal defence lawyers.

His Lordship had been referring to the so-called presumption of intention as is was expounded by the High Court in *R.* v. *Stapleton* [3] where it was stated:—

> "The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous."[4]

Then follows a passage of the greatest significance:

> "That was some years before the decision in *D.P.P.* v. *Smith* which seems only too unfortunately to confirm the observation. I say too unfortunately for I think it forces a critical situation in our (Dominion) relation to the judical authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's* case I think that we cannot adhere to that view or policy. There are propositions laid down in that judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we have long since laid it down in this Court and I think that *Smith's* case should not be used as authority in Australia at all."[5]

The learned Chief Justice added that he had authority to state that the views expressed in the passage quoted were shared by all other members of the High Court.

This pronouncement hardly came as a surprise when one examines the past decisions of the two courts. Of course, there had been a prior disagreement on the question of the presumption of intention, as shown

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1 (1963) 3 Alta. L. Rev. 16, where the remarks of Dr. Colin Howard in *An Australian Letter*, [1962] Crim. L. Rev. 433 were acknowledged.

2 (1963) 37 Aust. L.J.R. 3.

3 (1952) 86 C.L.R. 358.

4 *Id.* at 365.

5 37 Aust. L.J.R. 3 at 11-12. See Howard, *Australia and the House of Lords—Parker* v. *The Queen*, [1963] Crim. L. Rev. 675.

by *R.* v. *Smyth*.[6] This breaking of the courtesy bonds of precedent should lead to more cohesion in Australian law; in the past, some of the Supreme Courts of the states have paid undue deference to the House of Lords, to the detriment of decisions of the courts of other states or even the High Court of Australia. Nevertheless, in some areas of the law, provided the appellant has a sufficiently long purse, the High Court can be overruled by the Judicial Committee of the Privy Council.[7] As will be seen, however, this does not offer such a threat in the area of provocation which was the core of the problem being examined by the High Court in *R.* v. *Parker*. The High Court considered favourably the decisions of the Judicial Committee in *Lee Chun-Chuen* v. *The Queen*[8] and *Attorney-General of Ceylon* v. *Perera*[9], both of which are a departure from the law of provocation laid down by the House of Lords.[10]

R. v. *Parker* is an interesting case for Canadian criminal lawyers because it involves the interpretation of a criminal statute.[11]

Parker had killed the deceased Kelly with whom the appellant's wife had decided to live in preference to her husband. During the day of and the day preceding the death of Kelly, the deceased had made insulting and inflammatory remarks about Mrs. Parker in the presence of the appellant. Parker, who was smaller and weaker than his rival had been heard to make threats against Kelly some hours before the actual killing. Parker had pursued Kelly and Mrs. Parker as they left the Parker home and had run them down with his automobile as they stood by the roadside. He claimed that he only wanted to persuade his wife to return and denied any preconceived intention to kill Kelly. The appellant stated, however, that he became inflamed with passion when he thought that he had killed his wife in the collision. In this alleged state of mind, he attacked Kelly, the source of all his troubles. He struck Kelly with a knuckle-duster and then stabbed him several times with a knife (which Parker habitually carried). The medical evidence showed that Kelly had died as the result of the collision (which fractured both legs), the assault with the knuckleduster and the knife wounds, the last being clearly the most serious.

In view of the time lapse, the type of provocation, the unreasonable relationship between the 'mode of resentment' and the provocation received, and his interpretation of section 23 of the Crimes Act, the trial judge decided not to leave the possible mitigation of provocation to the jury which convicted Parker of murder.[12] Parker claimed on appeal that this was a misdirection.

In a 3-2 decision, the High Court of Australia refused Parker leave to appeal. In the light of the interpretations which have been placed upon the provocation sections in the Canadian Criminal Code, the case of Parker is an interesting and instructive one as well as giving further indication of the trend of Australian criminal law.

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6 (1957) 98 C.L.R. 163. See the discussion of this case and *Smith* v. *D.P.P.* [1961] A.C. 290 in Morris and Travers, *Smith* v. *Smythe*, (1961) 35 Aust. L.J. 154.

7 *e.g. A.-G. for S. Austr.* v. *Brown* (P.C. (Austr.)) [1960] A.C. 432.

8 [1962] 3 W.L.R. 1461.

9 [1953] A.C. 200.

10 See discussion of *Holmes* v. *D.P.P.* [1946] A.C. 588, *infra*.

11 See comments on its legislative history by Windeyer J. at 37 Aust. L.J.R. 3 at 21.

12 Murder is not a capital offence in New South Wales.

The Crimes Act of New South Wales is not so much a code as a consolidation and is not meant to be exhaustive. The importance of this consideration will be made obvious in the ensuing paragraphs. Section 23 of the Crimes Act provides that:—

> (1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the 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 blow.
>
> (2) Where, on 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:—
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> (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 the power of self-control, and did in fact deprive the accused of such power, and
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> (c) That the act causing death was done suddenly, in the heat of passion causing such provocation, without intent to take life.

In deciding whether provocation should have been left to the jury, the main difficulty presented by the wording of the above quoted section was whether the provisio in sub-section (2) was only meant to apply to provocation by words or gestures which is described in sub-section (1). Certainly the juxtaposition of these subsections shows clumsy draftsmanship as the second sub-section could have little real meaning, even if limited to provocation as a whole, because of the inclusion of the word 'omission'. No one suggested that the appellant or any other accused person could commit a murder recklessly and then rely on provocation as a mitigation. Furthermore, the appellant argued that the last phrase in subsection (2), "without intent to take life", was to be given a narrow construction which would allow for the widest application of provocation as a mitigation.

One majority judgment, written by Taylor and Owen JJ., held that the wording of clause (c) of sub-section (2) was such that it not only applied to all forms of provocation but had the function of placing upon the accused the burden of affirmative proof that the provocation caused such a heat of passion that the killing was 'done suddenly . . . without intent to take life.' The learned judges, along with Menzies J. in a separate opinion, were of the opinion that the rule in *Woolmington* v. *D.P.P.*[13] was not available because of the construction of section 23. Therefore there was no room for the operation of the presumption of intention in the light of this finding, despite the general approval, given in *obiter dicta* in *R.* v. *Parker*, to the common law position as stated by the Judicial Committee of the Privy Council in the recent case of *Lee Chun-Chuen* v. *The Queen* and its earlier opinion in *Attorney General of Ceylon* v. *Perera*.[13a]

Dixon C. J. relied more strongly on the common law position although his stand on the question of onus was not as clear-cut as that of the other dissenting judge, Windeyer J. The Chief Justice relied on the narrow ground that there was evidence of provocation which could

13 [1935] A.C. 462.

13a See notes 8 and 9, *supra*.

go to the jury. In the light of his previously cited remarks, it is not surprising that the Chief Justice would give little weight to any interpretation of the Crimes Act that might impinge upon the rule in *Woolmington's* case, (which, incidentally, he never mentions by name.)

The proviso in section 23 does not appear so clearly stated that the onus should be shifted as readily as the majority found. Of course the question of the onus in provocation cases is perfectly clear in Canada as the result of the wording of section 203 of the Code. Yet even under section 203 (and its predecessor, section 261 in the old Code) the question of onus has been examined by Canadian courts. In *R.* v. *Harms*[14] Mackenzie J.A. in disapproving of the trial judge's summing up to the jury stated:—

> "In view of the recent decision of the House of Lords in *Woolmington*, it would seem that it must always be ground for error for the trial judge to tell the jury in a criminal case, that the onus is on the accused to prove any issue arising therein except where his defence is one of insanity or in cases specifically provided for by statute."[15]

This is, in essence, the view taken by Windeyer J. who dissented in *Parker*. In a familiar role as legal historian,[16] His Honour showed his dislike for the careless drafting of section 23. He described the section as the "piecemeal result of parlaimentary afterthoughts". In discussing onus, His Honour recognized the fact that the pre-1935 law obliged the accused person to prove any provocation which he claimed in mitigation. He cited instances in which post-*Woolmington* decisions relating to pre-1935 statutes had followed the rule laid down by the House of Lords in *Woolmington*. The reliance on the House of Lords decision depended, of course, on the type of legislation being examined. In the light of the fact that the Crimes Act was not meant to deprive the law of New South Wales of any basic principle of the common law,[17] Windeyer J. believed that the onus should be on the prosecution. There was little direct authority for his decision; instead, he relied on the general (and, in his opinion, overriding) principle, that the prosecution should prove that the accused's acts were unprovoked because of the "strength and length of the golden thread discovered by *Woolmington's* case."

Of course the view which the majority held on the question of onus does not reflect their attitude in a common law jurisdiction, as can be implied from the *ex cathedra* statement of the Chief Justice in which all members of the High Court concurred. The same is true of the question of intent which, because of the way in which they decided the case, did not concern the majority to any great extent. Nevertheless, it is obvious that the present unsatisfactory state of section 23 of the Crimes Act does the "true reason" of the law a disservice and it is hoped that the legislature will make the necessary amendments in the near future. The Crimes Act is an anomaly in the Australian criminal legal scene because the other states either have comprehensive codes similar to the Canadian one[18] or rely almost solely on the common law as it is

14 (Sask. C.A. 1936) 66 C.C.C. 134.
15 *Id.* at 139-140. See also *R.* v. *Hladiy* [1952] O.W.N. 790, 792.
16 Windeyer, *Legal History* (Sydney, 1946).
17 *Cf.* s. 7(2) of the Canadian Criminal Code, 2-3 Eliz. 2, c. 51.
18 Western Australia, Queensland and Tasmania. These three states have criminal codes which are more or less adaptations of the English draft code. The Crimes Act of N.S.W. has some tenuous connections with the draft code's draftsmen, Sir James Fitzjames Stephen, as one of his kinsmen, Sir Alfred Stephen (later a judge of the N.S.W. Supreme Court) was an architect of the N.S.W. Crimes Act.

interpreted by their own courts, the High Court, the Judicial Committee of the Privy Council and, until recently, as influenced by the House of Lords.

There is conflict between the House of Lords and the Privy Council on the question of intent in relation to provocation. The wording of section 23 of the New South Wales Crimes Act caused a dilemma because it appeared to favour an unpopular rule laid down in *Holmes* v. *D.D.P.*[19] by Viscount Simon of the House of Lords. In *Holmes,* Viscount Simon had stated:—

> 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 intent to kill or to inflict grievous bodily harm is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case) or to inflict grevious bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."[20]

The Judicial Committee of the Privy Council in *Perera* held that provocation may validly arise where the accused does intend to kill or inflict grievous bodily harm.[21] The seemingly obvious difference of opinion expressed in these cases was somewhat blurred by the fact that both judgments used the example of a husband killing his wife's paramour when taken in adultery to show, in *Holmes* that the qualifier (i.e. "seldom") was warranted, and in *Perera,* that Viscount Simon's general rule was erroneous. This difficulty was resolved in a more recent decision of the Judicial Committee, *Lee Chun-Chuen,* when the Board stated that Viscount Simon's *dictum*:—

> ". . . cannot be read as meaning that proof of any sort of intent to kill negatives provocation. Lord Simon was evidently concerning himself with the theoretical relationship of provocation to malice and in particular with the notion that where there is malice there is murder; and he may have had in mind that actual intent in the sense of premeditation must generally negative provocation."[22]

Taylor and Owen J.J. had no great concern with this question because of their way of disposing of the case—primarily on their interpretation of the onus question and the view that there was not sufficient provocation on which the accused could rely. They did say, however, that the debate between *Holmes* and *Perera* (and *Lee Chun-Chuen*) "might have been more illuminating if [the courts] had proceeded upon a common understanding of what constitutes proof of an intent to kill. Such an intent is not necesssarily or conclusively established by proof that the offender had intentionally struck a deadly blow".[23]

The most fruitful and enlightening discussion of the question of malice and provocation is set out in the minority judgments of Dixon C.J. and Windeyer J. They made it obvious, from an examination of the law of homicide from the seventeenth century, that the decision of the House of Lords in *Holmes* is not tenable and that the view of the Judicial Committee in *Perera* and *Lee Chun-Chuen* is preferable, and most probably correct. Their decision enables the provisions of the Crimes Act to be seen as more in accord with the true spirit of the common law of homicide, and of provocation in particular.

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19 [1946] A.C. 588.
20 *Id.* at 598.
21 [1953] A.C. 200 at 243.
22 [1962] 3 W.L.R. 1461 at 1483.
23 37 Aust. L.J.R. 3 at 15.

Dixon C.J., as stated above, decided the case on narrow grounds. He decided that the provocation which the appellant had received—from the first taunt by Kelly to the sight (or thought) of Mrs. Parker leaving with Kelly—was sufficient provocation. It afforded no cooling time but was rather one concerted pattern of provocation consisting of more than mere words and gestures (although it is difficult to decide what category this supposed provocation should fill). At least, the learned Chief Justice saw that this was a view which "the jury was entitled to adopt." The Chief Justice was most reluctant to take any interpretation of the Crimes Act which would impede adherence to the *Woolmington* rule or encourage the erosion initiated by the decision in *Smith* v. *D.P.P.*

In the light of the interest taken in self-defence in the previous article and the historical survey which was made there, the judgment of Windeyer J. is particularly attractive. Windeyer J. believed that the appellant should have had the question of provocation left to the jury.[24] Windeyer J. made a full examination of malice. He saw subsection (2) of section 23 as a "restatement of common law doctrine, but shorn of some of the extravagances of malice aforethought and constructive malice." He continued:—

> At common law, murder was reduced to manslaughter by a provocation sufficient in Hale's words 'to take off the presumption of malice', that is to say to remove the implication of malice aforethought that the deed created. As the new statutory provisions supplanted the old learning concerning malice aforethought, an express preservation of the jury's right to acquit of murder and convict of manslaughter was prudent. And as the common occasion for doing so was when provocation existed the proviso is not out of place.[25]

Windeyer J., in discussing the common law background, with particular reference to provocation, pointed out that all homicides had once been felonious and that there had been a slow whittling away of this view. He claimed that it was not until 1547 that the distinction between murder and manslaughter was finally settled by statute which made 'homicide of malice aforethought a non-clergyable felony, leaving other punishable homicides clergyable." The Statute of Stabbing gave even stronger force to this view.

At one time, malice aforethought had its natural meaning: this did not include killing upon the sudden. As implied malice found its way into the law, this natural meaning lost much or most of its force. Coke described a homicide as having malice, 'if one kills another without any provocation on the part of him that is slain.' Hale, too, had spoken of 'such Provocation as will take off the presumption of malice' which, on first impression, seems to be the view accepted in *Holmes* v. *D.P.P.* In *Holmes,* Viscount Simon did not take sufficient account of *Woolmington,* and its implications.

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[24] In accordance with the statement of Fullagan J. in *R.* v. *Mraz* when that judge spoke of:—

> ". . . the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried." (1955) 93 C.L.R. 4993 at 514.

In *Parker,* the Solicitor-General admitted that the "possibility" in the last sentence was "very real".

[25] 37 Aust. L.J.R. 3 at 22.

Windeyer J. saw provocation, despite the vicissitudes of meaning and import through which the term *malitia praecogitata* had passed, as reducing murder to manslaughter on the basis of 'an appreciation that there are differing degrees of moral responsibility in homicide.' This is a most important point which lends weight to the argument made in the previous article that the 'defences' of excessive self-defence and provocation are nothing but mitigations to which no precise legal terms can be applied. They are little more than compromise verdicts which the court allows the jury to make on 'moral' grounds. By their very nature, they are not capable of clear expression in criminal law theory.

The many and varied fact-situations which make homicide manslaughter rather than murder by reason of provocation are such that it would be impossible to describe with any precision, the mental element which would allow a crime to attract manslaughter rather than murder, as the result of provocation. The learned judge says:—

> "At one period it seemed that in this branch of the law (i.e. provocation) principle might founder in a quagmire of single instances. It has been rescued by the recognition that the question is ultimately one of fact, to be determined by the application of general principles to particular facts, rather than by seeking for analogies among cases decided in earlier times in different social conditions."[26]

This statement is a valuable one in understanding the concept of provocation and the maintenance of the policy of leaving the question of provocation to the jury, in New South Wales as well as the rest of the common law world. The significance of these single instances of which Windeyer J. speaks was to pinpoint the moral responsibility of the accused, not to decide the case upon narrow legal principles but upon the recognition of the law's leniency for such accused persons, as seen through the non-legal eyes of the jury.

Windeyer J. accepted the explanation of Viscount Simon's judgment in *Holmes* as explained in *Lee Chun-Chuen* and *Perera*. In the latter case, Lord Goddard for the Privy Council has said:—

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."[27]

This was affirmed by Lord Devlin in *Lee Chun-Chuen* where he said of Viscount Simon's statement that provocation must negative malice, that:—

> "He cannot have meant that any sort of intention to kill or cause grevious bodily harm was generally incompatible with manslaughter because that would eliminate provocation as a line of defence."[28]

Windeyer J. decided that the last phrase in subsection (2) of section 23 should be interpreted in the same manner as the *dictum* of Viscount Simon in *Holmes* had been understood in subsequent cases. The learned judge could not believe that the Crimes Act (which it must be remembered was not a code but a mere consolidation) meant to upset completely the common law rules.

Furthermore, the chequered career of the term 'malice' lends weight to the belief that Viscount Simon had made an unfortunate interpretation of the term, more in accord with the meaning which attached to it in the time of Hale and Coke than in modern criminal law. If the term is

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26 *Id.* at 21.
27 [1953] A.C. 200 at 206.
28 [1962] 3 W.L.R. 1461 at 1465. See comments of Edwards, *The Doctrine of Provocation* (1953) 69 L.Q.R. 371.

given a meaning which restricts it to its original or 'pure' meaning then it can make sense, even in the *Holmes* context. This is obvious, in any case, because if the accused has malice in the old sense of a premeditated plan to kill regardless of the provocation which he alleges to have received, he was undoubtedly guilty of murder. In this circumstance provocation is very much a matter of fact for the jury.[29] The whole tradition of the law of provocation and the role of the jury in the criminal trial, particularly since *Woolmington*, is such that the circumscription which the N.S.W. Crimes Act wishes to place on the law is too stringent and should be avoided where a reasonable interpretation is possible.

In any event, the decision in *Woolmington* makes it obvious enough that, at best, Viscount Simon's statement in *Holmes* was ambiguous. In *Woolmington*, Viscount Sankey made a statement which leaves little room for doubt or excuse for ambiguity:—

> "When evidence of death or malice has been given (and this is a question for the jury), the accused is entitled to show, by evidence or by examination of circumstances adduced by the Crown that the act on his part which caused death was either *unintentional or provoked.*"[30]

Although the Canadian Criminal Code has never contained a proviso similar to that in clause (c) of section 23 (2) of the Crimes Act, there is not, on the other hand, any direct statutory authority for saying that malice need not be negatived. Nevertheless the courts in Canada have taken a view similar to that implied in Viscount Sankey's judgment. Therefore the true rationale of the mitigation of provocation is that the *mens rea* of the accused becomes unimportant if he is able to show that there are any circumstances which point toward provocation and, as a result, the accused can take advantage, to use East's words, of "suspension of reason arising from sudden passion". So long as there is no evidence or inference of revenge or real and genuine premeditation (such as ambush or planning evidenced by the use of poison), then he can claim that he acted under the pressure and passion of provocation.

The courts of the Commonwealth have criticized another rule relating to homicide and provocation laid down by the House of Lords. The relationship rule propounded by Viscount Simon in *Mancini* v. *D.P.P.*[31] has previously been criticized as inapplicable to the Canadian scene.[32] The Supreme Court of Hong Kong in *R.* v. *Ng Yiu-nam*[33] considered the rule in *Mancini*—that the "mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." The Supreme Court of Hong Kong described the rule (which was elaborated upon in *R.* v. *McCarthy*[34]) as not only "illogical but contrary to common sense."[35] No doubt this assessment of a rule, which made no sense in the context of provocation, will be warmly received by criminal lawyers. The fact that a person loses his self-control and therefore is no longer in the position of being able to decide whether he

29 For the Canadian law, see *R.* v. *Brennan* (1896) 27 O.R. 659, *R.* v. *Harlton* 57 C.C.C. 329; *R.* v. *Philbrook*, 66 C.C.C. 26; *R.* v. *Illerbrun*, 76 C.C.C. 77; *R.* v. *McLean* 87 C.C.C. 389; *R.* v. *Harms, supra*; *R.* v. *Sawnson* 10 C.R. 81; *R.* v. *Manchuk*, [1938] S.C.R. 341.

30 [1935] A.C. 462, 482. This was cited with approval by Kellock J. in *R.* v. *Taylor* [1947] S.C.R. 462 at 476.

31 [1942] A.C. 1.

32 *e.g. R.* v. *Linton* 9 C.R. 262, 265 per Robertson C.J.O. Cf. the approach of Kerwin J. in *R.* v. *Taylor, id.* at 482. The rule of the relationship of drunkenness to provocation is also different in Canada. See *Taylor, supra*, and *R.* v. *Abel*, 115 C.C.C. 119.

33 [1963] Crim. L. Rev. 850.

34 [1954] 2 Q.B. 105.

35 [1963] Crim. L. Rev. 850, 851. The commentator on this case believes that section 3 of the English Homicide Act 1937 may have abolished the relationship rule, *id.* at 852.

should retaliate with a knife or a fist, brings the rule in provocation even closer to the excessive self-defence rule. There will be many cases where it is difficult to say that the defence should be provocation rather than self-defence. The only patently clear cases will be ones in which the provocation consists of words or gestures and in those cases the accused might be able to argue that he believed or reasonably believed that the words or gestures constituted threats rather than mere insults. In those jurisdictions which have accepted the 'qualified' defence of excessive self-defence this confusion has been compounded. Although the Canadian and Australian courts have accepted the qualified defence (and in the latter it is more noteworthy because the cases have arisen in the common law jurisdictions), the English courts, including the Court of Appeal have continued to ignore these decisions although, as one commentator observes, the Commonwealth decisions are based on old English authorities.

In *R.* v. *Hassin*,[36] the appellant claimed that the deceased, for whose murder he had been convicted, had drawn a knife on him and that he had only retaliated in self-defence. The jury were directed that if they accepted the appellant's version of the facts, they should acquit him. (Bystanders testified that the appellant had been the sole assailant). The appellant contended that the judge should have instructed the jury that if they considered that the appellant had exceeded the bounds of self-defence, the proper verdict was manslaughter.

The Court of Criminal Appeal dismissed the appeal; unfortunately the decision is not fully reported.[37] The Court of Criminal Appeal was of the opinion that the submission was a novelty in modern times but that it may have had some merit in the days of chance medley. From the meagre report which is available, it does not appear that the court took any of the Commonwealth cases into account although, no doubt, the defence made reference to the burgeoning decisions of the Commonwealth courts in this field.

R. v. *Chisam*,[38] a case decided by the same court in the same year is a more interesting one because the theory surrounding self-defence was given some weight and consideration. In that case, the accused was charged with capital murder. The deceased T, with five other young people, passed Chisam's house at midnight playing a transistor radio and making a noise. Chisam told them to be quiet. They verbally abused him but moved away. When the young people were about eighty yards from Chisam's house the accused fired two shots. Three of the party, including T, returned to Chisam's house and broke in and a fight started between the accused and his son and the three young men. T collapsed and died.

The prosecution claimed that T had been shot when Chisam fired the rifle and had been able to return to Chisam's house before expiring. The accused claimed that he had fired into the air and that the fatal injury had been inflicted with a sword stick.[39] Among other defences,

36 [1963] Crim. L. Rev. 852.
37 The policy behind the selection of cases for full reporting is mystifying. Too often important cases are relegated to a short entry in the London *Times* or a sketchy report in a specialized journal (as was the case with both *R.* v. *Ng Yiu-nam* and *R.* v. *Hassin*).
38 [1963] Crim. L. Rev. 353.
39 The very short report available does not help to solve what should surely be a simple matter of fact.

including provocation, the defendant claimed that he had killed in self-defence. He claimed that he had feared for the safety of his family as well as himself. He was convicted of manslaughter and appealed this verdict on the ground that the trial judge had given an incomplete direction to the jury on the plea of self-defence. The Court of Appeal dismissed the appeal. Once again the report is an inadequate one. The Court of Criminal Appeal is reported as stating that it believed that the questions for the jury were the following:— did the defandant honestly believe that a member of his family or himself was likely to be put in danger, and, if so, were there reasonable grounds for that belief? In the present case, the court stated, the trial judge only left the first question to the jury and as the result was very favourable to the accused he should have no quarrel with the verdict of manslaughter. The report quotes two cases as having been cited by the Court of Criminal Appeal. They were *R.* v. *Weston*[40] and *Owens* v. *H.M. Advocate.*[41] There was no discussion of theory but the Court of Appeal obviously considered that the belief as to danger must be an objectively reasonable one. Although this view has been criticized, it seems most unlikely that the rule will be broadened to a subjective test, particularly in light of the "novelty" of the concept of excessive self-defence.[42]

In any event, the verdict reached in *Chisam* is a heartening sign although one would be happier if one knew that the court was making a conscious effort to resurrect the old English rule which has become common in other countries in the Commonwealth. The negative and colourless remarks of the Court of Appeal rob the English law of what could have been an encouraging return to creative judicial decisions. Inexplicably, the case of *Chisam* was not mentioned in *Hassim.*

The fact-situation in *Chisam* is a classic one in the law of excessive self-defence. It has arisen in many previous English cases in the nineteenth century and in the more recent and unsatisfactory decision in *Hussey.*[43] The only departure from previous 'classic' fact-situations, was the fact that the appellant had fired the previous shots which no doubt incited the youths to attack his "castle". The case, for what it is worth, shows that the castle doctrine is of little consequence in modern civilization.[44]

Perhaps the compromise quality of the 'defences' of provocation and excessive self-defence has persuaded English courts that any formalisation or rationalisation of the principles applicable, particularly to the latter, are undesirable and would rob the courts of flexibility in the future. One would have thought that a basic consideration of policy would be worthwhile.[45]

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40 (1879) 14 Cox C.C. 346.
41 1946 S.C. 119. See the previous article for a full discussion of these, and more important cases.
42 See Morris, *The Slain Chicken Thief,* (1958) 2 Syd. L. Rev. 414 at 430 for a discussion of the reasonableness of an accused's belief.
43 (1924) 18 Cr. App. R. 160.
44 See (1963) 3 Alta. L. Rev. 16, 23 *et seq.*
45 Even the cases chosen to support the decision in *R.* v. *Chisam* were not the most appropriate. (This was also true of the "modern" authorities used in the unfortunate case of *Smith* v. *D.P.P.*) *R.* v. *Weston* was "in some degree incomprehensible" because of the confusion between provocation and self-defence. See remarks (1963) 3 Alta. L. Rev. 16, at 37-38. One would have preferred reference to *R.* v. *Symondson* (1896) 60 J.P. 645. See other cases cited in previous article, p. 38 n. 133. If the Court of Criminal Appeal in *Chisam* wished to cite Scottish cases, the later case of *Crawford* v. *H. M. Advocate* [1950] S.L.J. 279 might have been more appropriate. See previous article at p. 47 and particularly case of *R.* v. *Miller* (1956) 20 J. Crim. L. 329 in n. 176.