CONSOLIDATED HEARINGS BOARD

IN THE MATTER OF Sections 2 and 3 and 6 (3) of the Consolidated Hearings Act, 1981, S.O. 1981, c.20;

— and —

IN THE MATTER OF Section 12(2) of the Environmental Assessment Act, R.S.O. 1980, c.140;

— and —

IN THE MATTER OF Sections 30, 35 and 38 of the Environmental Protection Act, R.S.O. 1980, c.141, as amended;

— and —

IN THE MATTER OF Sections 24 and 61 (2) of the Ontario Water Resources Act, R.S.O. 1980, c.361, as amended;

— and —

IN THE MATTER OF Section 28 (3) of, and Regulation 164 under, the Conservation Authorities Act, R.S.O. 1980, c.85, as amended;

— and —

IN THE MATTER OF Section 40(12) of the Planning Act, S.O. 1983, c.1, as amended; in connection with site plan control of the sanitary landfill site;

— and —

IN THE MATTER OF Section 22(1) of the Planning Act, 1983 in connection with a referral to this Board by the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, on a request by the Regional Municipality of Halton to amend the Official Plan for the Town of Milton to redesignate a parcel of land comprising Part Lots 3 and 4, Concession 2 N.S. in the Town of Milton from "Agriculture" and "Conservation and Hazard Lands" to permit the construction, operation and maintenance of a landfill site, Minister's File No. 24-OP-0208-A01;

— and —

IN THE MATTER OF Section 34(11) of the Planning Act, 1983 in connection with an appeal to this Board by the Regional Municipality of Halton for an order directing an amendment to By-law 61-85 of the Town of Milton to rezone the lands situated at Lot 3 and part of Lot 4, Concession 2 N.S., in the Town of Milton from "Agriculture" to permit a regional sanitary landfill site and ancillary uses;

— and —

IN THE MATTER OF Section 15(1) of the Planning Act, R.S.O. 1980 ch.379 in connection with a referral by the Honourable Claude F. Bennett, Minister of Housing on a request by Tremaine Britannia Citizen's Group for consideration of part of the Official Plan for the Halton Planning Area with respect to Sections 1 to 5 inclusive, 7, 9 and 10 of Part III D3 Solid Waste Management, Minister's File No. OPC-0026;

— and —

IN THE MATTER OF Section 64 of the Ontario Municipal Board Act, R.S.O. 1980, c.347 as amended in connection with an application by the Regional Municipality of Halton for an order approving:

a) the acquisition of land for the construction, operation and maintenance of a sanitary landfill site to contain 7.96 million cubic metres of waste in the Regional Municipality of Halton and to do so by one of two alternative methods as follows:

(i) landfilling at the site referred to in Halton's Environmental Assessment as Site F in the City of Burlington;
(ii) landfilling at the site commonly referred to in Halton's Environmental Assessment as Site D in the Town of Milton

at an estimated cost of $12,775,000.00, and the borrowing of money by way of temporary advances not exceeding in the aggregate such estimated cost pending the sale of debentures, and

(b) the issuance of necessary debentures to a maximum of $12,775,000.00 for a term not to exceed fifteen years;

— and —

IN THE MATTER OF Section 193(5) and Paragraph 84 of Section 210 of the Municipal Act, R.S.O. 1980, c.302, as amended;

— and —

IN THE MATTER OF Sections 6, 7 and 8 of the Expropriations Act, R.S.O. 1980, c.148;

— and —

IN THE MATTER OF an undertaking of the Regional Municipality of Halton to provide facilities for the purpose of receiving, dumping and disposing of waste as required by section 137 of the REGIONAL MUNICIPALITY OF HALTON ACT, R.S.O. 1980, c.436, as amended, by acquiring the land for, constructing, operating and maintaining a landfill to contain 7.96 million cubic metres of waste in the Regional Municipality of Halton.

APPLICANTS BOOK OF AUTHORITIES

RE: Reply Evidence

I N D E X

1. "Reply Evidence", Sopinka and Lederman, The Law of Evidence in Civil Cases at 517-519

2. "Evidence on Rebuttal", Phipson on Evidence, 13th Ed., at 824-827

3. Environmental Assessment Act, R.S.O. 1980 c. 140, s.18(20)

4. Statutory Powers Procedure Act, R.S.O. 1980 c.484, s.15

5. Environmental Assessment Act, R.S.O. 1980 c. 140, Reg. 4/88, s.47

6. Budd v. Davison (1880), 29 W.R. 192

7. Noble v. Noble and Ellis, [1963] 3 All E.R. 887

8. R v. Campbell (1977), 17 O.R. (2d) 673

9. Mersey Paper Co. Ltd. v. County of Queens (1959), 18 D.L.R. (2d) 19 (N.S.S.C.)

10. Law Society of Upper Canada Rules of Professional Conduct, Rule 10

were not covered in cross-examination.[365] Re-examination must be confined to matters which arose out of cross-examination.[366] A trial judge does, however, have a discretion, which is to be exercised sparingly, to permit re-examination on matters not touched upon in cross-examination which may, through an oversight, have been omitted when the witness was testifying in chief. In such cases, the opposing party will have a further right to cross-examine the witness.[367] A witness' credibility which may have been impaired in cross-examination may be rehabilitated in re-examination. This may entail the introduction of a previous consistent statement to rebut the suggestion that the witness' evidence was a recent contrivance.[368] As with examination-in-chief, leading questions may not be posed.[369] Inadmissible evidence which was improperly elicited in cross-examination may be the subject of re-examination, for, if a party is initially prejudiced by the introduction of such evidence in cross-examination, he should have an opportunity to qualify or explain it.[370]

H. REPLY EVIDENCE

At the close of the defendant's case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence.[371] As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded.[372] A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:

> ". . .first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning."[373]

[365] *Doe d. Wetmore* v. *Bell* (1890), 30 N.B.R. 83, at p. 89.
[366] *Prince* v. *Samo* (1838), 7 Ad. & El. 627.
[367] 6 *Wigmore on Evidence*, s. 1899.
[368] *R.* v. *Wannebo*, [1972] 5 W.W.R. 372. See text Chapter 3, Section C, 2, *supra*.
[369] *Ireland* v. *Taylor* [1949] 1 K.B. 300, at p. 313.
[370] *R.* v. *Noel* (1903), 6 O.L.R. 385; *Blewett* v. *Tregonning* (1835), 3 Ad. & El. 554.
[371] 6 *Wigmore on Evidence*, s. 1873, p. 517.
[372] The rule "will exclude *all evidence which has not been made necessary by the opponent's case in reply*": 6 *Wigmore on Evidence*, s. 1873, p. 511.
[373] *Ibid.*

The Ontario Court of Appeal recently held in *Allcock, Laight & Westwood* v. *Patten et al.*[374] that the trial judge had erred in permitting the plaintiff to adduce evidence, ostensibly as rebuttal, when the evidence was in effect confirmatory only of the plaintiff's case. Schroeder J.A., noting with approval an earlier decision of the Court of Appeal, *R.* v. *Michael*:[375] stated:

> "It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on *prima facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs* v. *Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534. . . . The Rule is now so well settled that it requires no further elaboration. It is important in the trial of actions, whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion."[376]

Although the court made no mention of the existence of a discretion in the trial judge, other cases have affirmed that there is a discretionary power vested in him to admit such evidence, notwithstanding that it may not be the proper subject matter of reply.[377]

In *Mersey Paper Co. Ltd.* v. *County of Queens*,[378] the trial judge denied the plaintiff the opportunity to examine expert witnesses on rebuttal, acceding to the defendant's objection that the plaintiff was splitting his case. The matter in issue was the mode of calculation of property assessment. The base figure remained unknown to the plaintiff until he elicited that fact on cross-examination of the assessor at trial. The defendant contended that the witness had been available during the presentation of the plaintiff's case, and should

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374 [1967] 1 O.R. 18.

375 [1954] O.R. 926.

376 [1967] 1 O.R. 18, at p. 21. See also *B.F. Goodrich Canada Ltd.* v. *Mann's Garage Ltd.* (1960), 21 D.L.R. (2d) 33.

377 *B.F. Goodrich Canada Ltd.* v. *Mann's Garage Ltd.*, *supra*, footnote 376; *Devlin* v. *Crocker* (1870), 7 U.C.Q.B. 398; *R.* v. *Markadonis*, [1935] 2 D.L.R. 105, at p. 112; *R.* v. *Parkin* (1922), 66 D.L.R. 175, at p. 201; *Williams* v. *Davies* (1833), 1 C. & M. 464, 149 E.R. 481; *Neary* v. *Fowler et al.* (1869), 7 N.S.R. 495; *R.* v. *Crippen*, [1911] 1 K.B. 149; *R.* v. *Briden*, [1960] O.R. 362, at p. 365.

378 (1959), 18 D.L.R. (2d) 19.

have been called at that time. It was further argued that the testimony of the expert witnesses was merely a continuation of the testimony in chief, and did not therefore constitute rebuttal evidence. On appeal to the Supreme Court of Nova Scotia, it was held that the evidence should have been admitted. The facts which the plaintiff wished to contradict were unknown and unforeseen by him before the defendant's case was put in and the evidence of the expert witnesses would have been valueless without knowledge of the assessment figure. There is no general rule that excludes evidence offered in rebuttal of facts brought out in cross-examination rather than direct[379] and in this case, the procedure followed by the plaintiff was the most reasonable. The court further held that if there was not a right to have the evidence admitted, the trial judge had improperly exercised his discretion in rejecting it.[380] By this, it might be inferred that even if the evidence was not properly referred to as "rebuttal evidence", it was, in the opinion of the appellate court, a situation in which the discretion referred to should have been exercised in the plaintiff's favour.

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[379](1959), 18 D.L.R. (2d) 19, at p. 37.
[380]*Ibid.*, at p. 38.

had not mentioned it in his sworn information, he was allowed on re-examination to state that he had included it in an earlier information.[53] And upon a charge of rape on a child, the prisoner's counsel having elicited on cross-examination of the child that the act had not caused her any pain, the prosecution was allowed to ask, in explanation, whether the prisoner had done the same to her on former occasions.[54] Even if inadmissible matters are introduced in cross-examination, the right to re-examine thereon remains.[55] Matters not properly explanatory, or new facts, cannot, however, be introduced in this way. Thus, where a certain conversation had been admitted in cross-examination, distinct matters occurring in the same conversation were not allowed to be proved in re-examination;[56] and an accomplice, having admitted on cross-examination by the prisoner's counsel that he had committed two other robberies on the night in question, was not allowed to be asked on re-examination in whose company he was, in order to criminate the prisoner, the question not arising out of the cross-examination.[57] New facts may, however, by leave of the judge, who usually puts the question himself, be elicited in re-examination; and the opponent may then cross-examine thereon. In re-examination, leading questions may not be asked.[58]

6.—EVIDENCE IN REBUTTAL

33-92 Evidence in reply, whether oral or by affidavit, must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff.[59] Thus, where the latter had closed his case without calling a defendant who did not appear, the plaintiff was not allowed to call him in reply.[60] So, in an action on a bill, where indorsement to the plaintiff was in issue, his case resting on mere proof of the indorser's handwriting, and the defendant, denying knowledge of the transaction, or authority to sign, had tendered evidence that the plaintiff was too poor to give value, proof by the plaintiff to rebut this was excluded as being merely confirmatory.[61] Moreover, where the issues on the claim and counterclaim are identical, evidence in rebuttal cannot be called, as it must necessarily be confirmatory.[62] With the judge's leave, rebutting evidence may be called by the plaintiff in answer to evidence of the defendant in support of an issue, the proof of

[53] *R.* v. *Coll*, § 32-30 for the admissibility of previous consistent statements, see generally *ante*, § 33-79.
[54] *R.* v. *Chambers*, 3 Cox 92.
[55] *Blewett* v. *Tregonning*, 3 A. & E. 554; but *cf. R.* v. *Cargill* [1913] 2 K.B. 271 (rebuttal of irrelevant evidence not allowed).
[56] *Prince* v. *Samo* (1838) 7 Ad. & El. 627; *cf. Shaw* v. *Roberts*, 2 Stark. 455.
[57] *R.* v. *Fletcher*, 1 Lew.C.C. 111.
[58] *Ireland* v. *Taylor* [1949] 1 K.B. 300, 313.
[59] *Gilbert* v. *Comedy Co.*, 16 Ch.D. 594; *Trimlestown* v. *Kemmis*, 9 C. & F. 749, 781.
[60] *Barker* v. *Furlong* [1891] 2 Ch. 172.
[61] *Jacobs* v. *Tarleton*, *ante*.
[62] *Green* v. *Sevin*, 13 Ch.D. 589.

which lay upon him.[63] The discretion may still be exercised in the plaintiff's favour where the nature of the defence became apparent during cross-examination of his own witnesses.[64] The judge, however, has a discretion to admit further evidence either for his own satisfaction or where the interests of justice require it,[65] and confirmatory evidence in rebuttal will generally be allowed when the party tendering it has been misled[66] or taken by surprise.[67]

Criminal proceedings

A similar rule obtains in criminal cases whenever the accused, in defence, gives evidence of fresh matter which the prosecution could not foresee. Thus, in an old case[68] on a charge of theft, the defence being that the prisoner had bought the property from A, A, called as a witness, was allowed to deny the prisoner's statement for this was strictly rebutting but not to add that he had "seen the prisoner steal it" for this was merely confirmatory of the original charge. The classic formulation of the rule is that by Tindal C.J. in *R.* v. *Frost* (1839)[69]: "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso,* which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to be no reason why the matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." 33–93

The court held that as in that case the evidence sought to be adduced in rebuttal was only marginally relevant they would not interfere with the judge's exercise of his discretion to admit it. All evidence in the possession of the Crown which is *clearly* relevant to the issues must be adduced as part of the prosecution's case and cannot properly be admitted after evidence for the defence: *R.* v. *Levy and Tait*[70] It is submitted that the court had in mind that there are many cases where evidence in the possession of the Crown becomes of much greater relevance and importance once the defence has been revealed. The test 33–94

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63 *Williams* v. *Davies*, 1 Cr. & M. 464; *Wright* v. *Wilcox*, 9 C.B. 650; *Penn* v. *Jack*, L.R. 2 Eq. 314.

64 *Shaw* v. *Beck*, 8 Exch. 392.

65 *Doe* v. *Bower*, 16 Q.B. 805; *Budd* v. *Davison*, 29 W.R. 192.

66 *Barker* v. *Furlong, supra; Rogers* v. *Manley*, 42 L.T. 585.

67 *Bigsby* v. *Dickinson*, 4 Ch.D. 24; *Budd* v. *Davison, ante; Wright* v. *Wilcox*, 9 C.B. 650.

68 *R.* v. *Stimpson* (1826) 2 C. & P. 418. Further illustrations are set out at § 1617 of the 11th ed. of *Phipson, viz.: R.* v. *Priestley* (1910) 5 Cr.App.R. 155; *R.* v. *Hilditch* (1832) 5 C. & P. 299; *R.* v. *Wheatley* (1915) 5 D.L.J. 332; *per contra* see *Briggs* v. *Aynsworth* (1838) 2 M. & R. 168; *R.* v. *Briggs* (1839) 2 M. & R. 199.

69 9 C. & P. 129, 159, adopted in *R.* v. *Harris* (1927) 20 Cr.App.R. 86, 89; *R.* v. *McMahon* (1933) 24 Cr.App.R. 95, 97; *R.* v. *Liddle* (1928) 21 Cr.App.R. 3, 13; and *R.* v. *Day* (1940) 2 Cr.App.R. 168, 172. The rule was applied more recently in *R.* v. *Cleghorn* [1967] 2 Q.B. 584 and *R.* v. *Joseph* (1971) 56 Cr.App.R. 60.

70 (1966) 50 Cr.App.R. 198.

would appear to be whether it was reasonable for the Crown not to have called that evidence as part of its case on the grounds that it was only "marginally, minimally, or doubtfully relevant.'[71] As to how the rule applies when the judge calls a witness, see § 33–95 below.) Lord Goddard commenting,[72] on the rule laid down by Tindal C.J., said that it is probably in wider language than would be used at the present day. "In *Crippen*[73] the court said in terms that they did not propose to adopt the language of that judge and they considered that the rule laid down in these terms might in some cases place an unfair burden on counsel for the prosecution and that it was a question for the judge . . . to determine in his discretion whether the evidence, not having been tendered in chief ought to be given as abetting evidence."[74] The Court of Appeal in *R.* v. *Milliken*[75] described Lord Goddard's observations as a valuable pronouncement upon this sometimes unnecessarily thorny topic.[76] In *Milliken*[77] the trial judge's ruling to allow an application to call evidence in rebuttal was upheld. Winn L.J. said[78] "Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the defendant and when it is reasonably foreseeable by the prosecution that some gap in the proof of guilt needs to be filled by evidence called by the prosecution, then generally speaking the court is likely to rule against the closing of any such gap by rebuttal evidence[79]; but . . . the evidence here was not evidence in any sense probative of the guilt of the defendant, since it really consisted of no more than denials of the accusations of conspiracy and concoction of the charge made by the defendant in his own evidence . . . the evidence was to disprove the truth of the defence which itself consisted of an affirmative attack upon the credibility and honesty of the police officer." *Semble* that this decision does not offend against the rule prohibiting contradiction on collateral matters (§ 33–83) because the matters alleged amounted to bias. Otherwise the defence should not have been allowed to prove them where proceedings are not upon indictment the general principles set out in the authorities will, of course, apply. In trials upon indictment, the calling of evidence in rebuttal of alibis is now governed by the Criminal Justice Act 1967, s.11 (see § 33–14, *ante*).

It was assumed in *R.* v. *Campbell*[80] on the authorities that evidence to rebut relevant statements of fact arising *ex improviso* introduced for the first time in an unsworn statement from the dock, can in appropriate circumstances be rebutted by the Crown. It is submitted that the assumption is correct. See § 33–99, *post*, for the authorities.

The defendant is less often entitled to give rebutting evidence since,

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[71] *R.* v. *Levy and Tait*, *ante*, at p. 202.
[72] In *R.* v. *Owen* [1952] 2 Q.B. 362, 366.
[73] (1911) 5 Cr.App.R. 255.
[74] *Per* Lord Goddard in *R.* v. *Owen*, *ante* 36 Cr.App.R. 16, 19.
[75] (1969) 53 Cr.App.R. 330.
[76] *Ibid.* At p. 334.
[77] *Ante.*
[78] *Ante.* at p. 333.
[79] See also Winn J. in *R.* v. *Rice* [1963] 1 Q.B. 857, 867, 868, reference to *ante*, § 33–27.
[80] (1979) 69 Cr.App.R. 221, 226.

knowing the witness's statements or depositions, he can give it in defence. As in civil cases, however, the judge may, when the interests of justice require it, admit evidence in rebuttal although it was available in chief.[81]

Where a rebuttal of relevant evidence has been improperly refused in a civil case, a new trial may be granted.[82] *Sembie* that in a summary trial of a criminal case this would give the prosecution the right to appeal by case stated. Rebuttal of irrelevant evidence will not be allowed.[83]

For the principle that the prosecution should call the evidence on which it intends to rely before the close of its case and omission to call technical evidence, see § 33–26 *ante*.

7.—EXAMINATION BY JUDGE AND JURY. RE-CALLING WITNESS

A judge may put all such questions to a witness as the interests of justice require[84]; and these questions may be based, not only on matters arising in the case, but on his own local or scientific knowledge.[85] It is not sufficient for him to rely on a document, the contents and source of which are unknown to the parties, and merely ask explanation of some of the statements in the document.[86] Although he is entitled to use his discretion, it is undesirable that he should interrupt examination in chief by questions which amount to cross-examination,[87] nor should be put questions which suggest that he, the judge, is satisfied that the prisoner is guilty.[88] Nor by his intervention should the judge deprive the defendant of the opportunity of developing his defence under the guidance of his counsel.[89] The Court of Appeal will not interfere directly on the ground that the judge has been guilty of discourtesy, even grave discourtesy, to counsel,[90] but will do so if the conduct of the judge amounts to "an invitation to the jury to disregard what was being said and active, positive interference with counsel in pursuit of his task."[91] In a later case,[92] the Court of Appeal quashed a conviction 33–95

[81] *R.* v. *Crippen* [1911] 1 K.B. 149; *R.* v. *Smith*, 11 Cr.App.R. 230.
[82] *Maclaren* v. *Davis*, 6 T.L.R. 372.
[83] *R.* v. *Cargill* [1913] 2 K.B. 271.
[84] *R.* v. *Hopper* [1915] 2 K.B. 431; *R.* v. *Remnant*, Rus. & Ry. 136; *R.* v. *Watson*, 6 C. & P. 653; *R.* v. *Jameson*, *The Times*, July 24, 1896; *R.* v. *Cain* (1936) 25 Cr.App.R. 204; *R.* v. *Clewer* (1953) 37 Cr.App.R. 204; *R.* v. *Hamilton* [1969] Crim.L.R. 486 (C.A.); *R.* v. *Hickman*, *ibid.* 1502 This statement of the law appearing in the Eleventh Edition of *Phipson* at § 1561 was approved by the Court of Appeal in *R.* v. *Fotheringham* [1975] Crim.L.R. 710; 119 S.J. 613, in which the judge's direction that a co-defendant giving evidence for the prosecution who said he could not remember what happened next be shown a statement which he had made to the police 22 days after an offence of rape, was upheld.
[85] *R.* v. *Antrim* [1895] 2 Ir.R. 603; *cf. Shortt* v. *Robinson*, 63 J.P. 295.
[86] *R.* v. *Architects' Registration Tribunal* [1945] 2 All E.R. 131.
[87] *R.* v. *Cain*, 25 Cr.App.R. 204, 205; *R.* v. *Gilson*, 29 Cr.App.R. 174, 181; *R.* v. *Bateman*, 31 Cr.App.R. 106; *R.* v. *Williams* [1965] Crim.L.R. 609; *Jones* v. *N.C.B.* [1957] 2 Q.B. 55. *R.* v. *Clewer* (1953) 37 Cr.App.R. 37; *R.* v. *Perks* [1973] Crim.L.R. 388; *R.* v. *Browning and Others* [1974] Crim.L.R. 714.
[88] *R.* v. *Rebbett* (1931) 23 Cr.App.R. 112.
[89] *R.* v. *Gunning* [1980] Crim.L.R. 592.
[90] *R.* v. *Ptophopoulos* [1968] Crim.L.R. 52; *R.* v. *Leggett and Others* [1970] 1 Q.B. 67.
[91] *R.* v. *Leggett*, *ante*; *R.* v. *Clewer*, *ante*. *R.* v. *Wilson* [1979] R.T.R. 57 (C.A.).
[92] *R.* v. *Hulusi*; *R.* v. *Purvis* (1973) 58 Cr.App.R. 378. For another recent example, see *R.* v. *Browning and Others*, *The Times*, September 14, 1976 in which the Court of Appeal held that the judge did not depart from his proper province.

the approval of the Lieutenant Governor in Council, make rules governing such practice and procedure and the exercise of its powers in relation thereto and prescribe such forms as are considered advisable.

Conduct of hearings by less than quorum

(13) The chairman may, in writing, authorize less than a quorum of the Board to conduct a hearing and the member or members conducting the hearing shall have all the powers of the Board for the purposes of the hearing.

Only members at hearing to participate in decision

(14) No member of the Board shall participate in a decision of the Board pursuant to a hearing unless he was present throughout the hearing and heard the evidence and argument of the parties and, except with the consent of the parties, no decision of the Board shall be given unless all members so present participate in the decision.

Board may appoint class representative

(15) For the purpose of proceedings before the Board, the Board may appoint from among a class of parties to the proceedings having, in the opinion of the Board, a common interest, a person to represent that class in the proceedings, but any other member of the class for which such appointment was made may, with the consent of the Board, take part in the proceedings notwithstanding the appointment.

Minister entitled to take part in proceedings

(16) The Minister is entitled, by counsel or otherwise, to take part in proceedings before the Board.

Giving of decision

(17) The Board shall give a copy of its decision together with written reasons therefor to the Minister, to the parties, or where an appointment has been made pursuant to subsection (15), to the appointee on behalf of the class, and to such other persons as have made written submissions pursuant to subsection 7 (2) and to the clerk of each municipality in which the undertaking is being or will be carried out.

When decision is effective

(18) No decision of the Board is effective until it becomes final pursuant to section 23.

Decisions, etc., of Board not subject to review

(19) No decision, order, direction, resolution or ruling of the Board shall be questioned or reviewed in any court and no proceeding shall be taken in any court by way of injunction, declaratory judgment, *certiorari*, *mandamus*, prohibition, application for judicial review, *quo warranto*, or otherwise to question, review, prohibit or restrain the Board or any of its decisions, orders, directions, resolutions or rulings.

Application of R.S.O. 1980, c. 484

(20) Except as otherwise provided in this Act, the *Statutory Powers Procedure Act* applies to the proceedings of the Board. R.S.O. 1980, c. 140, s. 18.

(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal or by such party, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court. R.S.O. 1980, c. 484, s. 13.

Protection for witnesses

14.—(1) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against him in any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

Right to object under

R.S.C. 1970, c. E-10

(2) A witness shall be informed by the tribunal of his right to object to answer any question under section 5 of the *Canada Evidence Act*. R.S.O. 1980, c. 484, s. 14.

What is admissible in evidence at a hearing

15.—(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute.

Conflicts

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

Copies

(4) Where a tribunal is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. R.S.O. 1980, c. 484, s. 15.

Notice of facts and opinions

16. A tribunal may, in making its decision in any proceedings,

(a) take notice of facts that may be judicially noticed; and

(b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge. R.S.O. 1980, c. 484, s. 16.

Decision

17. A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party. R.S.O. 1980, c. 484, s. 17.

Notice of decision

18. A tribunal shall send by first class mail addressed to the parties to any proceedings who took part in the hearing, at their addresses last known to the tribunal, a copy of its final decision and order, if any, in the proceedings, together with the reasons therefor, where reasons have been given, and each party shall be deemed to have received a copy of the decision or order on the fifth day after the day of mailing unless the party did not, acting in good faith, through absence, accident, illness or other cause beyond his control

all other parties to the hearing and provide an opportunity for parties to comment on its admissibility.

(4) For the purpose of allowing persons who are unable to attend the hearing during the day to give their views on an application, the Board may hold one or more evening sessions during the course of the hearing. O. Reg. 4/88, r. 46.

Order of Presentation

47. Evidence at a hearing shall be presented by parties as the Board may direct and, in the absence of any such direction in the following order:

(1) the applicant;

(2) those parties represented by counsel in support of the proposal, beginning with federal and provincial government agencies, then municipal corporations, intervenor groups and individual parties;

(3) those parties not represented by counsel in support of the proposal;

(4) those parties represented by counsel opposing the proposal, beginning with federal and provincial government agencies, then municipal corporations, intervenor groups and individual parties;

(5) those parties not represented by counsel opposing the proposal;

(6) those parties, such as regulatory bodies, that do not take a position in support of or in opposition to the proposal;

(7) the Board's witnesses, if any; and

(8) the applicant, in reply. O. Reg. 4/88, r. 47.

48. Parties shall examine, cross-examine and re-examine witnesses as the Board may direct and, in the absence of any such direction in the following order, but with the order rotating in accordance with which party is presenting evidence:

(1) the applicant;

(2) those parties represented by counsel in support of the proposal;

(3) those parties not represented by counsel in support of the proposal;

(4) those parties represented by counsel opposing the proposal;

(5) those parties not represented by counsel opposing the proposal;

(6) those parties, such as regulatory bodies, that do not take a position in support of or in opposition to the proposal;

(7) the Board's counsel, if any; and

(8) the applicant, in re-examination. O. Reg. 4/88, r. 48.

PART IV—ADDITIONAL PROVISIONS

Board Counsel

49. The Board may appoint and direct its own counsel to

(1) advise the Board on matters of law and procedure and on such other matters as the Board requests;

(2) conduct the examination-in-chief of Board-appointed witnesses if the Board has retained such witnesses;

(3) cross-examine witnesses; and

(4) provide liaison with counsel acting on behalf of parties, and parties that are unrepresented by counsel. O. Reg. 4/88, r. 49.

Argument and Submissions

50.—(1) The Board may order written argument to be submitted by the parties in addition to or in lieu of oral argument.

(2) All parties shall be given an adequate opportunity to respond to any written arguments and/or written submissions.

(3) In both written and oral argument, facts or quotations from the oral evidence on which the argument is based are to be referenced with the transcript volume and page number, if transcripts are available and, if the fact or quotation is from documentation filed as an exhibit, the exhibit number and page.

(4) Parties should, at the time of delivering argument, make known to the Board any terms and conditions they would like the Board to attach to any approval. Copies of draft terms and conditions should be distributed to other parties before argument is delivered. O. Reg. 4/88, r. 50.

Effect of Order

51. Any Board Order is effective from the date upon which it is pronounced orally or upon which it is signed, whichever is earlier. O. Reg. 4/88, r. 51.

Reports and Decisions

52.—(1) After every hearing of the Board, a report or decision shall be provided by the Board.

(2) The Board's report or decision shall include reasons for its recommendations or decision.

cannot feel that I am called upon, in order to provide for her, to force the sale of this estate, which I cannot restore to the infant when once sold.

It is argued that the family have always wished this estate to be sold. But the conduct of the last marquis seems inconsistent with any such wish. For the purpose of building a new mansion at Bayham, he procured an Act of Parliament giving power to raise £50,000, to be repaid by annual payments. As to the £10,000 which is said to be wanted for putting farm buildings and farm houses in repair, no doubt both the trustees will concur in selling so much as may be necessary for that purpose; but why, because £10,000 is wanted, I should sell property to the amount of £190,000, I do not see. The case wholly fails in establishing the necessity for a sale. There will be no order on the summons.

No order made.

Solicitors, *Nicholl, Manisty, & Co; Capron, Dalton, Hitchins, & Brabant; Farrar, Ouvry, & Co.*

Chan. Div. V.C.M. } Nov. 25.

BUDD v. DAVISON.

Practice—Further evidence—Scientific witnesses.

A judge may at any period in a case allow further evidence to be called by either party for his own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as of right.

This action was to enforce the execution of the lease of a house called Trentham House, in Twickenham Park, which the defendant had agreed to take from the plaintiffs for a period of twenty-one years, determinable at the end of seven or fourteen years.

The defence set up by the defendant was that a misrepresentation had been made to him on the subject of the drainage of the house, which had been stated to him by the plaintiff, Mr. Budd, to be very good.

The defendant alleged that shortly after he had begun to reside in the house he found the drainage so bad and ineffective as to render it unfit for residence.

At the trial of the action, which occupied several days, a large amount of *vivâ voce* evidence on the subject of the drainage was given on each side, and among others the defendant called several scientific witnesses in support of his case. On the conclusion of the defendant's case the counsel for the plaintiffs applied for leave to adduce scientific evidence to rebut the evidence of the experts who had been called by the defendant's counsel. This application was opposed.

Higgins, Q.C., and *Batten*, for the plaintiffs.—The Court of Appeal, under the Judicature Acts, ord. 58, r. 5, has power to admit further evidence, and *à fortiori* this must be within the power of the court of first instance. We were taken by surprise by the scientific evidence which the defendant has put in. We are, therefore, entitled to call rebutting evidence. Such further evidence was admitted in the cases of *Wright* v. *Willcox*, 9 C. B. 650; *Rogers* v. *Manley*, W. N. 1880, p. 106; *Bigsby* v. *Dickinson*, 25 W. R. 89, L. R. 4 Ch. D. 24.

Pearson, Q.C., and *Vaughan Hawkins*, for the defendant.—*Bigsby* v. *Dickinson* is in our favour, as it shows that further evidence can only be allowed in a case of surprise, which does not exist here. Our case was all along that the drainage was defective. *Rex* v. *Hilditch*, 5 C. & P. 299, shows that evidence, which is merely confirmatory of the plaintiff's case, is not admissible subsequently. In that case Mr. Justice Taunton says, "Whatever is a confirmation of the original case cannot be given as evidence in reply."

They also referred to Roscoe's Nisi Prius, 14th ed., p. 270.

Higgins, Q.C., replied.

MALINS, V.C.—It is difficult in these cases to lay down any rule. I am not altogether prepared to say that Mr. Justice Taunton's opinion, eminent though he was, would be accepted on this matter at the present day. I think that, very strictly speaking, the plaintiffs had sufficient notice of the defendant's case, but I think they were not altogether prepared for the mass of scientific evidence which has been called. I feel myself in very great difficulty on the scientific evidence. I therefore come to the conclusion that it is doubtful whether the plaintiffs are entitled to call further evidence or not, but that there is no doubt the judge may allow them to do so to assist himself. It will greatly assist me to hear further evidence, and I shall therefore allow the plaintiffs to call a scientific witness, as they desire.

Pearson, Q.C.—If that is so, I shall also ask to be allowed to call a further witness to rebut the evidence of the one to be called by the plaintiffs.

MALINS, V.C.—I cannot in fairness refuse that request.

Subsequently it appeared that the proposed new witnesses would not be able to attend at once, and that if called the case would be much delayed. It was therefore arranged to proceed without them.

Solicitors for the plaintiffs, *Anderson & Sons.*

Solicitors for the defendant, *Farrer, Ouvry, & Co.*

Chan. Div. V.C.H. } Nov. 29.

SEAR v. HOUSE PROPERTY INVESTMENT COMPANY (LIMITED).

Lease—Covenant not to assign without consent—"Such consent not to be unreasonably withheld"—Covenant or qualification—Action for injunction or damages—Demurrer.

A lessee covenanted with a lessor not to assign the demised property without the consent in writing of the lessor, "but such consent not to be unreasonably withheld."

The lessor withheld his consent to the granting of an underlease of the premises.

The lessee brought an action for an injunction or damages.

The lessor demurred, on the ground that there was no covenant or contract binding him to grant the licence claimed.

Held, that there was no covenant by the lessor not to unreasonably withhold his consent, but that if the consent should be unreasonably withheld, the lessee would be at liberty to assign without the lessor's consent.

Demurrer.

By an indenture of lease, dated the 14th of July, 1876, and made between Wm. Nunn of the one part, and Ebenezer Sear, the plaintiff, of the other part, a piece of land with the house and shop thereon, known as No. 2, The Pavement, Rye-lane, Peckham, were demised by the said Wm. Nunn to the plaintiff, his executors, administrators, and assigns, from the 29th of September, 1877, for the term of twenty-nine years, determinable at the expiration of the first seven or fourteen years of the said term as therein mentioned, at the yearly rent of £89 5s., and subject to the lessee's covenants therein expressed; and the plaintiff thereby covenanted with the

A In the same judgment, he goes on to deal with processions, which he says (8):

> "... may use the streets for passage on lawful occasions and for lawful objects; and provided the user is reasonable there is no nuisance."

That case is valuable as setting out the true position, as this court understands it, after reviewing the previous cases. Unfortunately in the present case, as I have
B already said, there was no direction to the jury as to the question of reasonableness or unreasonableness. It may well be that, on a proper direction, the appellant would, all the same, have been convicted, but the question was really withdrawn from the jury, they being told that if, in fact, there was physical obstruction, that constituted nuisance, and that the appellant, if he incited it, was guilty. The court feels that this is a case in which they are unable to apply the proviso to s. 4 (1)
C of the Criminal Appeal Act, 1907, (9). It follows that, in their view, since there was a material misdirection as to the law, this appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors: *B. M. Birnberg* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

D [*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

NOTE.

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NOBLE v. NOBLE AND ELLIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Scarman, J.), July 2, 3, 4, 5, 8, 9, 10, 11, 1963.]

Divorce—Collusion—Evidence—Leave to call witness after evidence closed—
F *Respondent wife alleging collusion between petitioner and co-respondent—Witnesses on collusion were petitioner and a witness from his solicitor's office—Co-respondent did not enter appearance and did not give evidence—Application by wife to call co-respondent—Court's duty to investigate issue—Matrimonial Causes Act*, 1950 (14 *Geo.* 6 c. 25), *s.* 4.

[As to adducing further evidence after close of case, see 15 HALSBURY'S LAWS
G (3rd Edn.) 271, 272, para. 495. As to the divorce court's duty to inquire into existence of collusion, see 12 HALSBURY'S LAWS (3rd Edn.), pp. 291, 292, para. 575.

For the Matrimonial Causes Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Trial.

This was an application at the hearing of a divorce suit brought by the husband
H against the respondent wife raising issues of cruelty and adultery. In the course of cross-examination of the petitioner it appeared that there might have been a collusive bargain between the husband and the co-respondent as to evidence of adultery against the wife. After the arguments of counsel on the question of collusion were finished, the wife applied for leave to call the co-respondent.

Elwyn Jones, Q.C., and *S. J. Waldman* for the husband, the petitioner.
I *J. T. Molony, Q.C.*, *J. Jackson* and *J. C. J. Tatham* for the respondent wife.

SCARMAN, J., gave the following ruling on the application: I think that it is necessary for the court to rule formally on this application which is made not only after the conclusion of the evidence but at the fifty-ninth minute of the eleventh hour. It is made, indeed, after the conclusion of speeches for those parties who have been represented at the hearing, and it is necessary, I think,

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(8) [1903] 2 I.R. at p. 89. (9) 5 HALSBURY'S STATUTES (2nd Edn.) 929.

in order to understand this application, to refer, however shortly, to the pleadings. A
This is a suit which at the commencement of the hearing was concerned with
issues of cruelty and adultery alleged by a husband against the wife, and issues
of cruelty and adultery alleged by a wife against a husband. The co-respondent
was served, but I think that it is right to say, entered no appearance. If he did
enter an appearance he certainly has taken no part in the suit. It appeared in
the course of the cross-examination of the petitioner that it was possible that a B
collusive bargain had been reached between the petitioner and the co-respondent
as to the providing of evidence of adultery against the respondent wife. That
being so, counsel for the respondent wife sought and obtained leave to amend his
answer by alleging collusion between the petitioner and the co-respondent, and the
amended answer is now on the file. At the conclusion of the hearing of the evi-
dence, the evidence before the court on the issue of collusion consisted of the C
evidence of the petitioner himself and the evidence of a solicitor who was in the
employment of the solicitors instructed on behalf of the petitioner. No evidence
was called by the respondent. Efforts had been made to persuade or induce the
co-respondent to attend court to give evidence, but those efforts failed, and the
court considered that, since the co-respondent was not a compellable witness, it
would be wrong to use the ultimate process available for compelling his attendance. D

I have heard arguments from petitioner's counsel and respondent's counsel
on the issue of collusion, and, indeed, those arguments were concluded when the
hearing entered its final stage this morning with the concluding part of counsel's
address on behalf of the petitioner, he having substantially concluded his sub-
missions on the issue of collusion. It is, therefore, at the very, very end of this
case that junior counsel for the respondent now makes an application to call E
the co-respondent who, I am told, is present in court.

I think that this application raises in acute form the extent of the duty of the
court as set out in s. 4 of the Matrimonial Causes Act, 1950. By sub-s. (2) of s. 4
it is provided:

> " If the court is satisfied on the evidence that—(a) the case for the petition
> has been proved; and [omitting immaterial words] (c) the petition is not F
> presented or prosecuted in collusion with the respondent or either of the
> respondents; the court shall pronounce a decree of divorce, but if the court
> is not satisfied with respect to any of the aforesaid matters, it shall dismiss
> the petition: . . ."

Thus s. 4 places on the court, in cases where the facts warrant investigation, a G
duty to inquire (1). It is plain, in my judgment, that such facts as have been
revealed to the court warrant investigation of the issue of collusion in this case.
If I were sitting merely as an umpire between conflicting parties I would have
said that it was far too late to accede to the application to call the co-respondent,
but in the best sense of the term I am an inquisitor and it seems to me that I
must, in compliance with my duty to inquire, allow this application. H

The co-respondent will be called. He will be told of the existence of his
privilege and I shall inquire of him whether he desires to exercise that privilege. If
he is content to waive the privilege then I see no reason why the cross-examination
of counsel for the petitioner should necessarily be limited to the issue of collusion.

Leave granted.

Solicitors: *Sydney Silverman* (for the husband); *Clintons* (for the wife). I

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(1) Section 4 (1), so far as material, reads: " On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether . . . any collusion exists between the parties . . ."

[COURT OF APPEAL]

Regina v. Campbell

ARNUP, MARTIN AND LACOURCIERE, JJ.A.

10TH NOVEMBER AND 21ST DECEMBER 1977.

Criminal law — Defences — Provocation — Charge of attempted murder — Whether provocation defence to attempted murder reducing offence to attempted manslaughter — Whether provocative conduct on part of victim factor in determining whether accused had requisite specific intent for offence of attempted murder — Cr. Code, s. 215.

Criminal law — Homicide — Attempted murder — Whether provocation defence to attempted murder reducing offence to attempted manslaughter — Whether provocative conduct on part of victim factor in determining whether accused had requisite specific intent for offence of attempted murder — Cr. Code, s. 215.

Provocation is not a defence to a charge of attempted murder so as to reduce the offence to one of attempted manslaughter. Assuming that attempted murder involves the intent to do that which, if death ensued, would constitute murder, provocation would be a defence to attempted murder if an unprovoked killing were an essential element of the offence of murder. However, absence of provocation is not part of the *actus reus* of murder. Rather, the defence of provocation as defined by s. 215 of the *Criminal Code* exists with respect to a charge of murder even though all the elements of the definition of murder have been established. Moreover, the language of s. 215 is consistent only with the defence of provocation being limited to reducing murder to manslaughter. However, although the defence of provocation, where it applies, is based on the loss of self-control caused by the provocation and not on its negativing the intent requisite for murder, there may be cases where the conduct of the victim amounting to provocation produced in the accused a state of excitement, anger or disturbance as a result of which he might not contemplate the consequences of his acts and might not, in fact, intend to bring about those consequences. Thus in some cases the conduct of the victim might be a relevant piece of evidence on the issue of intent whether the charge be murder or attempted murder. In this sense, however, provocation does not operate as a defence but rather as a relevant item of evidence on the issue of intent.

[*Lajoie v. The Queen* (1973), 10 C.C.C. (2d) 313, [1974] 1 S.C.R. 399, 33 D.L.R. (3d) 618, consd; *R. v. Newman*, [1948] V.L.R. 61; *R. v. Spartels*, [1953] V.L.R. 194; *R. v. Smith*, [1964] N.Z.L.R. 834; *A.-G. Ceylon v. Perera*, [1953] A.C. 200; *Lee Chun-Chuen v. The Queen*, [1963] A.C. 220; *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588; *R. v. Cunningham* (1958), 43 Cr. App.R. 79; *R. v. Falla*, [1964] V.R. 78; *R. v. Laga*, [1969] N.Z.L.R. 417; *R. v. Jack* (1970), 17 C.R.N.S. 38; *R. v. Bruzas*, [1972] *Crim. L.R.* 367, refd to]

Criminal law — Defences — Self-defence — Charge of attempted murder — Excessive force in self-defence not defence to charge so as to reduce offence to attempted manslaughter — Quaere, whether excessive force reduces murder to manslaughter.

[*R. v. Barilla* (1944), 82 C.C.C. 228, [1944] 4 D.L.R. 344, [1944] 3 W.W.R. 305, 60 B.C.R. 511; *R. v. Howe* (1960), 100 C.L.R. 448; *Linney v. The Queen* (1977), 32 C.C.C. (2d) 294, 73 D.L.R. (3d) 4, [1977] 2 W.W.R. 158, 13 N.R. 217; *Palmer v. The Queen*, [1971] A.C. 814; *R. v. Falla*, [1964] V.R. 78, refd to]

Criminal law — Evidence — Witnesses — Rule against previous consistent statements — Exceptions — Recent fabrication — Whether counsel may elicit from Crown witnesses previous consistent statements by accused prior to accused testifying, in anticipation of allegation of recent fabrication.

Criminal law — Evidence — Witnesses — Rule against previous consistent statements — Exceptions — Recent fabrication — Nature of exception — Whether accused may testify as to previous consistent statements prior to Crown's express allegation in cross-examination of recent fabrication — Whether cross-examination of accused as to improbability of entire story constitutes allegation of recent fabrication.

The accused was charged with the attempted murder of his wife. The accused and his wife lived in the United States and she testified that they drove to Canada and when they left the car the accused shot her several times and then poured gasoline on her and set fire to her. The accused testified that in fact his wife was attempting to kill him and that while she held a gun on him she threw gasoline at him, some of which blew back on her and was ignited by a cigarette in her mouth. He then obtained hold of the gun and fired blindly not intending to kill her. During the Crown's case counsel for the accused sought to elicit from a Customs officer and a police officer that the accused had told this same story shortly after the incident. Defence counsel also undertook to call the accused. This cross-examination was not permitted although the accused in testifying was permitted to relate these conversations. As well, the accused was not permitted to call these witnesses after he had testified. On appeal it was argued that this evidence and the cross-examination was admissible to rebut an allegation of recent fabrication by the accused. On appeal by the accused from his conviction, *held*, the appeal should be dismissed.

The trial Judge was correct in refusing to permit cross-examination of the Crown's witnesses as to prior consistent statements by the accused. As a rule such statements are inadmissible in the absence of the applicability of an exception, such as the exception which permits evidence of prior consistent statements to be given in evidence to rebut an allegation of recent fabrication. An express allegation of recent fabrication in cross-examination is not required before the exception becomes operative. A suggestion that the accused's story was recently contrived may arise implicitly from the whole circumstances of the case. In such a case counsel may properly anticipate the allegation of recent fabrication in cross-examination and examine the accused in chief with respect to previous statements to other persons prior to his being cross-examined. However, such statements may not be elicited during the Crown's case in order to rebut an anticipated allegation that the accused's evidence, not yet given, will be a recent fabrication, on the understanding that in fact the accused will testify. The accused remains free to alter his instructions to counsel, or to change his mind with respect to testifying. Such an extension of the exception is unwarranted, would be destructive of an orderly trial and might be productive of mistrials if the accused did not testify.

The trial Judge also did not err in refusing to allow these Crown witnesses to testify as to the accused's prior consistent statements, after he had testified. In this case the accused was cross-examined with a view to showing the improbability of his story. The fact that a witness's whole story is attacked does not itself constitute an allegation of recent fabrication so as to make the exception operative. The application of the exception is generally a matter of discretion by the trial Judge and it could not be said he erred in this case.

Finally, as the exception did not apply in this case, logically the accused ought not to have been permitted to testify in examination-in-chief as to his prior consistent statements. But this error was to the accused's benefit and could not be the subject of complaint on appeal.

[*Nominal Defendant v. Clements* (1960), 104 C.L.R. 476, consd; *R. v. Giraldi* (1975), 28 C.C.C. (2d) 248, [1975] W.W.D. 166; *R. v. Racine* (1977), 32 C.C.C. (2d) 468; *R. v. Wannebo* (1972), 7 C.C.C. (2d) 266, [1972] 5 W.W.R. 372; *R. v. Oyesiku* (1971), 56 Cr. App. R. 240; *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017; *Lucas v. The Queen*, [1963] 1 C.C.C. 1, [1963] S.C.R. vi, 39 C.R. 101; *R. v. Pappin* (1970), 12

C.R.N.S. 287; *R. v. Hughes et al.* (1942), 78 C.C.C. 305, [1942] 4 D.L.R. 535, [1942] 3 W.W.R. 480, 58 B.C.R. 189, refd to]

Criminal law — Trial — Charge to jury — Reasonable doubt — Direction to jury that case for Crown must "carry a high degree of probability" and that case proved if leaves only "remote possibility" in accused's favour — Whether constitutes misdirection — Whether reasonable doubt may be founded on reasonable possibility — Whether curative provision may be applied on appeal from conviction — Cr. Code, s. 613(1)(b)(iii).

A direction to the jury with respect to the burden of proof on the Crown that "the degree of cogency need not reach certainty, but it must carry a high degree of probability" and that "if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt" ought not to be given. There is a danger that such a direction may mislead the jury by leading them to believe that a high degree of probability of guilt is proof beyond a reasonable doubt and lead the jury to consider that a reasonable doubt must be founded on probabilities as opposed to possibilities, whereas reasonable possibilities in the accused's favour may give rise to a reasonable doubt. However, where the jury is also directed on several occasions that they must give the accused the benefit of a reasonable doubt and it is clear that, viewing the charge in its entirety, the jury would not be under any misapprehension with respect to the nature of the onus which rested on the Crown, or as to what constituted a reasonable doubt, the curative provision of s. 613(1)(*b*)(iii) of the *Criminal Code* may be applied.

[*R. v. McKenna* (1964), 81 W.N. (Pt. I)(N.S.W.) 330; *R. v. Lachance*, [1963] 2 C.C.C. 14, 39 C.R. 127, consd; *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372, disaprvd; *R. v. Sears* (1947), 90 C.C.C. 159, [1948] O.R. 9, 5 C.R. 1, refd to]

Criminal law — Evidence — Rebuttal evidence — Accused charged with attempted murder of wife — Victim testifying that following automobile trip accused shot her, poured gasoline on her and set her on fire — Victim also testifying that prior to incident accused went in car to get gasoline — Accused denying he went to get gasoline — Accused testifying victim attempted to throw gasoline on him but ignited herself when it blew back at her — Crown in reply calling evidence accused seen at car with trunk open prior to trip and no gasoline odour detected on accused after incident — Crown also calling expert who testified he could not obtain ignition of gasoline through method described by accused — Whether constituting proper rebuttal evidence.

The accused was charged with the attempted murder of his wife. She and the accused lived in the United States and she testified that just prior to the trip they made to Canada the accused went on his own to get some gasoline. They then proceeded to Canada and at some point the car was stopped. The accused then insisted that she look in the trunk. As she was doing this the accused shot her. He then shot her several more times, poured gasoline on her and set her on fire. The accused testified and denied going to get gasoline and denied being near the trunk of the car earlier that night before they came to Canada. He testified that in fact when they stopped the car his wife threatened him with a gun, threw gasoline at him, blinding him, that the gasoline blew back at her and was ignited by a cigarette she was smoking, that her gun fell and he picked it up and shot blindly but not intending to kill her. In reply the Crown called a witness who testified that she saw the accused standing before the open trunk around the time he and his wife left. The Crown also called an expert who attempted to duplicate the accused's version and that of his wife as to the throwing of the gasoline and who testified he could only obtain ignition on the wife's version. Finally, the Crown called a Customs inspector who searched the accused shortly after the incident and testified he could not detect any odour of gasoline on his clothes. On appeal from his conviction the accused argued that the rebuttal evidence should not have been admitted. *Held*, the appeal should be dismissed.

As a general rule the prosecution must introduce all the evidence in its possession upon which it relies as probative of guilt before closing its case, rebuttal evidence being restricted to evidence to meet new facts introduced by the defence. The evidence that the accused was seen standing in front of the open trunk of the car shortly before the accused and his wife drove away was relevant during the Crown's case as an incriminating fact. Its denial was implicit in the plea of not guilty and should have been anticipated and this evidence, if then in the possession of the Crown, should have been adduced as part of its case. On the other hand, the evidence acquired greater relevance after the accused testified and in the circumstances it could not be said the trial Judge erred in exercising his discretion in favour of admitting the evidence.

The expert evidence as to the ignition of the gasoline, however, was not primarily evidence upon which the Crown relied as probative of guilt but rather was adduced to refute the case advanced by the accused. Although the accused's version of events was foreshadowed by the cross-examination of the victim the issue to which the expert's evidence was directed did not arise until the accused testified. This evidence was rebuttal evidence and was properly admitted in reply.

Finally, the evidence of the Customs inspector was not proper rebuttal evidence. However, no substantial wrong or miscarriage of justice was occasioned by its admission. The accused was permitted to call in surrebuttal an investigator who testified that the inspector told him he could not remember whether or not he detected the odour of gasoline on the accused. As well, no reasonable jury could fail to find that the uncontroverted physical facts were wholly inconsistent with the accused's version of events.

[*R. v. Michael* (1954), 110 C.C.C. 30, [1954] O.R. 926, 20 C.R. 18; *R. v. Day* (1940), 27 Cr. App. R. 168; *Shaw v. The Queen* (1952), 85 C.L.R. 365; *R. v. Frost* (1840), 4 St. Tr. (N.S.) 85, 9 Carr. & P. 129, 173 E.R. 771; *R. v. Crippen* (1910), 5 Cr. App. R. 255; *R. v. Parkin (No. 2)* (1922), 37 C.C.C. at p. 53, 66 D.L.R. at p. 193, [1922] 1 W.W.R. at p. 753; *R. v. Therien and Sanseverino* (1943), 80 C.C.C. 87, [1943] 3 D.L.R. 652, [1943] 3 W.W.R. 63, 59 B.C.R. 204; *R. v. Pilcher et al.* (1974), 60 Cr. App. R. 1; *R. v. Levy and Tait* (1966), 50 Cr. App. R. 198; *R. v. Perry and Franks* (1977), 36 C.C.C. (2d) 209; *R. v. Coombs* (1977), 35 C.C.C. 85, 2 B.C.L.R. 1; *People v. Carter* (1957), 312 P. 2d 665; *R. v. Milliken* (1969), 53 Cr. App. R. 330, refd to]

Criminal law — Evidence — Witnesses — Prior statements — Victim of attempted murder cross-examined by counsel for accused on sworn statement — Trial Judge charging jury that statement evidence of truth of its contents — Direction constituting misdirection — Statement not evidence of truth of its contents notwithstanding it was sworn — Statement however supporting theory of defence — Accused's version of events incredible in view of all the evidence — Appeal from conviction dismissed — No substantial wrong or miscarriage of justice in circumstances.

[*Deacon v. The King* (1947), 89 C.C.C. 1, [1947] S.C.R. 531, [1947] 3 D.L.R. 772, 3 C.R. 265, refd to]

Criminal law — Sentence — Attempted murder — Offence involving brutality and deliberation indicated — Accused steadily employed — No criminal record — Good pre-sentence report — No tendency towards violence — Sentence of 25 years reduced on appeal to 15 years.

APPEAL by the accused from his conviction and sentence on a charge of attempted murder.

Alan D. Gold, for accused, appellant.
E. F. Then, for the Crown, respondent.

November 10, 1977.

The judgment of the Court was delivered by

MARTIN, J.A.:—The appellant Jimmy Campbell was found guilty by a jury at Windsor on an indictment charging him with attempting to murder Susan Campbell, his wife. He appeals against the conviction and the sentence of 25 years imposed upon him.

The case for the prosecution was that the appellant induced his wife to go for a drive, directed her to a secluded lane, shot her five times with a pistol, poured gasoline over her, and then set her on fire.

The defence advanced by the appellant was that his wife persuaded him to go for a drive, drove into a lane, ordered him out of the car at gun point, saying she was going to kill him, and then threw gasoline from a can at him, some of which went in his eyes, temporarily blinding him; that some of the gasoline which the complainant threw at the appellant was blown back on her by the gusting wind and ignited by a cigarette that she was smoking; that the appellant picked up the gun which she dropped and fired blindly and instinctively, not intending to hit her.

The evidence

The complainant and the appellant were married in 1974, and lived together in Detroit until Friday, February 7, 1975, the date of the events which gave rise to the charge.

The appellant was 28 years of age and was employed as a "disc jockey". His wife was 29 years of age and was employed as a billing clerk. The marriage was not an entirely happy one; the appellant maintained a separate apartment, and his wife resented his associations with other women.

The appellant and the complainant each testified with respect to statements, in the nature of threats, made by the other. Despite these incidents, and cause for discord, they appear, otherwise, to have lived together on reasonably good terms.

On Wednesday, February 5, 1975, the appellant and his wife received delivery of a 1974 Cadillac car, which the wife had purchased. They also owned an old car.

Both the appellant and his wife owned revolvers. The complainant said that when her step-father died, she had come into possession of a .32 calibre nickel-plated six-shot revolver, which had belonged to him, and which she kept for protection. The appellant had a .22 automatic pistol which he kept in the basement.

The complainant said that when she returned home from work at about 5:30 p.m. on Friday, February 7, 1975, she removed her revolver from the safe where it was kept during the day, and placed it under her night table, according to her usual custom.

She testified that the appellant returned home at approximately 8:45 p.m. He said that they were going out that night, and requested the complainant to get dressed, which she did. The appellant called upstairs, saying that he was going to get some gasoline and left, taking the new car. He returned home and dressed, and they walked out of the house together to the new car. The appellant then said "wait a minute", and returned to the house for two or three minutes.

The complainant testified that when the appellant returned to the car, he got in the passenger's side, and she drove off. She said the appellant suggested that they cross the Ambassador Bridge into Canada, and he told the Customs officials that they were going to Amherstburg. They drove along Highway 18, passed through Amherstburg, and continued until they came to the extension of Howard Ave., where she turned left as directed by the appellant. They passed a lane running east from Howard Ave., and the appellant told her to make a U-turn and pull into the laneway until he recovered from an asthma attack. The evidence establishes that the lane is 29.4 miles from their residence in Detroit.

The complainant testified that she turned off the ignition and placed her head on her husband's shoulder. He said: "Don't underestimate me because I will kill you." He then told her that he had a surprise for her in the trunk of the car, and insisted that she see it. They both got out of the car and walked around to the trunk. As she was putting the key in the lock, she heard a "loud pop" and was struck by a bullet behind her ear. She fell to the ground, but observed the appellant walk back to the car. She jumped up and started running towards Howard Ave., but the appellant caught her after she had run 30 or 40 ft., grabbed her by the collar, put the gun to the top of her head and pulled the trigger; she fell on the ground face downwards. The appellant walked in front of her, and fired at her twice more while she lay on the ground and "played dead". The appellant returned, and she could smell gasoline as he poured it on her back and upper legs. She saw him strike a match and drop it on her back as he stood in front of her. She tried to remain still, but the pain became unbearable, as she was all in flames; she jumped up, threw off her coat and rolled in the snow, extinguishing the flames. She then ran north across the lane to a fence, upon which she lay and "played dead" for 10 or 15 minutes. After she saw the appellant drive away, she walked out to Highway 18, and flagged a passing car.

The driver of the car testified that because she was in a state of shock and panic, and was worried "about somebody coming after her", he stopped at a nearby house and telephoned the Anderdon Township police. Constable Dufour arrived at about 11:20 p.m. and relayed the information which he received from the complainant to the surrounding police departments and to Customs at the Ambassador Bridge and the Detroit tunnel. The complainant was then taken to the hospital by ambulance.

The complainant had mixed second and third degree burns over 50% of her body. Those burns were distributed over both the front and back of her body, but included burns all around the waist, burns on the chest, the backs of both arms, the backs of both legs and the back of the left shoulder blade. There was a superficial burning to the face and neck with scorching of the hair around the face. Examination at the hospital also revealed a number of bullet wounds which were consistent with the complainant having been struck by five bullets. There was a bullet wound on the right side of the head behind the ear, and another one at the back of the head near the occipital bone; there were entry and exit wounds made by a single bullet in the left upper arm, a bullet wound in the left flank and one in the right buttock.

The appellant testified in his own defence, and said that, although he wanted to stay home after he returned from work that evening, his wife insisted that she wanted to go out, and he finally agreed to do so. While he was dressing his wife went downstairs, saying "I'm going to warm the car up". She was sitting in the driver's seat when he left the house. She drove to the Ambassador Bridge, and when he asked her where they were going she did not give him a definite answer; nor could he recall what she told the Customs officer about their destination. He said that he had never been to Amherstburg and was unfamiliar with the Essex County area.

After they had been driving for some 40 minutes, they stopped at a service station so that he could take a pill to relieve an attack of asthma from which he suffered chronically. When he returned to the car his wife drove off to a destination unknown to him. Some 20 minutes later, he suffered another asthma attack, and while he was bent over "wheezing, coughing, and not able to breathe", the car stopped. His wife lit a cigarette while he was in the throes of the attack, got out of the car, and a couple of minutes later walked around to the passenger's side, told him to get out, said she was going to kill him and made an obscene remark indicating that it was because of his women friends. As the appellant turned around and looked up he saw his wife standing there holding a gun in one hand and cradling a can of gasoline under her arm. He got out of the car and walked towards her saying "Please, please don't". She was stepping backwards, with the glowing cigarette in her mouth, and from a distance of approximately seven feet she splashed him in the face and eyes with the gasoline. He saw a bright flash of light through his closed eyes and heard a scream; he felt something hit his shoe, and when he picked it up he realized it was a gun and shot blindly. He said "I could not see, I just shot in front of me". He recalled shooting continuously, but said he did not mean to shoot his wife.

The appellant said he spent several minutes washing out his eyes with snow, and when he regained his sight he saw his wife lying face down, and he thought she was dead. He removed the keys from the lock in the trunk of the car, backed the car down the lane a short distance, where he threw the gun out the window, and then drove off. By the time he pulled himself together he was near the Ambassador Bridge, although he did not know how he got there. After crossing the bridge, he said he told the United States Immigration officer on duty, one Bridges, that he wanted to report a shooting; that he had just killed his wife. Bridges directed the appellant to the Customs officer at secondary inspection, one Vaughan. The appellant entered Mr. Vaughan's office at 12:15 a.m. on February 8, 1975. The appellant testified that he told the man at the desk that there had been an accident, saying "I just killed my wife". According to the appellant, the officer said, "Well where is the gun? What did you use"? The appellant testified that he said, "Well, I threw the gun away in a ditch next to my wife". He said he told the officer that he "didn't mean to shoot her", that she had taken him out that night; that he did not know where they were going and he found out that "she was taking [him] over" to kill him; that she had "planned to throw gasoline" on him and shoot him.

Mr. Vaughan indicated that he was going to contact the Canadian police, and shortly afterwards, Chief Hooper of the Anderdon Township Police Department, and another officer arrived. The appellant testified that he told Chief Hooper that his wife had tried to kill him, and also how she had tried to do so. The appellant, however, declined to return to Canada.

Constables of the Anderdon Township Police Department conducted a search in the lane and the surrounding area at approximately 12:40 a.m. on February 8, 1975, and found a can containing a quantity of gasoline in a field south of the lane, about 50 ft. south of the fence. The complainant identified the can as one that was usually kept in the trunk of the old car. The appellant said that the last time he had seen the can it was in the basement of the house, and that a different can was kept in the trunk of the old car.

The police observed two charred areas in the lane and recovered burnt remnants of the complainant's clothing from one of those areas. They also obtained the clothing that the complainant was wearing that evening and burnt remnants of that clothing at the hospital. Tests performed at the Centre of Forensic Sciences revealed that the clothing and burnt remnants contained traces of gasoline.

The complainant said that the gun with which the appellant shot her was not his pistol. The police conducted a search for the gun in the vicinity of the lane in the early hours of the morning of February 8, 1975, but no gun was found. The search, however, was hampered by gusting winds. The complainant testified that she was unable to find her own gun in the search of the house, when she was released from the hospital.

Although other grounds of appeal were advanced, the Court required to hear argument from counsel for the Crown only with respect to the grounds of appeal which are hereafter discussed.

Whether the trial Judge erred in failing to leave with the jury provocation as a defence to attempted murder.

The first ground of appeal advanced was that the trial Judge erred in failing to leave with the jury the defence of provocation. Mr. Gold, in a very attractive argument, contended that provocation is a defence to attempted murder, as well as murder. He put his argument in this way: The intent requisite for attempted murder is an intent to do that which if death ensued would constitute murder. If the accused's intent to do what he did was the result of provocation sufficient to reduce murder to manslaughter, then he did not have the intent to do that which if death ensued would constitute murder (notwithstanding he had the intent to kill or the intent to cause bodily harm which he knew was likely to cause death under *Criminal Code*, s. 212(*a*)(i)(ii)), since if death ensued he would be guilty of manslaughter only. He contended that if the jury found provocation, the proper verdict was guilty of attempted manslaughter.

This argument assumes that absence of provocation is implicit in the definition of murder. The argument, put in a slightly different way, is that the *actus reus* of murder is an *unprovoked killing*, which is what the accused must intend to bring about in order to be guilty of attempted murder. In support of this contention we were referred to a number of Australian and New Zealand cases: see *R. v. Newman*, [1948] V.L.R. 61; *R. v. Spartels*, [1953] V.L.R. 194; *R. v. Smith*, [1964] N.Z.L.R. 834. See also *Australian Criminal Law*, 2nd ed., by Colin Howard at pp. 148-52.

In support of his submission that the intent required to constitute attempted murder is an intent to do that which if death ensued would constitute murder, Mr. Gold relied on the judgment of the Supreme Court of Canada in *Lajoie v. The Queen* (1973), 10 C.C.C. (2d) 313, [1974] 1 S.C.R. 399, 33 D.L.R. (3d) 618, and particularly the following passage at p. 318 C.C.C., p. 406 S.C.R.:

> The word "intent" does not appear in s. 210 [now s. 222]. It appears in the definition of an attempt in s. 24, but the reference there is to "having an intent to commit an offence". For the reasons already given, it is my view that, in the light of the wording of s. 210, there may be an intent to do that which constitutes the commission of the offence of murder without that intent being to kill the victim.

Provocation as a defence to murder is based on a loss of self-control as a result of sudden provocation rather than on its negativing the requisite intent, and the law is now settled beyond question that provocation reduces murder to manslaughter notwithstanding the existence of an intent to kill: see *A.-G. Ceylon v. Perera*, [1953] A.C. 200; *Lee Chun-Chuen v. The Queen*, [1963] A.C. 220.

Mr. Gold's submission was not, however, that provocation negatives an intent to *kill* or to cause bodily harm known to the offender to be likely to cause death, but that it negatives intent to *murder*, which is the intent required to constitute attempted murder, and an intent to *murder* requires an absence of provocation.

Although the argument is attractive, it is, in my view, unsound. Absence of provocation is not part of the *actus reus* of murder in the sense that absence of consent is part of the *actus reus* of rape. The defence of provocation exists with respect to a charge of murder even though all the elements of the definition of murder have been established; it is an allowance made for human frailty which recognizes that a killing, even an intentional one, is extenuated by the loss of self-control caused by adequate provocation, and is less heinous than an intentional killing by a person in possession of his self-control. It is unnecessary to invoke the defence of provocation until all the elements of murder have been proved.

That this is so, is clear from s. 215(1) of the *Code* which reads:

> 215(1) Culpable homicide *that otherwise would be murder* may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(Emphasis mine.)

I am, moreover, of the view that the language of s. 215 is consistent only with the defence of provocation being limited to reducing murder to manslaughter. In addition, the great weight of authority in the British Commonwealth holds that the defence of provocation is available only where the charge is murder: see *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588 at p. 601; *R. v. Cunningham* (1958), 43 Cr. App. R. 79 at pp. 82-3; *R. v. Falla*, [1964] V.R. 78; *R. v. Laga*, [1969] N.Z.L.R. 417; *R. v. Jack* (1970), 17 C.R.N.S. 38; *R. v. Bruzas*, [1972] *Crim. L.R.* 367. I am accordingly of the opinion that the trial Judge was right in not putting the limited defence of provocation to the jury, since it did not apply on a charge of attempted murder.

I would, however, make an additional observation. As previously indicated, the defence of provocation, where it applies, is based on the loss of self-control caused by the provocation, and not on its negativing the intent requisite for murder. Provocation may, of course, inspire the intent required to constitute murder. There may, however, be cases where the conduct of the victim amounting to provocation produces in the accused a state of excitement, anger or disturbance, as a result of which he might not contemplate the consequences of his acts and might not, in fact, intend to bring about those consequences. The accused's intent must usually be inferred from his conduct and the surrounding circumstances, and in some cases the provocation afforded by the victim, when considered in relation to the totality of the evidence, might create a reasonable doubt in the mind of the jury whether the accused had the requisite intent. Thus, in some cases, the provocative conduct of the victim might be a relevant item of evidence on the issue of intent whether the charge be murder or attempted murder. This, I take it, was the view of Eveleigh, J., in *R. v. Bruzas*, *supra*, at p. 369. Provocation in that aspect, however, does not operate as a "defence", but rather as a relevant item of evidence on the issue of intent.

In the present case, if the jury believed the appellant's evidence (or if it left them with a reasonable doubt) the conduct of the complainant in throwing gasoline at the appellant after she, while armed with a gun, had said she was going to kill him, was a relevant circumstance to be considered by the jury in deciding whether the appellant intended to shoot his wife or whether he fired instinctively and blindly as he testified. In my view, however, those circumstances were adequately put to the jury by the trial Judge in relation to the issue with respect to the appellant's intent.

Whether the trial Judge erred in failing to direct the jury that excessive force in self-defence leads to a verdict of attempted manslaughter

The second ground of appeal advanced was that the trial Judge erred in failing to direct the jury that if the appellant used excessive force in self-defence, the jury should return a verdict of attempted manslaughter.

Counsel for the appellant contended that it is an established principle of law that on a charge of murder, the jury should be instructed that if the accused has caused death by the use of excessive force in self-defence, they should return a verdict of manslaughter only. This ground may be disposed of quite briefly. There are cases both in Canada and Australia which hold that such a rule exists. I refer to only two of these cases: see *R. v. Barilla* (1944), 82 C.C.C. 228, [1944] 4 D.L.R. 344, [1944] 3 W.W.R. 305 (B.C.C.A.), and *R. v. Howe* (1960), 100 C.L.R. 448.

In *Linney v. The Queen* (1977), 32 C.C.C. (2d) 294, 73 D.L.R. (3d)

4, [1977] 2 W.W.R. 158, Dickson, J., delivering the majority judgment of the Supreme Court of Canada, makes reference to the trial Judge's charge in that case, in which he directed the jury that excessive use of force in self-defence led to a verdict of manslaughter (at p. 299). The question, however, whether there is a substantive doctrine that excessive force in self-defence leads to a verdict of manslaughter, separate from the defence of provocation that may be afforded by the attack against which the accused alleges he was defending himself, was not before the Court, and the Supreme Court was not required to pass upon it.

The Judicial Committee of the Privy Council in *Palmer v. The Queen*, [1971] A.C. 814, held that there is no separate rule of law that excessive force in self-defence leads to a verdict of manslaughter, although an issue might, none the less, arise whether there was provocation where self-defence is relied on, or whether the requisite intent for murder had been proved (p. 832). Even in Australia where excessive force in self-defence is recognized as a "qualified" defence to murder, the precise limits of the doctrine have not been finally settled: see *Australian Criminal Law*, 2nd ed., pp. 96-8, by Colin Howard.

It is unnecessary in this case to decide the question whether there is a separate rule that excessive force used in self-defence reduces murder to manslaughter and the limits of that doctrine, since, where it is recognized it is applicable only where the charge is murder: see *R. v. Falla, supra*, at pp. 80-1. This ground of appeal, accordingly, fails.

Whether the trial Judge erred in rejecting evidence of appellant's previous statements

This ground of appeal is based upon the refusal of the trial Judge to admit the evidence of third persons with respect to previous statements made by the appellant, and sought to be introduced through cross-examination and otherwise, for the purpose of showing their consistency with the evidence of the appellant.

The question of the appellant's right to elicit from the Crown witnesses his previous statements to them, was raised several times during the trial. Initially, the trial Judge ruled that defence counsel could not introduce the appellant's self-serving statements in cross-examination, and thus place the defence before the jury in that way, at all events before the appellant had testified. The trial Judge also held that the undertaking of defence counsel to call the appellant as a witness could not affect the application of the exclusionary rule that self-serving statements are not admissible.

The trial Judge, however, permitted the appellant in his testimony to narrate what he told the Customs officer and Chief Hooper, as previously outlined. Although the trial Judge, after further argument, expressed doubt as to the correctness of his ruling that the appellant could himself give evidence of his previous statements, he, none the less, in his charge instructed the jury that the statement which the appellant testified that he made to Inspector Vaughan could only be used to show the consistency of the conduct of the appellant with his testimony, and that the statement was not evidence of the truth of what was said. No exception was, or could be, taken by the appellant to that instruction.

The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:

I. The rule which precludes an accused from eliciting from witnesses self-serving statements which he has previously made.

II. The rule which provides that a witness, whether a party or not, may not repeat his own previous statements concerning the matter before the Court, made to other persons out of Court, and may not call other persons to testify to those statements.

Statements made by an accused which infringe rule I are excluded as hearsay. The narration by a witness of earlier statements made to other persons out of Court appears to be excluded under rule II, because of the general lack of probative value of such evidence, save in certain circumstances, in support of the credibility of the witness. Each of the above rules is subject to well-recognized exceptions or qualifications, and there is some overlap, both in the rules and in the exceptions to them: see *Phipson on Evidence*, 12th ed. (1976), at pp. 650-3; *Cross on Evidence*, 4th ed., at pp. 207-20; *Previous Consistent Statements*, [1968] Camb. L. J. 64, by R. N. Gooderson.

I did not understand Mr. Gold to argue that the appellant's previous statements were admissible under any of the exceptions to the first of the above rules. He contended, however, that the previous statements made by the appellant, and alleged to be consistent with his testimony at the trial, were admissible under the well-recognized exception to rule II, namely, that prior consistent statements made by a witness are admissible to rebut an allegation of recent fabrication. Where that exception applies, the earlier consistent statements of the witness may be proved by third persons as well as by the witness. He contended, moreover, that upon defence counsel giving his undertaking to call the appellant as a witness, the trial Judge ought to have permitted him to cross-examine the Crown witnesses with respect to the appellant's previous statements to them, notwithstanding the appellant had not then testified, since it was clear, from the cross-examination of the complainant, what the appellant's version would be when he testified, and it was implicit in the Crown's case that such version was a recent fabrication.

I accept the proposition that an express allegation of recent fabrication in cross-examination is not necessary before the exception with respect to rebutting an allegation of recent fabrication becomes operative, and that a suggestion that the accused's story has been recently contrived may also arise implicitly from the whole circumstances of the case, the evidence of the witnesses who have been called, and the conduct of the trial. Where the circumstances are such as to raise the suggestion that the accused's evidence is a recent fabrication, counsel may properly anticipate the allegation of recent fabrication in cross-examination, and examine the accused in chief with respect to previous statements to other persons, prior to his being cross-examined: see *R. v. Giraldi* (1975), 28 C.C.C. (2d) 248, [1975] W.W.D. 166; *R. v. Racine* (1977), 32 C.C.C. (2d) 468 at p. 473; *Previous Consistent Statements*, at pp. 86-7, by R. N. Gooderson.

I am, however, unable to assent to the proposition that upon counsel giving an undertaking to call the accused as a witness, although given in the utmost good faith, counsel is then entitled to elicit from third persons statements made to them by the accused in order to rebut an implicit and anticipated allegation that his evidence, not yet given, will be a recent fabrication.

The accused, of course, remains free to alter his instructions to counsel, or to change his mind with respect to testifying. Such an extension of the exception is unwarranted, would be destructive of an orderly trial and might be productive of mistrials if the accused did not testify after his self-serving statements had been introduced on the basis that such statements would become admissible under this exception.

In my view, the trial Judge, therefore, did not err in refusing to permit defence counsel to elicit from the Crown witnesses, before the appellant testified, his previous statements to them.

I turn now to the complaint concerning the exclusion, after the appellant testified, of the evidence of third persons with respect to the appellant's previous statements. The exception with respect to admissibility of the previous statements of a witness to rebut an allegation, express or implied, of recent fabrication sometimes raises questions of considerable difficulty in its application.

An examination of the principal situations in which the exception has been successfully invoked provides an indication of its scope. As Windeyer, J., pointed out in the much quoted case of *Nominal Defendant v. Clements* (1960), 104 C.L.R. 476, the expression "recent fabrication", and other similar expressions, all presuppose some period or point in time in relation to which the alleged fabrication occurred (p. 493). In that case, evidence of a statement made by the plaintiff to a sergeant of police was admitted to rebut a suggestion that the plaintiff's account of the accident was the result of coaching by his father, who had written out the answers for him to learn.

Perhaps the clearest case for the application of the exception is where it is suggested that the witness and a third person at some particular point in time together concocted the false story to which the witness testified. In those circumstances, evidence may be given that at an earlier date, before the witness and the third person had an opportunity of concocting the story, the witness gave the same account as that to which he testified: see *R. v. Wannebo* (1972), 7 C.C.C. (2d) 266, [1972] 5 W.W.R. 372; *R. v. Oyesiku* (1971), 56 Cr. App. R. 240; *Nominal Defendant v. Clements*, at p. 493. Similarly, where it is suggested that the witness has fabricated his testimony because of some motive of bias or other influence, evidence that the witness made a similar statement before the alleged motive existed, is admissible: see *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017 at pp. 1025-6; *Nominal Defendant v. Clements*, at p. 494.

Where the failure of a witness to mention some circumstance on an earlier occasion when he might have done so, is made the basis for a suggestion that he had invented the story since that occasion, then evidence is admissible that on a still earlier occasion, he did mention that circumstance: see *Nominal Defendant v. Clements*, at p. 495. Manifestly, it would also be open to the witness to repel a suggestion of recent fabrication of that kind by introducing evidence that on the very occasion on which it is suggested he omitted to mention the circumstance, he did, in fact, speak of it.

On the other hand, the fact that the whole story of a witness is challenged does not, by itself, constitute an allegation of *recent* fabrication: see *Fox v. General Medical Council, supra*, at p. 1026.

Much of the cross-examination of the appellant was conducted with a view to showing certain improbabilities in his story. If a witness cannot be cross-examined with a view to showing that his story is improbable, without bringing into play the exception arising from a suggestion of recent fabrication, he cannot be cross-examined at all without making the exception operative. Mr. Gold's submissions really amount to this: in every case where the accused denies the truth of the Crown's case, there is an implicit allegation that his story has been recently contrived. I do not think the exception is so broad.

There is an additional matter upon which I wish to comment. Before he concluded his cross-examination of the appellant, counsel for the Crown, in the absence of the jury, indicated that he proposed to cross-examine the appellant on his statement to Customs Inspector Vaughan, and stated that he was going to suggest to the appellant that he gave a different account to Inspector Vaughan than the one he gave in his evidence. Defence counsel (who was not the counsel who argued the appeal) declined to admit that the statement to Inspector Vaughan was voluntary, and took the position that a *voir dire* was necessary to determine its voluntariness. A further discussion followed, and when the jury returned, counsel for the Crown stated that he had no further questions and concluded his cross-examination of the appellant.

Assuming, without deciding, that in the circumstances a *voir dire* was necessary, defence counsel was, of course, entitled to decline to waive it; none the less, it is, I think fair to say that he then had an opportunity afforded by the line taken by Crown counsel, if he wished to avail himself of it, of placing before the jury the appellant's statement to Inspector Vaughan, which defence counsel had earlier sought to introduce to show consistency with the story told by the appellant in the witness-box. In those circumstances, a complaint in this Court that the appellant was prejudiced by the improper exclusion of Inspector Vaughan's evidence of what the appellant told him, has an air of unreality.

In my view, the appellant's statement to relatives and friends, some time later, had little, if any, probative value in support of his credibility.

Counsel for the Crown at the trial ultimately took the position that, since he had not cross-examined the appellant with respect to his conversations with the Customs officials and the police at the Ambassador Bridge, he had not alleged a recent fabrication. While the record is, perhaps, not entirely clear in this respect, it is reasonable to conclude that the trial Judge refused to admit the evidence of other persons as to the appellant's previous statements because he did not consider that there had been an allegation that the appellant's testimony had been recently fabricated within the meaning of the authorities.

In *Fox v. General Medical Council, supra*, Lord Radcliffe, speaking for the Judicial Committee of the Privy Council, said at p. 1025:

> Plainly the rule that sets up the exception cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of the cross-examination and the relative cogency of the evidence tendered to repel it. Its application must be, within limits, a matter of discretion, and its range can only be measured by the reported instances, not in themselves many, in which it has been successfully invoked.

For the reasons indicated, I am unable to say that the learned trial Judge erred in holding that the exception arising from an allegation of recent fabrication did not arise, or, at all events, that he wrongly exercised his discretion in so holding. Having held that the exception was not applicable, he ought logically to have also held that the appellant was precluded by the same rule from narrating his previous statements in giving evidence. In permitting this narration, the trial Judge was, no doubt, influenced by the dictum of Kerwin, C.J.C., in *Lucas v. The Queen*, [1963] 1 C.C.C. 1 at pp. 10-1, [1963] S.C.R. vi, 39 C.R. 101; *cf.*, however, *R. v. Pappin* (1970), 12 C.R.N.S. 287. The appellant was, however, the beneficiary of any error in this respect. It is an ancient rule that the appellant cannot assign error in his own favour: see *R. v. Hughes et al.* (1942), 78 C.C.C. 305 at p. 307, [1942] 4 D.L.R. 535, [1942] 3 W.W.R. 480.

Accordingly, I would not give effect to this ground of appeal.

Whether the trial Judge erred in defining reasonable doubt

Counsel for the appellant contended before us that the trial Judge misdirected the jury by adding to his correct definitions of reasonable doubt, the following additional definition:

> The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The above definition or description of reasonable doubt is taken from the judgment of Denning, J. (as he then was), in *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 at p. 373.

Counsel for the appellant directed our attention to the judgment of the Court of Criminal Appeal of New South Wales in *R. v. McKenna* (1964), 81 W.N. (Pt. I) (N.S.W.) 330, in which that Court expressed strong disapproval of the use of certain passages in that definition in a charge to the jury as to what constitutes reasonable doubt.

There is a danger that the above definition of reasonable doubt, standing alone, may mislead the jury by leading them to think that a high degree of probability of guilt is proof beyond a reasonable doubt. Moreover, notwithstanding the references to "fanciful possibilities" and to "remote possibility", there is also a danger that the passage "of course it is possible, but not in the least probable" may lead the jury to consider that a reasonable doubt must be founded on probabilities as opposed to possibilities, whereas reasonable possibilities in the accused's favour may give rise to reasonable doubt.

In *R. v. Lachance*, [1963] 2 C.C.C. 14, 39 C.R. 127, this Court, constituted as a Court of five Judges, held that refinements based on the distinction between possibilities and probabilities ought not to be introduced in a definition of reasonable doubt left with a jury. The Court said at p. 17:

> It is plain, therefore, that to exclude from the consideration of a jury, things or results which are reasonably possible but not natural or probable in the sense indicated, is to whittle down the burden of proof resting upon the Crown to

such a degree as to convert the presumption of innocence into little more than a figure of speech.

Indeed, Mr. Then did not endeavour to support the particular definition of reasonable doubt with respect to which complaint is made. He contended, however, that the jury would not in any way be misled as to what constituted reasonable doubt by the impugned passage, considered in relation to the charge in its entirety.

The trial Judge charged the jury as follows:

Now to return to what I have foreshadowed when I was talking about reasonable doubt, we have two basic principles in our criminal law. Consider, ladies and gentlemen, the first is that the onus, the burden of proving the charge against the accused Campbell is on the prosecution, on the Crown, and it stays on the prosecution from the beginning to the end of the trial. The accused has no burden on him to prove anything and I emphasize that in case I do not repeat it which is most unlikely because it runs as it has been said, like a golden thread through the criminal law and it is almost impossible to say anything about criminal law without referring to that burden on the prosecution. And turning it around and looking at it from the other side, one can say an accused man is presumed to be innocent until he has been proven guilty, found guilty by you. Throughout the trial he is presumed to be innocent and the Crown — this is the other aspect of it, of these twin principles — the Crown has not only the burden of proving the charge against the accused but proving it beyond a reasonable doubt. Now these words I am sure you have heard. If at the end of the case and after considering all the evidence, and I repeat all the evidence, you cannot decide, cannot make up your minds that the offence as charged has been committed, you must acquit the accused. And if you are in that state of mind you will entertain a reasonable doubt. That doubt, of course, must be reasonable. It cannot be a sort of fanciful doubt based upon suspicion. It has to be raised by the evidence and it must be honest, sensible and of some substance.

The trial Judge then instructed the jury in accordance with the definition of Roach, J.A. (*R. v. Sears* (1947), 90 C.C.C. 159 at pp. 163-4, [1948] O.R. 9 at p. 14, 5 C.R. 1). He said:

By reasonable doubt as to a person's guilt is meant that real doubt — real as distinguished from illusionary [sic] — which an honest juror has after considering all the circumstances of the case and as a result of which is unable to say: "I am morally certain of his guilt". Absolute, that is, demonstrable certainty is generally impossible and juries must well be told that in discharging their serious responsibilities their consciences need not be racked and tortured because of the fact that absolute certainty is impossible. If, after applying themselves to the best of their ability, they are, in a criminal trial, morally certain of the guilt of the accused, then it is their duty to return a verdict of guilty.

He then gave the jury Lord Denning's definition which is the subject-matter of complaint and continued:

Now those are two statements as to what reasonable doubt means of the highest authority, ladies and gentlemen, and no words of mine can improve upon them and, indeed, it is some times said the more that one tries to define reasonable doubt the more difficulty is created. But if I leave it at this — if after considering all the evidence and in connection with all of the verdicts, which I shall outline to you shortly, you are morally certain you must convict him or find him guilty of such lesser charge if you think the Crown has proved that beyond a reasonable doubt and, in discussing the different verdicts that you can bring in I will be taking considerable time in a moment.

The trial Judge throughout his charge emphasized that the burden was on the prosecution to establish the guilt of the accused beyond a reasonable doubt, and that if the defence theory raised a reasonable doubt in their minds, they must acquit. He also in clear language instructed the jury that if they entertained a reasonable doubt as to whether the accused had the requisite intent that they must give the accused "the benefit of it". He also instructed the jury on more than one occasion that they must acquit if they entertained a reasonable doubt as to whether the accused acted in self-defence. The trial Judge again instructed the jury that they must give the accused the benefit of a reasonable doubt when he charged the jury with respect to included offences. As he approached the conclusion of his charge he said:

> Ladies and gentlemen, the determination of the issue in this case, it is hardly necessary to say, is very much a question of credibility and your decision as to whom you believe is at the heart of the case. Always bear in mind the burden is on the Crown to prove the charge or any included offence beyond a reasonable doubt and there is no burden on the accused, on the defence, to prove anything. If the case for the accused raises a reasonable doubt, as I defined it to you, he must be given the benefit of it and found not guilty.

Mr. Gold, of course, contended that the subsequent reference to reasonable doubt would be related by the jury to the additional definition of reasonable doubt contained in the impugned direction which followed the earlier correct definition. He also emphasized that the Court in *R. v. McKenna*, *supra*, held that it was not an appropriate case in which to apply the curative provisions of the New South Wales statute which are the counterpart of s. 613(1)(*b*)(iii) of the *Code*. In that case, however, the Judge in his charge went beyond Lord Denning's definition of reasonable doubt and he crystallized the instruction by saying "You disregard possibilities you consider the probabilities". In addition, in that case, the particular misdirection founded on Lord Denning's dictum was combined with a serious misdirection as to the onus of proof with respect to the explanation given by the accused to account for his possession of goods recently stolen.

In endeavouring to assess the effect on the jury of this part of the charge on reasonable doubt, it is, I think, significant that the experienced defence counsel, who made several objections to the charge, did not object to the trial Judge's direction on reasonable doubt. While the failure of counsel to object is, of course, not fatal it is, at least, some indication that he did not consider that the appellant's interest had been prejudiced by the direction on reasonable doubt with respect to which complaint is now made. In the context of the entire charge on reasonable doubt, the passage, here assailed, did not strike his mind as whittling down the meaning of reasonable doubt. After anxiously considering the effect of the direction founded on Lord Denning's dictum, I have concluded that, considering the charge on reasonable doubt in its entirety, the jury would not be under any misapprehension with respect to the nature of the onus which rested on the Crown, or as to what constituted reasonable doubt. It is not necessary, therefore, to invoke the curative provisions of s. 613(1)(*b*)(iii). Accordingly, I am of the opinion that this ground of appeal fails.

I am bound to say, however, that for the reasons indicated, the definition of reasonable doubt formulated in *Miller v. Minister of Pensions*, *supra*, ought not, in the future, to be given to a jury, notwithstanding the approval of that definition by eminent textwriters: see *Glanville Williams Criminal Law* (The General Part), 2nd ed., at p. 873; *Cross on Evidence*, 4th ed., at pp. 93-4, *cf.*, however, p. 98.

The term "reasonable doubt" is, to a great extent, self-defining and its meaning is, I think, generally well understood by the average person. Attempts to further amplify its meaning have often proved unsuccessful and, as a general rule, it is both undesirable and unnecessary to elaborate upon its meaning by departing from the traditional and accepted formulations.

Whether the trial Judge erred in admitting the reply evidence

This ground of appeal is based upon the ruling of the trial Judge, allowing the Crown to adduce in reply the evidence of Miss Frances Berry, Donald Bryan and Customs Inspector Vaughan.

Miss Berry, who lived across the street from the house in which the appellant and his wife lived, testified that at 8:40 p.m. on the evening in question, she saw the new Fleetwood Cadillac car in the appellant's driveway with the trunk open and the appellant standing in front of the trunk.

Donald Bryan, a fire research engineer employed at the Ontario Fire College, testified that he conducted certain tests during the end of March and the first of April, 1976, in which gasoline was sprayed on a lighted cigarette under conditions approximating a person smoking it, without ignition resulting. He expressed the opinion that under the weather condition prevailing at the time of the incident in question, the possibility was remote, although he could not exclude it, that gasoline spilled on a person's clothing could be ignited by a cigarette which that person was smoking. On the other hand, he testified that when he spilled gasoline on the ground and threw a match "at it", the gasoline ignited immediately.

He also gave evidence with respect to certain tests conducted by him using the gasoline can found by the police in the field south of the lane in which the remnants of the complainant's burnt clothing was recovered.

By using both hands to hold and tilt the can he was able to splash gasoline from a full can a distance of six to eight feet, spilling only four ounces in the process. He thought that if the can were only half full "perhaps slightly more" gasoline would be spilled by that action.

Customs Inspector Vaughan testified that shortly after midnight on the morning of February 8, 1975, he "frisked" the appellant for firearms but did not detect any odour of gasoline.

Counsel for the appellant contended that none of this evidence was properly admissible in reply, since it should have been adduced during the prosecution's case.

The general rule with respect to the order of proof is that the prosecution must introduce all the evidence in its possession upon which it relies as probative of guilt, before closing its case: *R. v. Michael* (1954), 110 C.C.C. 30, [1954] O.R. 926, 20 C.R. 18; *R. v. Day* (1940), 27 Cr. App. R. 168; *Shaw v. The Queen* (1952), 85 C.L.R. 365. The rule prevents the accused being taken by surprise, and being deprived of an adequate opportunity to make a proper investigation with respect to the evidence adduced against him. The rule also provides a safeguard against the importance of a piece of evidence, by reason of its late introduction, being unduly emphasized or magnified in relation to the other evidence.

Rebuttal evidence by the prosecution is restricted to evidence to meet *new facts* introduced by the defence. The accused's mere denial of the prosecution's case in the witness-box does not permit the prosecution in reply to reiterate its case, or to adduce additional evidence in support of it. In practice, however, it may often be difficult to distinguish between evidence, properly the subject of rebuttal, and evidence of facts relevant to prove guilt which should have been proved in the first instance by a full presentation of the prosecution's case: see *Wigmore on Evidence*, 3rd ed. (1940), vol. VI at pp. 510-1.

The Court has, however, a discretion to admit evidence in reply which has become relevant to the prosecution's case as a result of defence evidence which the Crown could not reasonably be expected to anticipate.

A strict application of the rule as Tindal, C.J., is reported to have stated it in *R. v. Frost* (1840), 4 St. Tr. (N.S.) 85 at p. 386, would confine within very narrow limits the trial Judge's discretion to admit in reply evidence that tends to establish the accused's guilt. He is there reported as saying:

> There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no

> human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown.

The High Court of Australia in *Shaw v. The Queen*, *supra*, has, however, pointed out that the words "which no human ingenuity can foresee", are not found in the report of *R. v. Frost* in (1840), 9 Car. & P. 129 at p. 159, 173 E.R. 771, where Tindal, C.J., is reported to have said:

> But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply.

The Court in *Shaw v. The Queen*, also observed that the words "*ex improviso*" mean no more than "unexpectedly" or "suddenly" (at p. 379).

In *R. v. Crippen* (1910), 5 Cr. App. R. 255, the Court of Criminal Appeal adopted a more flexible approach with respect to the Judge's discretion to admit evidence in reply which tends to link the accused with the crime, notwithstanding its relevance does not arise *ex improviso*. The Court in that case said, however, that if the prosecution had done something unfair, as by setting a trap, resulting in injustice to the accused, it reserved full power to deal with the matter and, in that event, would probably hold that a miscarriage of justice had occurred.

In that case the accused was charged with the murder of his wife. Some six months after the time she disappeared, human remains, alleged to be those of Mrs. Crippen, together with a pyjama jacket, were found in the cellar of the accused's house. The jacket had the same pattern as an odd pair of pyjama trousers, also found in the house. Attached to the jacket was a tag bearing the name of the firm which supplied it. The defence disputed that the remains were proved to be those of Mrs. Crippen. The accused testified that he had purchased the suit of pyjamas, of which the jacket formed a part, several years before and that the jacket had worn out and had been thrown away long before his wife had disappeared. The Court of Criminal Appeal upheld the decision of the trial Judge permitting the Crown to call in reply the buyer from the firm supplying the pyjamas, to prove that three suits of pyjamas, one of which had the same pattern as the jacket found with the remains, were delivered to the accused long after he said he had purchased the pyjamas in question. The evidence called in reply in that case was in the possession of the Crown before closing its case; it was clearly relevant to connect the accused with the remains, and to prove that they were, in fact, those of Mrs. Crippen. Moreover, the relevance of the evidence did not arise *ex improviso*, although it no doubt acquired greater probative value as a result of the accused's testimony.

R. v. Crippen, supra, has been cited with approval by Canadian appellate Courts: see *R. v. Parkin (No. 2)* (1922), 37 C.C.C. at p. 53 at pp. 58 and 61, 66 D.L.R. at p. 193 at pp. 198 and 201, [1922] 1 W.W.R. at p. 753; *R. v. Therien and Sanseverino* (1943), 80 C.C.C. 87 at p. 90, [1943] 3 D.L.R. 652 at p. 655, [1943] 3 W.W.R. 63. The more recent decisions, however, take a more restrictive view of the field within which the Judge's discretion may operate: see *R. v. Pilcher et al.* (1974), 60 Cr. App. R. 1 at p. 5; *R. v. Levy and Tait* (1966), 50 Cr. App. R. 198 at p. 202; *R. v. Perry and Franks* (a judgment of this Court, released May 17, 1977, not as yet reported [since reported 36 C.C.C. (2d) 209]).

In *R. v. Coombs* (1977), 35 C.C.C. 85, 2 B.C.R. 1, Robertson, J.A., speaking for the British Columbia Court of Appeal, after a careful review of the authorities, said at p. 92:

> From these authorities and others I think that it is clear that the Judge in each case has a discretion with regard to the admission of evidence in rebuttal and that in exercising his discretion he should not generally allow such evidence to be given when it has before or during the presentation of the Crown's case been both within the possession of the Crown and clearly relevant to the issue.

Unfortunately, the evidence is not conclusive whether Crown counsel or the police were aware of Miss Berry's evidence before the Crown closed its case. In cross-examination by defence counsel, Miss Berry said that she first became aware that she was going to be a witness on the very day she gave her evidence. She said a car was sent to her; Crown counsel interviewed her, and asked her if she had seen anything that night. She also said that she had told Susan just after she got out of the hospital what she had seen. On the other hand, the cross-examination of the appellant clearly reveals that Crown counsel was aware of Miss Berry's evidence at that stage of the trial.

Mr. Then contended that the evidence that the appellant was seen standing in front of the open trunk of the car, was not a significant item of evidence as the case stood at the close of the Crown's case for these reasons: The complainant testified that the appellant had taken the car to get gas and the complainant was not cross-examined with respect to that issue; the trip to get gasoline would be consistent with the appellant's access to the trunk. The issue was accordingly not pursued, until the appellant in his testimony denied that he had ever gone to get gas, and specifically denied in cross-examination that he had "anything to do with the trunk" around 8:30 or 8:40 p.m. on February 7th. Notwithstanding Mr. Then's able argument I am of the view that the evidence that the appellant was seen standing in front of the open trunk of the car shortly before the appellant and his wife drove away, was relevant during the prosecutor's case as an incriminating fact. Its denial was implicit in the appellant's plea of not guilty and should have been anticipated: see *People v. Carter* (1957), 312 P. 2d 665, *per* Traynor, J., at p. 675. In my view the evidence, if it was then in the possession of the Crown, should, in strictness, have been adduced as part of its case.

On the other hand, the evidence acquired greater relevance after the appellant had testified. The circumstances called for a delicate exercise of the trial Judge's discretion, and I am unable to say that he exceeded the field of his discretion in admitting Miss Berry's evidence in reply. The particular item of evidence was not a type which required an extensive investigation. The narrow question of fact depended on the view the jury took of Miss Berry's credibility. The cross-examination by defence counsel indicates that he was aware of Miss Berry's antecedents, and cross-examined her with respect to her moral character; any frailties attaching to her evidence by reason of her moral character would be evident to the jury. This is not a case, like *Shaw v. The Queen, supra*, for example, where the evidence held to have been improperly adduced in reply, clearly exposed the accused to an unfair disadvantage.

The trial commenced on May 5, 1976, and, as previously indicated, Mr. Bryan performed certain tests in March and April, 1976. It is clear that these tests were conducted at the request of Crown counsel, as a result of the cross-examination of the complainant at the preliminary hearing, which indicated the nature of the defence. Defence counsel also, in cross-examination at the trial, put to the complainant the appellant's version of the occurrence, to which he subsequently testified. The complainant said that version was false. Counsel for the appellant contended on the appeal that Mr. Bryan's evidence was not admissible in reply, since it was in the possession of the prosecution prior to the trial, and it was not made necessary by any evidence adduced unexpectedly by the defence.

The expert evidence, however, was not *primarily* evidence upon which the Crown relied as probative of guilt; rather, it was adduced to refute the case advanced by the appellant in his testimony, supported by the evidence of a defence witness, a mechanic and service station lessee, who testified under the prevailing weather conditions, if a person with a glowing cigarette threw gasoline from a can to another person, there was a "good chance" of the thrower igniting himself as a result of a back-splash of gasoline.

Although the appellant's version was foreshadowed by the cross-examination of the complainant, the issue to which the rebuttal evidence of the expert witness was directed did not arise until the appellant testified.

The judgment of the Court of Appeal (Criminal Division) in *R. v. Milliken* (1969), 53 Cr. App. R. 330, is of assistance in the present case. In that case, the accused, who was charged with possession of house-breaking instruments by night, denied that the incident on which the charge was based had ever happened, and alleged that he had been falsely charged as the result of a conspiracy between the arresting officer and two other officers, because, on the day before the alleged incident, he had refused their demand for money. The trial Judge allowed two police officers to be called in rebuttal of the alleged conspiracy. The Court of Appeal (Criminal Division) held that the trial Judge had properly exercised his discretion in admitting the evidence. The Court of Appeal, in its judgment dismissing the appeal, quoted (at p. 332) the ruling of the trial Judge who said:

> "... I do not think the evidence [*i.e.*, the rebuttal evidence] became relevant until the defendant gave evidence about it because many things could be said in cross-examination which do not become relevant issues in the case. I am speaking rather generally."

The Court of Appeal said at p. 333:

> ... but it is to be noted that the evidence here was not evidence in any sense probative of the guilt of the defendant, since it really consisted of no more than denials of the accusations of conspiracy and concoction of the charge made by the defendant in his own evidence.
>
> If it has to be analysed, the evidence called by way of rebuttal was evidence to disprove the truth of the defence, which itself consisted of an affirmative attack upon the credibility and honesty of the police officers.

The expert evidence, in my view, fell within the category of rebuttal evidence, and was properly admitted in reply. Even if that evidence might also have been properly admitted as part of the Crown's case, its relevance was, at that stage, marginal only, and it was, accordingly, within the discretion of the trial Judge to admit it in reply: see *R. v. Levy and Tait, supra*, at p. 204.

The final item of evidence adduced in reply to which objection is taken is the evidence of Customs Inspector Vaughan that he did not detect an odour of gasoline when he "frisked" the appellant. Mr. Then conceded that this evidence ought not to have been given in reply, but said that its admission was not a substantial wrong to the appellant, and did not result in a miscarriage of justice. I will assess the effect of the improper admission of this evidence after considering the next ground of appeal, which is:

Whether the trial Judge erred in charging the jury that a sworn statement of the complainant was evidence of the truth of its contents

The complainant on June 18, 1975, made a sworn statement at the hospital before Provincial Court Judge Hendriksen. It is, I think, apparent that the sworn statement was made for the purpose of extradition proceedings against the appellant. The complainant was cross-examined extensively with reference to discrepancies alleged to exist between this statement and her evidence at the trial. In the sworn statement she said she was shot twice before she ran, and was caught by the appellant, whereas at the trial she said she had been shot once before she ran. Defence counsel, if I apprehend the cross-examination correctly, also suggested to the complainant that her sworn statement before Judge Hendriksen, by implication, indicated that she was standing up when her clothing caught fire. I do not read the statement as containing that implication, but it would be for the jury to decide. The trial Judge had the statement produced and it became ex. 12, without objection from either counsel. The trial Judge was, of course, entitled to require the production of the statement under s. 10(1) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10. The statement was, however, admissible only with respect to the credibility of the complainant, and did not, by virtue of its production under s. 10(1), become evidence in these proceedings of the truth of its contents: see *Deacon v. The King* (1947), 89 C.C.C. 1, [1947] S.C.R. 531, [1947] 3 D.L.R. 772.

The statement did not become evidence in this trial of the truth of its contents because it was sworn. The trial Judge, however, in his general instructions to the jury, contrasted the sworn statement with unsworn statements, and said that the sworn statement was evidence of the truth of its contents. With deference, the learned trial Judge was in error. Mr. Then, indeed, conceded that this instruction was erroneous, but submitted that it had not resulted in a substantial wrong or miscarriage of justice.

Conclusion

The appellant, in my view, had a fair trial, free from error, apart from the improper reception of the evidence of Customs Inspector Vaughan in reply, and the error in the charge with respect to the use that could be made of the complainant's sworn statement. In considering the first error it is of some importance to note that the trial Judge permitted the defence to call, in surrebuttal of the evidence of Customs Inspector Vaughan, an investigator who testified that Customs Inspector Vaughan had told him that he could not remember one way or the other whether he detected any odour of gasoline from the appellant. This was the last evidence which the jury heard with respect to this question, and it is not reasonable to suppose that the improper reception of the evidence of Mr. Vaughan in reply, as opposed to his evidence having been given as part of the Crown's case, could have affected the verdict of the jury.

Mr. Then, while conceding the error in the charge with respect to the use that could be made of the complainant's sworn statement, contended that the error did not result in any prejudice to the appellant, since the defence relied on the statement as supporting its position that the complainant was standing when she was ignited. There is much to be said for this submission.

I am, moreover, of the view that no reasonable jury could fail to find that the uncontroverted physical facts are wholly inconsistent with the appellant's version of what occurred. I have in mind, in particular, the five bullet wounds suffered by the complainant, two of which were in the back of the head and one of which was in the buttock; also the nature, extent and position of the burns on the complainant's back and upper legs. How the complainant with five bullet wounds, suffering from the burns already described and thought by the appellant on his evidence to be dead, could have disposed of the gasoline can in a way that could account for its position when found must, without doubt, have led the jury to find this part of the appellant's story incredible. In my view, a reasonable jury properly instructed would inevitably have returned a verdict of guilty. I would, accordingly, apply the provisions of s. 613(1)(*b*)(iii) and dismiss the appeal from conviction.

Arrangements may be made with the Registrar to list for hearing the appeal against sentence.

December 21, 1977.

MARTIN, J.A. (orally):—The appellant Jimmy Campbell was found guilty by a jury at Windsor on an indictment charging him with attempting to murder Susan Campbell, his wife. He appealed against his conviction, and the sentence of 25 years that was imposed upon him. This Court reserved its judgment on the appeal against conviction, and on November 10, 1977, dismissed that appeal. The Court has been reconvened to hear the appeal against sentence.

The circumstances out of which the charge arose are fully set out in the reasons for judgment of this Court dismissing the appellant's appeal from his conviction, and need not be here repeated other than to say that the crime was accompanied by great brutality and was committed under circumstances that indicate deliberation. Indeed, it is right to say that the crime itself was as grave an offence of attempted murder as can be imagined.

On the other hand, the appellant was at the time of the commission of the offence 28 years of age. He had virtually no criminal record having been convicted on one occasion only in 1972, of disturbing the peace in respect of which he was fined and placed on probation. He has been steadily and gainfully employed as a disc jockey and supplemented his income from that source by also working part-time as a dishwasher.

The pre-sentence report is an excellent one, and indicates that the appellant is a "non-aggressive" person, and has never previously exhibited any disposition or tendency toward violence. The pre-sentence report with respect to the appellant's non-violent character is confirmed by the evidence of persons who have known the appellant over a long period of time. There are some unusual circumstances surrounding the events inasmuch as the appellant's wife appears to have forgiven him to some extent, at least, for the terrible attempt made by him to take her life. The appellant visited her after her release from the hospital and the evidence indicates that they had sexual intercourse on at least one occasion.

While we are of the view that the crime was a grave one, calling for a severe sentence, the sentence of 25 years does not give adequate weight to the appellant's previous crime-free pattern of behaviour. We are all of the view that in the circumstances the sentence was too long, and that a sentence of 15 years would not depreciate the gravity of the crime committed, and would give appropriate weight to the previous good character of the appellant and his previous lack of involvement in any violent conduct.

The appeal is allowed to give effect to this variation.

Appeal from conviction dismissed: sentence varied.

[HIGH COURT OF JUSTICE]

Laderoute v. Laderoute

GOODMAN, J. 10TH JANUARY 1978.

Contracts — Unconscionability — Transfer of land in exchange for services — Vendor aged 73 — Value of land and services approximately equal — Whether agreement unconscionable.

An agreement between a man and his mother, aged 73, an independent woman in full possession of her mental faculties, involving a transfer of land for services of approximately equal value, is neither in itself unconscionable nor presumed to have been secured by the exercise of undue influence.

[*Calmusky et al. v. Karaloff*, [1947] S.C.R. 110, [1947] 1 D.L.R. 734; *Black v. Wilcox* (1976), 12 O.R. (2d) 759, 70 D.L.R. (3d) 192, apld; *Vanzant v. Coates* (1917), 40 O.L.R. 556; *Mundinger v. Mundinger*, [1969] 1 O.R. 606, 3 D.L.R. (3d) 338 [affd [1970] S.C.R. vi, 14 D.L.R. (3d) 256*n*], distd]

ACTION to set aside a conveyance of land.

James B. Chadwick, Q.C., and *Thomas C. Barber*, for plaintiff.
Paul L. LaFrance, for defendant.

GOODMAN, J.:—This is an action for a declaration that a deed conveying certain lands and premises from the plaintiff to the defendant is null and void or, in the alternative, for a declaration that there has been a fundamental breach of an oral agreement entered into between the plaintiff and the defendant, and for an order requiring the defendant to reconvey the lands and the premises to the plaintiff.

tion, and in doing so was left in the position of having elected to affirm the contract with full knowledge of the breach.

Here there can be no doubt that the waiver agreement gave the insurer full discretion to settle all claims and any such settlement should be treated as though it were a judgment recovered against the defendant which the insurer had been compelled to pay by reason of s. 183 of the *Insurance Act*. The insurer was entitled to the full benefit of s-s. (8) of s. 183. The correspondence shows that all settlements were arrived at with the full concurrence of the solicitor for the defendant without prejudice to the rights of the insurer or the defendant as between themselves. I cannot give effect to this contention of the defence.

The plaintiff is entitled to judgment in the amount of $1,793.57 and costs.

MERSEY PAPER CO. LTD. v. COUNTY OF QUEENS

Nova Scotia Supreme Court, Ilsley C.J., Parker, Currie, MacDonald and Patterson JJ. February 11, 1959.

Taxes III B, III D—

Statutory direction to assess at actual cash value but to ensure uniform burden—Uniformity dominant factor—Rebuttal evidence in challenge of assessor's valuation—Whether agreement of municipality and taxpayer as to value binding on Court—Guesswork valuation—Right to review on appeal—Rule 2 of s. 18 of the *Assessment Act*, R.S.N.S. 1954, c. 15 provides that "all property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality". *Held*, on appeal from an assessment, [while the assessor is not entitled to assess property at less than its actual cash value (*e.g.* by discounting the value by 25% as in this case), yet the history of the rule shows that the dominant and controlling factor in determining an assessment is not actual cash value but uniformity.] The words "in forming such opinion" must be construed to mean "in assessing any property". It follows that if an assessor has assessed other property at 75% of its actual cash value, it is his duty (even though this involves a violation of the first part of R. 2) to assess a subsequent taxpayer's property at the same percentage. Where the issue is whether an assessor, in violation of R. 2, has assessed certain property at a higher percentage of the actual cash value than the percentage at which other properties in the municipality have been assessed, evidence is admissible as to the correctness of certain multipliers used by the assessor in arriving at the actual cash value of the other properties of which he took the particular percentage applied to the taxpayer's property. Clearly, if the multipliers were too low the assessment of the properties would be vitiated. Moreover, the objecting taxpayer is entitled to bring evidence in rebuttal of the replacement cost new of certain properties (in challenge of the assessor's figures) and is not obliged to give this evidence-in-chief. It is entitled to bring this evidence when it can be compared with the assessor's figures and it was not the taxpayer's duty to call the assessor so that the comparison could be made. *Held,* also, acceptance by opposing counsel at an assessment appeal of a certain sum as the actual cash value of property does not bind the presiding Judge. A municipality and a property owner cannot agree on a valuation which violates a statute, since it may be most prejudicial to other taxpayers. *Held,* also, an assessor does not apply the right principle where he makes his assessment by loose guesswork, as by purporting to apply a sales method of determining actual cash value and yet acting on newspaper accounts of a recent sale of the property and making guesses as to deductions and arbitrarily dividing the result of his computations. The assessor's opinions are reviewable and may be weighed with the evidence on an assessment appeal. [*Re Mindamar Metals Corp.*, 38 M.P.R. 75; *Re Starr Mfg. Co.*, [1926] 1 D.L.R. 212, 58 N.S.R. 243, apld]

APPEAL from a municipal tax assessment. Case remitted.

H. B. Rhude and *D. R. Chipman,* for appellant.

A. G. Cooper, Q.C., and *J. H. Dickey,* Q.C., for respondent.

ILSLEY C.J.:—This is an appeal by Mersey Paper Co. Ltd. (to be referred to as Mersey) against the assessment of some of its real and personal property in the County of Queens for the year 1958. This property is the property of Mersey "within the mill fence at Brooklyn" assessed at $9,000,000, of which $7,500,000 was for real property and $1,500,000 for personal property.

Mersey is a company which was incorporated under the laws of Nova Scotia on May 7, 1956 under the name of Scotian Paper Company Limited. Its name was on June 22, 1956 changed to Mersey Paper Company Limited. On July 17, 1956 Mersey acquired by transfer the property, assets and undertaking of another company, also called Mersey Paper Company Limited (to be referred to as Old Mersey), as a going concern, taking the same over as of April 30, 1956.

The assessment in question was part of a general reassessment of all property in the Municipality of the County of Queens. This reassessment was carried out by one assessor, W. Robie Silver, who was appointed as such in March, 1956 by the municipal council of the Municipality of the County of Queens, and who began his work of reassessment on April 16, 1956 and completed it on December 16, 1957.

The evidence is that he was instructed, presumably by the municipal council, to assess all property at 75% of its actual cash value within the meaning of that term as used in s. 18, R. 2 of the *Assessment Act*, R.S.N.S. 1954, c. 15. Rule 2 is as follows: "All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality." The instructions given the assessor by the municipal council were improper as he was instructed to assess properties not at their actual cash value but at 75% of their actual cash value. This he proceeded to do or attempted to do.

At this point it is convenient to mention the material in existence, some of which was available and some not available to the assessor, which he might properly have taken into consideration in fixing the actual cash value of the real and personal property of Mersey within the mill fence. This property, all lying within District 6 of the municipality, consisted of:

1. Land. 2. The mill buildings of Mersey. 3. Mill equipment. 4. An item referred to at times as stock and stores and at other times as materials and supplies but not including raw materials. 5. Raw materials. 6. Stock in trade (newsprint). 7. Wharf and harbor improvements.

A small proportion in value of these items, 7% or 8%, was below highwater mark. Some evidence was adduced before the County Court Judge whose decision is appealed from, bearing on the question whether anything below high-water mark is within the Municipality of the County of Queens; but the learned Judge, after considering this question fully, found that the real and personal property of Mersey below high-water mark is within the municipality and therefore assessable. The appellant in its factum filed in this Court expressly abandoned its position taken in the Court below on this question, saying "the appellant has now abandoned this ground of appeal". I think this Court should deal with the matter as if the property below high-water mark is assessable and included within the property within the mill fence, such property however not including ships belonging to Mersey.

The purchase-price paid by Mersey for the property of Old Mersey was approximately $53,750,000. Mersey made a written offer to purchase this property dated June 7, 1956. This offer was to purchase from Old Mersey "all the property, assets and undertaking of" Old Mersey "as a going concern at the close of business on the 30th day of April, 1956, the whole for the total purchase price of Fifty-three million seven hundred and fifty-four thousand five hundred and one dollars and ten cents ($53,754,501.10), the said amount being attributed as follows in payment of the said assets respectively".

Then follows various items, the only relevant item being

"(m) All other fixed assets, including real estate, buildings, plant and equipment, wharves, dwellings, etc. $39,750,000.00"

There is no item in the offer of purchase of goodwill, nor is there any item expressly relating to contracts, agreements, leases and licences, although Old Mersey had valuable contracts, agreements, leases and licences, including a power contract with the Nova Scotia Power Commission, a wood agreement with the Government of Nova Scotia, newspaper customers' contracts, suppliers' contracts, pulpwood supply contracts, stumpage agreements, bills of sale, stream-driving rights, booming privileges, and a patent and trademark. These, however, were all transferred, set over and assigned to Mersey as part of the property, assets and undertaking of Old Mersey, although no part of the $53,750,000 purchase-price was attributed to them. The fact that no part of the purchase-price was so attributed strikes one as extraordinary, but it would appear that Mersey had in mind the issuing of a prospectus and desired to represent in the prospectus that the physical assets to which the sum of $39,750,000 was attributed had approximately that value.

The purchase-price was paid to Old Mersey in cash. The cash was raised by Mersey through a bond issue of $26,000,000 and the issue of preferred shares having a par value $10,000,000, the balance being raised otherwise. In connection with the issue of the preferred shares a prospectus containing certain statutory information and dated August 29, 1956 was duly filed in the office of the the Registrar of Joint Stock Companies on that date.

While the statutory information states that as part of the undertaking Old Mersey transferred, assigned and set over to Mersey all of its contracts, agreements, leases, licences, etc. (p. 17), it also states that no amount was paid for goodwill (p. 17), and the prospectus states that under date of July 31, 1956, Stone & Webster Engineering Corp., Consulting Engineers, submitted a report to the company containing an appraisal of the fixed assets acquired as of April 30, 1956 from Old Mersey by the company, excluding any value for freehold and leasehold timber limits. The prospectus goes on to say:

"This report states that as at April 30, 1956 the fixed assets acquired by the Company from Old Mersey (excluding any value for freehold and leasehold timber limits) and the cargo ships owned by wholly-owned subsidiaries had a replacement cost new of $47,-887,223 and a replacement cost new, less depreciation of $42,819,-600. Distribution of these valuations by major classes of assets is set out below:

	New	Replacement Cost New Less Depreciation
"Paper Mill Property		
Land, including limestone quarry...	$ 237,400	$ 237,400
Mill buildings	7,767,136	7,378,800
Miscellaneous buildings off mill site..	195,521	185,700
Mill equipment	31,271,511	29,707,800
Wharf and harbor improvements ...	1,725,062	1,638,800
Dams	390,598	371,100
Total, Paper Mill Property	$41,587,228	$39,519,600"

While some of the assets to which the $39,519,600 applies are outside the mill fence, it is apparent from the evidence that these would not amount to more than 10% of the whole in value. Mersey was therefore representing to the public that its fixed assets within the mill fence had been appraised at, say, at least $35,000,000 as their replacement cost new less depreciation. This does not include the value of materials and supplies, raw materials, or stock in trade within the mill fence. Even if it be assumed that Mersey should be taken at its word and as having paid in cash in 1956 $35,000,000 plus for the real and personal property within the mill fence, it does not follow that this figure represents the actual cash value of this property for assessment purposes within R. 2 of s. 18 of the *Assessment Act*, but it is extremely relevant evidence.

The assessor placed a value on the property within the mill fence including that below high-water mark of $12,000,000. He apparently did not know of the prospectus, the valuation of Stone & Webster, or the offer of purchase; at least he gives no indication in his evidence that he knew of them. His method of assessing the property within the mill fence may without unfairness be described as a hit-or-miss one. He says that there are two methods of assessment of which he has knowledge: (1) the selling price or sales method, that is the use of the selling price "to come at your final figure"; (2) the replacement cost method, that is the use of replacement cost less depreciation and obsolescence with certain adjustments if necessary. He says that he used method (1) for Mersey and method (2) for the other properties in the municipality. With regard to Mersey he says that he saw in the daily paper that the whole property and undertaking had been sold for approximately $53,000,000; that he knew from records of Court proceedings in Halifax that Mersey had said its timberlands had a value of

$5,600,000; that this left $47,400,000; that he deducted from this figure $2,000,000 for Mersey's ships, leaving $45,400,000; that he deducted from this figure $1,000,000 so as to have regard to woodlands, wood in the river, and things like that that were outside the mill fence but still in the municipality, leaving $44,400,000; that he thought that goodwill must have been involved in the sale and he knew that there were paper contracts and wood contracts, so he took off $20,000,000 as a round sum to cover those as he says, "purely a guess," his resulting figure being $24,400,000; and that from this he took off $400,000 to get round figures, leaving $24,000,000. He then said to himself: "This is still too much money and, the only thing I can see, I will split it, call it $12,000,000." He thought that was the very least figure that anybody could possibly expect to get the plant for, "and that is too low". He then discounted the $12,000,000 by 25%, because he was assessing all property at the rate of 75%. As to the division of the $9,000,000 between real and personal, he obtained the opinion of the secretary-treasurer of Mersey that of the property within the mill fence one-fifth in value was personal and four-fifths real. Varying these proportions somewhat, he assessed the real property at $7,500,000, and the personal property at $1,500,000. He considered every figure from $5,000,000 to $15,000,000.

Being apparently much concerned, and this can be easily understood, about the proper figure to arrive at, he consulted the warden of the municipality. The warden called a meeting of the council. This was held on December 14, 1957. The council passed a resolution recorded in the minutes as follows: "On motion of Coun. Grosse, seconded by Coun. Freeman, it was suggested that the assessor consider placing an assessment of $9,000,000 on the Mersey mill plant, all property inside the fence, broken down as follows: real property, $7,500,000, personal property $1,500,000. Motion carried unanimously." The assessor, armed though he was with this resolution of the council, gave the matter further consideration all through the next day and finally decided in the evening to assess the property inside the mill fence at $9,000,000.

It may be noted at this stage that Stone & Webster's written appraisal of certain property of Old Mersey as of April 30, 1956 was put in evidence and this shows, as the prospectus stated, that their appraisal of the total paper mill property was $39,519,600; this however being stated to be its cost to reproduce new less depreciation.

An appraisal engineer in the employ of Stone & Webster was called on behalf of Mersey in the proceedings before the County Court Judge and he, despite the former appraisal by Stone & Webster, which was not made by him, submitted figures appraising the physical assets within the mill fence, including those below high-water mark, (not including materials and supplies, raw materials or stock in trade) at $11,831,009. This, he said, was the replacement cost new less depreciation as of December 31, 1957.

One might at first blush assume that there had been a great depletion of assets in the meantime. But this was not so. There was a net addition in value to the property within the mill fence between April 30, 1956 and December 31, 1957, after allowing for retirements. In addition to the physical assets within the mill fence appraised at $11,831,009, this witness appraised the materials and supplies at actual cash value as of December 31, 1957, $304,282; the raw materials at cost, average of high and low for year 1957, at $810,432; and the stock of goods at cost less raw materials included in cost, average of high and low for year 1957, at $198,438; making in all $13,144,161.

With regard to the physical assets (other than materials and supplies, raw materials and stock in trade) this witness arrived at these valuations by taking the replacement costs new, ascertaining the age, the service life and the remaining life of each item (other than land), from these data ascertaining the percentage condition of each item, and thereby arriving at his final figure. The depreciation was reckoned by the diminishing balance method, and the witness said that in his opinion the result gave the fair cash value which he identified with the actual cash value within the meaning of this term as used in the *Assessment Act*.

From the assessor's valuation of $9,000,000 Mersey appealed to the Board of Revision and Appeal, which confirmed his assessment. Mersey then appealed to the County Court of District No. 2, and the evidence I have referred to above and much other evidence was given.

The learned County Court Judge affirmed the decision of the Board of Revision and Appeal and confirmed the assessment of Mersey at $9,000,000. The concluding words of his decision are as follows:

"I have come to the conclusion and find that the assessment of the appellant, the Mersey Paper Company Limited, at $7,500,000 for real and $1,500,000 for personal property is a fair and equitable assessment as 75% of its actual cash value within the meaning of the *Assessment Act*. The decision of the Court of Revision and Appeal will be confirmed and the appeal dismissed with costs."

In his decision the following passages appear:

"Evidence at great length was tendered by experts and officials of the appellant company and by the assessor on behalf of the municipality as to the value of the property real and personal within the mill fence. In their argument, however, counsel agree that the actual cash value of the real and personal property within the mill fence is $12,000,000. I therefore accept it as a reasonable valuation of the property real and personal."

"Reference has been made above to the method used by the assessor in arriving at the actual cash value of the property assessed. It is criticized by the appellant and approved by the respondent. However, as they both agree with his conclusion that the actual cash value of the property is $12,000,000 it does not in my opinion affect the result."

"As stated above, both parties having now accepted his valuation of $12,000,000 for the plant, the way in which he arrived at it is unimportant."

From these quotations it appears that the learned Judge did not address his own mind to either of the following questions: (1) Whether $12,000,000 was the actual cash value of the property assessed, or (2) Whether the assessor pursued a proper method of arriving at the actual cash value of this property. The learned Judge adopted $12,000,000 as the actual cash value by reason of the acceptance by both counsel of this figure in argument. In my opinion this acceptance did not bind the learned Judge. I do not think that a municipality and a property owner can validly agree on a valuation which is in violation of a statute. Nor, in my view does an acceptance or agreement made in argument before the learned Judge bind this Court. It is obvious that an agreement on valuation made between one taxpayer and the municipality might be most prejudicial to other taxpayers.

Also to be considered is the question whether the fact that the appellant in its notice of appeal to this Court expressly excepts from its appeal that portion of the judgment of the learned Judge "wherein it is found that the actual cash value of the real and personal property of the appellant within the mill fence of Brooklyn, in the County of Queens, is $12,000,000," binds this Court to accept that finding of fact by the learned Judge.

The notice of application to this Court is for: "An Order vacating and setting aside all of the said decision or judgment of His Honour Judge J. Welsford Macdonald of the County Court for District Number Two, except that portion thereof wherein it is found that the actual cash value of the real and personal property of the Appellant within the mill fence at Brooklyn in the County of Queens is $12,000,000.00, and the whole of the Order based thereon, and directing that a new trial, hearing or inquiry be had in the said County Court for District Number Two." The appellant apparently relied on that part of Order LVII, r. 1, (Rules of the Supreme Court) which reads as follows: "The appellant may, by the notice of motion, appeal from the whole, or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part."

Dealing with the English provision, "notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the Court below" (O. 58, r. 3), the 1958 Annual Practice says (p. 1664): "In order to avoid a possible liability for costs in respect of issues on which the appeal fails, the notice of appeal should confine itself to that part of the judgment or order which is complained of, and should specify it — for example the quantum of damages as distinct from the liability, the grant of an injunction as distinct from an award of damages, a refusal to find contributory negligence on the part of the plaintiff, as distinct from a finding of negligence by the defendant, a dismissal of the action against one defendant as distinct from others."

It will be noted from the examples given in The Annual Practice that each part of the judgment or order not appealed from in the instances given was *res judicata*, that is, a finding which was involved as a basis of the judgment appealed from. If the finding of the learned Judge that the Mersey property within the mill fence had an actual cash value of $12,000,000 were a finding of fact involved as a basis of the judgment of the County Court Judge and this finding was not appealed, it might be that it could not now be challenged, but the only finding of fact which was involved as a basis of the judgment was that the actual cash value was *not less than* $12,000,000, so it cannot in my opinion be said that the question whether the actual cash value is *not more than* $12,000,000 is no longer open.

On *res judicata* see Stroud's Judicial Dictionary, 3rd ed., vol. 3, p. 2566.

The learned Judge in his judgment states the issue as seen by him. He says: "The sole point now to be decided in this appeal is whether the assessor and the Board of Revision and Appeal in confirming the assessment of the property in question at 75% of its value have violated the principle set forth in R. 2 of s. 18 of the *Assessment Act* in that they did not have regard to the assessment of other properties in the municipality so as to ensure that taxation shall fall in a uniform manner upon all property in the town or municipality. In other words, is the Mersey Paper

Co. assessed at 75% of its actual cash value while other properties in the municipality are assessed at a lesser percentage?"

From the evidence it would appear (although this Court need not decide) that the actual cash value of the property within the mill fence was at least $12,000,000. Can a property owner whose property is assessed at less than its actual cash value successfully challenge the assessment on the ground that the amount for which other property is assessed is a lower percentage of its actual cash value than the percentage at which the complaining property owner is assessed? The answer to this question involves an interpretation of R. 2, which I now propose to attempt.

In *Re Mindamar Metals Corp.* (1954), 33 M.P.R. 75, Rule 2 was interpreted by this Court. The Rule, however, was then as follows: "All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties of the like class in the town or municipality." The Rule was enacted in that form by c. 33 of the Acts of 1931. Before that the Rule was as follows:

"All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice": *Assessment Act,* R.S.N.S. 1923, c. 86, s. 17.

From this it will be seen that since the enactment of R.S.N.S. 1923 there have been two successive attempts to widen the basis of the assessor's opinion of the actual cash value of property to be assessed. The guide legislatively furnished by the first amendment was the assessment of other properties of the like class. The guide supplied by the second amendment was the assessment of other properties in the town or municipality. By the second amendment the following significant words were added: "so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality."

I think the history of this Rule and the words beginning "so as" show that the Legislature by the second amendment intended that the dominant and controlling factor in determining the amount at which property is to be assessed should be not its actual cash value but uniformity. I think the first part of the Rule directing assessment of property at its actual cash value is subsidiary or subordinate to the latter part of the Rule. The use of the words "but" (in introducing the latter part of the Rule), "shall", and the words beginning "so as to ensure" point to this conclusion. Even under Rule 2 as it was before the last amendment, I am not sure that the actual cash value test was the controlling test. See *Re Mindamar Metals Corp. supra.*

It may be thought that the words beginning with the word "but" in the Rule should be disregarded completley because thought control by legislation is impracticable and it is impossible to provide by law that a person shall form any particular opinion. For instance, in the case at bar, there is no dispute as to what the assessor's opinion was. His opinion was that the property in question had an actual cash value of $12,000,000, yet he assessed the property at $9,000,000. Was this because he changed his opinion of its actual cash value after taking into account the fact that he had discounted other actual cash values by 25%. This suggestion seems absurd to me, yet this appears to be what the Legislature has tried to instruct him to do.

I do not think it could be reasonably argued that the opinion referred to in the Rule is a statutory opinion which is different from the assessor's true opinion.

In *Dreifus* v. *Royds* (1920), 57 D.L.R. 44 at p. 51, 61 S.C.R. 326 at p. 336, Duff J. in construing the meaning of the words "actual value" in the Ontario *Assessment Act* said:

"It is very clear to me that the Board has proceeded upon the theory that the enactment of sec. 40, sub-sec. 1" (the section providing that land shall be assessed at its actual value) "is modified by that of sub-sec. 16 of sec. 69" (the section permitting reference to the value at which similar land in the vicinity is assessed) "and that the actual value for the purpose of assessment may be something other than the actual value in fact, the determination of which is governed by the practice of the assessor as applied to similar lands in the vicinity. This I think is an erroneous view." Nevertheless, the Legislature has gone to so much pains by successive amendments to stress the importance of uniformity in assessment that I think that R. 2 is now in such terms that it must be interpreted substantially as if the words "but in forming such an opinion" meant "but in assessing any property".

If this is the correct interpretation it was the duty of the assessor, once he had assessed the other property in the municipality at 75% of its actual cash value, to assess Mersey's property at the same percentage. In doing so he would be violating the direction in the first part of R. 2 but he would be obeying the dominant direction in the second part of R. 2.

I think this Court should make it very clear that it disapproves of this method of assessment. Assessors and municipal councils who deliberately set out to assess the property in the municipality at less than its actual cash value are not only making trouble for themselves but they are flouting the intention of the Legislature. In this case the municipal council and the assessor went to the very limit which they were permitted by law to go without making an assessment which would be *prima facie* unjust and fraudulent (see s. 173 of the *Assessment Act*). It may be that the whole assessment roll could be or could have been attacked in some proceedings other than these, but, once it becomes clear that the general level of assessed values of real and personal property other than that of one property owner is 25% less than what in the opinion of the assessor is its actual cash value, it would be a great injustice and, I think, a violation of R. 2 to uphold an assessment of that property owner's property at its full actual cash value. I think it would be a lesser but still an undoubted injustice and violation of R. 2 to uphold an assessment of that property owner's property at a substantially larger percentage than 75% of what in the opinion of the assessor is its actual cash value. And finally I think it would be an injustice and violation of R. 2 for an assessor to assess a property at a substantially higher percentage of its actual cash value than that at which he assessed other properties generally.

I think the learned Judge correctly stated the issue in the passage from his judgment quoted above beginning with the words "The sole point now to be decided in this appeal". This was the basis upon which the appeal was argued by both counsel and I think the correct basis. The question is, was Mersey assessed at a higher percentage of the actual cash value of the property in question than the percentage of actual cash value at which other properties in the municipality were assessed?

It should not be overlooked that R. 2 gives to the term "actual cash value" a technical meaning, "such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice". But the opinion of the assessor is not unchallengeable. In *Re Starr Mfg. Co.*, [1926] 1 D.L.R. 212 at p. 213, 58 N.S.R. 243 at p. 247, Harris C.J. said:

"It was strenuously argued that the opinion of the assessors ought to govern, but it is obvious that if this was so, no appeal could ever succeed. I quite admit that due weight ought to be given to the opinion of the assessors and to the fact that they have had much experience in valuing property, but their opinions are only worth what they are worth — they are not conclusive. They are evidence, and the trial Judge has to weigh them with the other evidence and reach his own conclusions."

It should also be noted that the determination of the actual cash value of property which is an integral part of a business reaching far beyond the bounds of the district of the municipality and of the municipality itself is a task of formidable difficulty: *Re Maritime Telegraph & Telephone Co.*, [1940] 1 D.L.R. 602, 51 C.R.T.C. 113, 14 M.P.R. 387; affd [1940], 3 D.L.R. 721, S.C.R. 616, 51 C.R.T.C. 198. Rule 2 seems conspicuously unsuitable for the assessment of such property. In the *Maritime Telegraph & Telephone Co.* case several varying judicial opinions were expressed and the only guidance that I have been able to get from that case is that the property must be assessed as it stands and not as discarded junk. Is the hypothetical auction referred to in R. 2 (considered in relation to the case at bar) an auction at which the only bidders are persons who cannot make practical use of the property in question as a unit in the carrying on of a newsprint manufacturing business because those bidders do not have sources of supply or market outlets? It would not so appear to me. It would appear to me that sources of supply and outlets would likely be available to bidders if the property owner were going out of business, which it would be if its mill and plant were being sold at auction. It was stated by Graham J. in this Court in the *Maritime Telegraph & Telephone Co.* case [p. 606 D.L.R., p. 117 C.R.T.C.]: "The hypothetical statutory auction is to be one at which there is competition." And that: "The Assessors may reasonably assume that the appellants would bid." I am not convinced that this latter is so, but I do not think that the hypothetical statutory auction is to be one at which the bidders must all be devoid of resources required to enable the mill and equipment to be profitably operated.

In this case the assessor was confronted with a difficult task but I think the mere recital of his evidence as to the manner in which he arrived at the $12,000,000 value shows that he did not apply the right principle. His mental operations did not reach the level of judgment as to the actual cash value of the property but were not much more than loose guesswork.

What were the duties of the County Court Judge in dealing with the appeal? Section 62 of the *Assessment Act* is as follows:

"(1) The county court shall inquire into the matter *de novo*, and examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter.

"(2) On the appeal the county court shall have all the powers of the court appealed from."

Proceedings before the County Court Judge were an inquiry into the matter *de novo*. Unfortunately there is a conflict of judicial opinion as to what this means.

The learned Judge quoted the M.P.R. headnote of *Re Assessment* *of Manning*, 17 M.P.R. 9, [1943] 1 D.L.R. 383, as follows: "On an appeal under sec. 60 of The Assessment Act, ch. 2, Acts N.S. 1938, a County Court should not disturb an assessment made by the assessors and affirmed by the Assessment Appeal Court unless it is clear that the assessors or the members of the appeal court were not fully aware of their duty under the Act, or that they adopted a wrong principle or ignored a right one, or that some governing factor was overlooked." Examination of the *Manning* case, however, shows that in a Court of six, three of the Judges considered that this was not the correct principle for the County Court to apply, however correct it might be for a higher Court to apply, and suggested, as I gather, that it was the duty of the County Court on appeal to determine the actual cash value and allow the appeal if satisfied that the actual cash value was less than the value fixed by the assessor and affirmed by the Board of Revision and Appeal. However, the point is of little importance in a case where, as here, (not as in the *Manning* case) the County Court Judge dismissed the appeal.

The rule which this Court should follow is that set out in *Glace Bay* v. *Seaboard Power Corp.*, [1952] 2 D.L.R. 826 at p. 833, as follows: "Unless this Court is satisfied that the decision of the Judge appealed from is clearly wrong, or unless he erred by adopting some wrong principle or by refusing to apply some right one, or unless he overlooked some governing fact, then his decision must stand." This rule is also laid down in *Landers* v. *Town of Digby* (1955), 37 M.P.R. 1 at p. 6.

If the assessor and the Board of Revision and Appeal proceeded on a wrong principle or overlooked some governing fact, then the County Court Judge did the same thing, because he found that they did not. This Court should therefore in determining whether the County Court Judge was clearly wrong or erred in adopting some wrong principle or by refusing to apply some right one or overlooked some governing fact, consider whether the assessor and the Board of Revision and Appeal did the same thing. This Court should in addition consider whether any errors were made by the County Court Judge over and above those made by the assessor and the Board of Revision and Appeal.

I have set out the method by which the assessor arrived at 75% of the actual cash value of Mersey's property within the mill fence. I must now refer to the method by which he arrived at 75% of the actual cash value of the other properties in the municipality. In order to arrive at the latter he used the replacement cost method, applying a manual for that purpose. He described in detail how he proceeded. His description related particularly to residential properties but also, to some extent, to business premises and to the valuation of land. His method was to measure the floor space of a building, ascertain the number of storeys in the building, then multiply the number of square feet in the floor space by a certain figure which I may refer to as a multiplier. This multiplier varied in accordance with the size of the floor space, the number of storeys, and the "class" of the building. The resultant figure was taken by him to be the replacement cost new. This was the basis of his assessment but, having arrived at this figure, he adjusted it for depreciation, obsolescence and zone. He used his knowledge of recent sales as a check on the result, but he did not apply the sales method, he did not regard the recent sales prices as a governing factor.

In his opinion the result that he arrived at by the method he used was the actual cash value of the building within the meaning of the Act. He added what appears to have been a flat figure of $150 for the land on which the building stood regardless of the size of the lot. A whole farm would not be considered as a lot and he valued farmlands in accordance with his manual.

It will be seen that the efficacy of this method depended mainly upon the figures in his manual being the correct multipliers. If he used multipliers that were too low, the assessment of properties generally throughout the municipality would be fundamentally vitiated.

These multipliers were challenged by Mersey as being too low and as resulting in replacement costs new which were substantially lower than the true replacement costs new would be.

It was manifestly of the utmost importance that the County Court Judge thoroughly consider all properly tendered relevant evidence as to the correctness of these multipliers. The assessor himself gave a most unsatisfactory account of their origin. He said that in 1956 he examined a building in each class and formed an opinion from his experience (which was considerable) of what the replacement costs new would be, and that from this judgment so formed he arrived at the multiplier for a building of that floor space, number of storeys and class. He could not, however, give any details of buildings examined and considered by him, nor whether contractor's profits were included or, indeed, any other relevant details. He then adjusted the multiplier so arrived at upward and downward for buildings in the same class of different floor space and number of storeys. In these adjustments he followed another manual referred to as the Mooney Manual. There was no attempt to establish that the Mooney Manual was generally accepted or correct as a guide although there was evidence that it had been used.

Mersey adduced evidence of thirteen sales (two in 1950, one in

1951, two in 1954, one in 1955, one in 1956, five in 1957 and one in 1958) of properties in the municipality for amounts 75% of which would be substantially in excess of the assessments and indicating that these properties were assessed by the assessor at 46.6% of the total of their sale prices. These sales were all very near the Town of Liverpool and, I think, may not have been representative of sale values throughout the County. For the most part they were sales for cash but may, in my opinion, have brought in higher prices, at least in some instances, than the amounts that would have been obtained at auction.

Mersey also adduced the evidence of an expert valuer from Halifax who valued seventy-three properties, not very well distributed geographically throughout the municipality, and this expert gave it as his opinion that these properties were assessed at 59% of their combined actual cash values. The evidence of this expert was vigorously attacked, but it is unnecessary for the purposes of this decision to pass upon its strength or conclusiveness, in the view I take of the appeal. The inference that Mersey asked us to draw from the evidence of the sales and of its expert was that the properties outside the mill fence were assessed at approximately 50% of their actual cash value as against 75% for Mersey, and on this ground has asked this Court to reduce Mersey's assessment from $9,000,000 to $6,000,000.

Alternatively Mersey argued that the case should be remitted to the County Court for a new inquiry on the ground that relevant evidence was rejected. Indeed, in Mersey's notice of appeal, the first ground is stated as follows: "That the learned Judge improperly rejected and/or refused to hear and/or refused to allow on the record evidence tendered by the Appellant in rebuttal."

I do not think that this Court would be justified in reducing Mersey's assessment. There are two reasons for this conclusion: (1) I am not satisfied that Mersey is assessed at as much as 75% of the actual cash value of its property. As stated above I think it was the duty of the learned Judge to consider this question. Had he done so there is no way of knowing what conclusion he would have arrived at. Would he have given some weight to the Stone & Webster valuation of 1956, the purchase offer, the attribution of at least $35,000,000 to the greater part of the property within the mill fence, and to the prospectus? How did Purdy impress him as a witness? And was he convinced that Purdy's valuation was reasonably correct and in accordance with the *Assessment Act*? This Court is not in a position to pass upon these questions, at least all of them. (2) This Court cannot pass upon the validity of the multipliers used by the assessor because some of the available evidence on this issue was rejected, as noted below.

Nor do I think that this Court should dismiss the appeal. For this conclusion there are two reasons: (1) I think the actual cash value of Mersey's property should be determined by a Court which has the facilities for determining it. (2) There is obviously available more evidence, not admitted, on the validity of the multipliers.

The third alternative is to remit the matter to the County Court of District No. 2 for re-inquiry. This was the course that was pursued in *Glace Bay* v. *Seaboard Power Corp.* The following is from the judgment of Parker J. [1952] 2 D.L.R. at p. 837 in that case: "In my opinion the matter should be remitted to the County Court Judge for reconsideration of the evidence placed before him when he first considered the matter and for the consideration of such additional evidence as either the Town or Seaboard may see fit to adduce and which he may see fit to admit." I have come to the conclusion that this, substantially, is the course that we should follow in this case. The main reason that I think this should be done is that in my opinion the learned Judge wrongly rejected certain evidence which would bear directly on the correctness of the multipliers used by the assessor, a vital question, as a substantial error in those multipliers would result, either certainly or probably, in a general assessment of property outside the mill fence throughout the municipality at less than 75% of its replacement cost new as adjusted for depreciation, obsolescence and other proper factors, and therefore, on the principle applied by the assessor, at less than 75% of its actual cash value.

Why do I say that evidence was wrongly rejected?

The appellant did not know and, although through its counsel it tried to ascertain, was unable to ascertain before the inquiry came on before the County Court Judge, the figure which the assessor had arrived at and used as 75% of the replacement cost new of any property outside the mill fence. And it had no way of ascertaining this figure except my calling the assessor as a witness. The appellant herein was also the appellant in the proceedings before the County Court. There it was the duty of the appellant to begin with a view to making a *prima facie* case that the valuation placed by the assessor on the appellant's property was too high, having regard to the valuations he had placed on other properties.

The appellant did not call the assessor as a witness for the purpose of ascertaining the basic replacement cost figures on which after adjustment he had based these valuations. To have done so would have been to make the assessor the appellant's witness, with all the disadvantages thereby entailed. Had the appellant called the assessor it would be for the purpose, *inter alia,* of eliciting from him evidence of the figures he used of the replacement cost new of certain specified buildings so that the appellant could check these replacement costs after examination of these buildings by an expert. Should the check reveal that the figures of replacement cost new were in the appellant's opinion too low, the appellant would then likely call its expert to give his own contradictory estimate of the replacement cost new. It is this course which the respondent suggested the appellant should have followed. Mr. Cooper, Q.C., counsel for the respondent in objecting to rebuttal evidence as to the correctness of the multipliers in the manual used by the assessor said: "That evidence was available to my learned friend in his proof because he had the assessor under subpoena. He was here for two or three days and could have been called. This is only matter arising after my learned friend's case was closed and is not new matter or such matter as would take anybody by suprise or anything of that nature, and is not a proper subject of rebuttal."

Instead of taking this course the appellant obtained the information it desired from the assessor on cross-examination. The assessor was called upon in cross-examination to produce the replacement costs new which he had used for a considerable number of properties outside the mill fence.

It was also in the course of giving evidence as a witness for the respondent that the assessor described his system of assessments and produced his manual with a large number of multipliers for different classes, sizes and heights of buildings. The appellant then in rebuttal called a witness for two purposes: first, to testify that the multipliers were too low; and, secondly, for the purpose of giving his estimate of the replacement cost new of a number of buildings as to which the assessor had testified.

The learned trial Judge admitted the evidence of the witness as to the correctness of the multipliers but, when counsel for the respondent objected to his giving any evidence of the estimates of the replacement cost new of individual properties, the learned Judge sustained this objection and this witness was not permitted, except as to one building, to give any evidence of his estimates of the replacement cost new. Had this witness been permitted to give estimates of the replacement cost new of a substantial number of houses or other buildings, and had his estimates been accepted as reliable and correct by the learned Judge, and had they been considerably higher in a considerable number of cases than the figures representing replacement cost new used by the assessor, the conclusion might very reasonably have been drawn that the assessor's multipliers were incorrect and too low. This conclusion would have had a most significant bearing upon the crucial point of the case, namely, whether the property outside the mill fence throughout the municipality was assessed at a smaller percentage of its actual cash value than the assessor said it was, the very proposition which the appellant was seeking to establish.

I think this rejected evidence should have been admitted. The argument *contra* is that to admit it would have been to permit the appellant to split its case by first relying on *prima facie* proof and when this had been shaken by evidence given on behalf of the respondent (by the assessor) adducing confirmatory evidence.

A great many cases were cited on the question whether the appellant was entitled to have the rejected evidence admitted including the following: *Jacobs* v. *Tarleton* (1848), 17 L.J.Q.B. 194 (as to which see Roscoe's Evidence in Civil Actions, 20th ed., p. 234); *Doe d. Lawrence* v. *Stalker* (1849), 5 U.C.Q.B. 346; *Wright* v. *Willcox* (1850), 9 C.B. 650, 137 E.R. 1047; *Neary* v. *Fowler* (1869), 7 N.S.R. 495 at p. 499 (a trial Judge's discretion to reject rebuttal testimony may be reversed by the Court); *Trenholm* v. *Dom. Express* (1914), 43 N.B.R. 98; *Chytraus* v. *Chicago* (1895), 160 Ill. Rep. 18, 43 N.E. 335; *Doe d. Simonds* v. *Gilbert* (1883), 22 N.B.R. 576; *Whittaker* v. *Welch* (1874), 15 N.B.R. 436 (where the contradicted statement appeared for the first time on the cross-examination of the defendant); *Heavy* v. *Odell* (1863), 10 N.B.R. 524; *R.* v. *Tower* (1880), 20 N.B.R. 168; *Williams* v. *Davies* (1833), 1 C. & M. 464, 149 E.R. 481 (where Bayley B. drew a distinction between what is done by an Appeal Court when evidence is improperly rejected and where the Judge has exercised his discretion to admit it, saying "where evidence is rejected improperly it is a ground for a new trial"); *Browne* v. *Murray* (1825), Ry. & Mood. 254, 171 E.R. 1012; Annotation to *R.* v. *Michael* (1955), 20 C.R. 24.

Reference was also made to Phipson on Evidence, 9th ed., p. 44; Wigmore on Evidence, 3rd ed., vol. VI, p. 510; and Taylor on Evidence, 11th ed., pp. 290-1.

In *Maclaren & Sons* v. *Davis* (1890), 6 T.L.R. 372 at p. 373, Mr. Justice Cave said: "There must be a new trial, first and foremost, because the learned Baron had not exercised his discretion properly in the refusal to allow evidence to be given in reply."

In most of the cases cited, the fact emerging from the evidence on behalf of the defendant which the plaintiff may contradict in rebuttal is evidence of unforeseen particular facts brought out in direct examination rather than cross-examination. The facts sought to be contradicted here were unknown to the appellant. Though doubtless suspected it cannot be said that they were foreseen. True, they were brought out in cross-examination, not in direct examination;

but I think that it would be unjustifiably technical to make anything depend on this distinction.

It was argued that the appellant could have called its expert on replacement costs in adducing its evidence-in-chief; but practically the whole point of such evidence would be lost if the appellant did not also have the assessor's figures to compare with its expert's figures. I do not believe it was the appellant's duty to call the assessor for the purpose of making possible this comparison. The assessor's figures as to replacement cost new of particular properties were necessary before the expert for the appellant could examine these properties and give his estimate. I think the reasonable and proper course for the appellant to follow is that which it did follow, namely, elicit from the assessor on cross-examination the figures he used, then have an estimate made by its own expert of the cost of replacement new of the properties to which those figures related, and then call the expert in rebuttal. The expert, had he been permitted to testify, might perhaps have been able to discredit very seriously the correctness of the multipliers used by the assessor, but he could do this effectively only if permitted to give evidence with respect to particular properties.

I consider that the appellant had the right to have this evidence admitted, and that if it did not, the discretion which the learned Judge exercised in rejecting it was wrongly exercised. I consider also that there was a substantial wrong or miscarriage in this regard within the meaning of these words as used in O. XXXVII, r. 6 (Rules of Supreme Court).

If a thorough inquiry into the matter *de novo* was to be conducted by the County Court, it was essential that the soundness and correctness of the system followed by the assessor in arriving at 75% of the actual cash value of properties generally should be throughly investigated. This was not done. In my opinion the matter should be remitted to the County Court of District No. 2 for a new inquiry. The order for a new inquiry should, I think, contain a provision that if the Judge who conducts the new inquiry is the Judge whose decision is appealed from he may reconsider the evidence placed before him when he first considered the matter without the witnesses being called again, and shall consider such additional evidence as either party may adduce, saving all just exceptions.

When the matter is inquired into anew, one of the matters which the learned County Court Judge should in my opinion consider is what the actual cash value of Mersey's property within the meaning of the *Assessment Act* is without regarding himself as bound by the agreement of the parties in this regard.

The costs of the appeal to the County Court, and of the appeal to this Court should all abide the event of the new inquiry; that is, they should be paid by the respondent if as a result of the new inquiry the assessment of the property in question is reduced, and by the appellant if it is not reduced, by the County Court.

PARKER, CURRIE, MACDONALD and PATTERSON JJ. concur with ILSLEY C.J.

Case remitted.

HETHERINGTON v. ROBERTS

Alberta Supreme Court, Appellate Division, Clinton J. Ford C.J.A., Hugh John Macdonald, Boyd McBride, Porter and Johnson JJ.A. April 14, 1959.

Vendor & Purchaser IV B, III A—

Contract of sale of subdivided land — Purchaser complaining of acreage — Vendor requiring completion — Telegram from purchaser requiring acreage as if no subdivision or "can only start all over"— Repudiation — Vendor replying agreement terminated — Whether purchaser entitled to specific performance — P made a written offer, which was accepted, to buy from V certain property described in the offer as "Lots in Block 2 & 3 Sub: Glenmorgan Heights Plan 820 K.S. Property municipally known as Approximately 70 acres". While the property as a whole consisted of about 70 acres, it had been subdivided by V and excluding allowances for roads, parks and public works, there were about 49 acres left for building purposes. P had been given a plan of the existing subdivision before he made his offer and he signed the offer (after V signed) knowing (in view of the insertion therein of a plan number) that the land was subdivided. P subsequently discussed with V the possibility of getting the plan cancelled and for a rebate in price in respect of an alleged shortage of acreage. V agreed to look into the matter but found it would take some time to get the existing plan cancelled. Being under heavy pressure from mortgagees and by reason of tax arrears he wanted to get the deal completed and consequently he telegraphed to P, who was out of town, asking for immediate closing and indicating his willingness to entertain a request for a price concession. P telegraphed back that "unless you can deliver seventy acres per original contract sorry can only start all over", and he offered just over half of the price previously agreed upon, payable on terms, and less than half if cash. V replied that he accepted the telegram as termination of the existing agreement. *Held*, **P had repudiated the contract** and V, having accepted the repudiation, was no longer bound. [*Freeth* v. *Burr*, L.R. 9 C.P. 208; *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.*, 9 App. Cas. 434; *James Shaffer Ltd.* v. *Findlay Durham & Brodie*, [1953] 1 W.L.R. 106, apld]

APPEAL by a purchaser from a judgment of Cairns J., dismissing an action for specific performance. Affirmed.

S. H. McCuaig, Q.C., and *D. C. McDonald*, for appellant; *W. G. Morrow*, Q.C., and *W. A. Stevenson*, for respondent.

The judgment of the Court was delivered by

HUGH J. MACDONALD J.A.:—This is an appeal from a judgment

The lawyer as advocate

Rule 10

When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law.[1]

COMMENTARY

Scope of the Rule

1. The principle of this Rule applies generally to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.[2]

Abuse of Process

2. The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect.[3]

The lawyer must not, for example:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;[4]

(b) knowingly assist or permit the client to do anything which the lawyer considers to be dishonest or dishonourable;[5]

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer which give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of such officer;[6]

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;[7]

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct;[8]

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;[9]

(g) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established;[10]

(h) deliberately refrain from informing the tribunal of any pertinent authority which the lawyer considers to be directly in point and which has not been mentioned by an opponent;[11]

(i) dissuade a material witness from giving evidence, or advise such a witness to be absent;

(j) knowingly permit a witness to be presented in a false or misleading way, or to impersonate another;

(k) needlessly abuse, hector, or harass a witness;

(l) needlessly inconvenience a witness.

3. (a) The lawyer who has unknowingly done or failed to do something which, if done or omitted knowingly would have been in breach of this Rule and discovers it, has a duty to the court, subject to Rule 4 on Confidentiality of Information, to disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.[13]

(b) If the client desires that a course be taken which would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to Rule 8 on Withdrawal of Services, withdraw or seek leave to do so.[14]

4. In civil proceedings, the lawyer has a duty not to mislead the court as to the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, shall forthwith reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

Unmeritorious Proceedings

5. The lawyer should never waive or abandon the client's legal rights, for example an available defence under a statute of limitations, without the client's informed consent. In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or tactics which will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.[15]

Encouraging Settlements

6. Whenever the case can be fairly settled, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings.[16]

Courteousness

7. At all times the lawyer should be courteous and civil to the court and to those engaged on the other side. Legal contempt of court and the professional obliga-