and Dunphy J. in *Cameron's* case[30] in relation to elections: that where cases of appointments of up to three years are concerned considerations of administrative convenience will prevail against the competing need of affording members the right to elect their office bearers. It is certainly arguable that in the process the Court has lost sight of the need to preserve membership control of organisations.

THE SECTION 140(1)(c) CHALLENGE

A secondary ground of challenge was that the appointees would, if they sought election at the end of their period of appointment, be deemed to hold office for a period of five years whereas a successful opponent would only be able to serve for three years, and that these provisions were contrary to section 140(1)(c) in that they were oppressive, unreasonable or unjust. Spicer C.J. and Smithers J. dismissed this claim holding that in view of the similarity of the old and new positions which the appointee held they could be regarded as having been elected as state secretaries. This being so, it was neither oppressive, unreasonable or unjust for them, having proved themselves in the offices to be elected for a longer period than an untried person who defeated them.[31] Kerr J. confined himself to holding that there was nothing oppressive, unreasonable or unjust about the initial appointment provisions.[32]

RICHARD R. S. TRACEY*

DONNINI v. THE QUEEN[1]

Criminal Law—Evidence as to character and previous convictions—Leave of court—What constitutes evidence by accused as to good character—Discretion of court—What constitutes cross-examination as to previous convictions —Proper direction by judge where evidence admitted not directly relevant to guilt.

The High Court in a 3:2 decision, confirmed a decision of the Full Court of the Supreme Court of Victoria that the trial judge's grant of leave to cross-examine the accused as to his prior convictions under section 399(e)(ii) of the Crimes Act 1958, and the evidence given in cross-examination, did not cause the trial to miscarry.

This decision is a disquieting example of the failure of section 399(e) to protect an accused from the possibility of a trial largely influenced by his previous convictions, than the merits of the present charge.

The accused was convicted of armed robbery of a bank and illegal use of a motor car. He denied any participation in the crime, including a confession of such participation allegedly made to police witnesses. Prior to the robbery he had lived in a flat rented from a Mrs. Brading, who was called as a witness by the Crown to prove the circumstances in which the accused left the flat on the day following the robbery. The accused's counsel, during cross-examination of the landlady, asked her:

[30] (1959) 2 F.L.R. 45.
[31] (1969) 15 F.L.R. 215, 226-7.
[32] *Ibid.* 237-8.
* LL.B. (Hons), Senior Tutor in Law in the University of Melbourne.

[1] (1973) 47 A.L.J.R. 69. High Court of Australia; Barwick C.J., McTiernan, Menzies, Walsh and Mason JJ.

> During the time the accused was staying at the flat, had you formed any opinion as to his character?

to which she replied:

> I would have imagined that he was quite a shy young man. He was always very pleasant when we said 'Good morning'.

This question was the basis for giving the prosecutor leave to cross-examine the accused on his prior convictions pursuant to section 399(e)(ii).

The prosecutor was persistently questioning the accused as to why he rented the flat under an assumed name, when the accused stated that he wished to tell the jury of previous shopbreaking and drug convictions.[2]

There were four main issues considered by the High Court—firstly, a majority of the court held that the trial judge's use of his discretion in granting permission to cross-examine the accused as to his previous convictions was erroneous.[3] Menzies J. held that it was erroneous, but that in any case, permission should have been refused because the question asked by the accused's counsel of the landlady was not one to establish the accused's good character.[4] He was the only member of the court who considered that the question did not intend to help establish the good character of the accused. Although it is reasonable to accept the other four judges' opinion that the rather incautious question was asked to show the accused in a good light, the attitude of Dixon C.J. in *Dawson v. R.*[5] should have been heeded.

> It is the thesis of English Law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details amounting to the crime, and not to be inferred from the character or tendencies of the accused . . . [The Accused] is protected accordingly against the disclosure of a discreditable past, unless in exceptional conditions.

Walsh J. also considered that the trial judge had erroneously exercised the discretion. Applying the criteria to be followed in the proper exercise of the discretion established in *R. v. Brown*[6] and accepted by the High Court in *Dawson v. R.*,[7] he found that in granting the permission the trial judge gave undue weight to the adverse effects which the evidence as to the accused's good character might have on the Crown's case and insufficient weight to the prejudice to the accused that might result from cross-examination as to prior convictions.[8] Mason J. agreed the leave should not have been granted

[2] (1973) 47 A.L.J.R. 69, 70-1 *per* Barwick C.J.

[3] Menzies, Walsh and Mason JJ.

[4] (1973) 47 A.L.J.R. 69, 76. He cited *R. v. Crawford* [1965] V.R. 586. In that case the accused was charged with fraudulently obtaining money. He called his bank manager as a witness to prove that he had previously conducted several satisfactory financial transactions. It was held that he had not put his character in issue because the evidence of honest transactions was a necessary part of the defence that the accused was conducting a *bona fide* business. This case, therefore, is distinguishable from the present situation, for the question asked of the landlady was not part of the accused's defence that he was not at the bank at the time of the robbery. But probably Menzies J. referred to the case as an example of the rule that only in exceptional cases should cross-examination of the accused as to prior convictions or bad character be allowed, and the mere fact that some questions are asked by the accused's counsel which tend to show the accused in a good light, does not *prima facie* allow cross-examination of the accused under s. 399(e)ii. See *R. v. Crawford* [1965] V.R. 586, 591 *per* Smith J.

[5] (1961) 106 C.L.R. 1, 16-17.

[6] [1960] V.R. 382.

[7] (1961) 106 C.L.R. 1.

[8] (1973) 47 A.L.J.R. 69, 78.

because the authorities established that the introduction of bad character is 'exceptional'—by Dixon C.J. in *Dawson v. R.*[9] and by the court in *R. v. Crawford*[10] and applying the criteria in *R. v. Brown*[11] held:

> To my mind, the risk of unfair prejudice to the applicant was far greater than the prospect that he would derive advantage from Mrs. Brading's evidence, for that evidence was of little value.[12]

Barwick C.J. however held that the trial judge's use of the discretion was not erroneous but only unwise, even though he acknowledged the insignificance of the landlady's remarks: 'But though the advantage was small and the potential harm to the applicant great, in my opinion the exercise of discretion did not miscarry.'[13] In so holding, Barwick C.J. is denying one of the criteria accepted by the High Court in *Dawson v. R.*[14] as being relevant to the proper exercise of the discretion in section 399(e)(ii), and is willing to allow the accused to suffer the mistake of his counsel: 'In particular, I do not think that the lack of caution in counsel for the applicant ought to be accounted a reason for refusing the permission.'[15] Thus, as well as asking how 'unwise' does use of the discretion have to be before it is considered erroneous, on the authorities it would appear that as to the question of whether the trial judge's exercise of his discretion was erroneous as a matter of law, Chief Justice Barwick's judgment is not sound. McTiernan J. offers no reasons for his decision that the trial judge was not in error in granting the Crown permission to cross-examine the accused as to his antecedents.

A second issue before the court was whether an erroneous use of the discretion in section 399(e)(ii) by itself, would amount to a miscarriage of justice. This question was considered by the three who held that the exercise of the discretion was erroneous. Menzies J. held that it would not, for the critical question was not whether in granting the permission to cross-examine, the trial judge was in error, but whether the questions were asked contrary to the terms of section 399(e)(ii). He considered the questions asked of the accused as to his reason for using an assumed name, were not questions prohibited by the section because they did not necessarily concern the past offences or bad character of the accused—they might simply have been directed to destroying the credit of the accused.[16] But considering the reason for which the prosecutor sought leave to cross-examine the accused, the intended objective of the questions was not a matter of speculation, and what better way to destroy the credit of the accused than by eliciting a string of previous convictions. Walsh J. agreed that the erroneous granting of permission to cross-examine did not alone cause the trial to miscarry, but if it had any relevant effect upon the course taken by the prosecutor in questioning the accused, or upon the course adopted by the accused himself in referring to his convictions, then the court ought to hold that a miscarriage had occurred. There is a *prima facie* assumption of miscarriage where there is an erroneous use of the discretion, rebutted only by

[9] (1961) 106 C.L.R. 1, 16.
[10] [1965] V.R. 586.
[11] [1960] V.R. 382.
[12] (1973) 47 A.L.J.R. 69, 82.
[13] *Ibid.* 72.
[14] (1961) 106 C.L.R. 1.
[15] (1973) 47 A.L.J.R. 69, 72. Barwick C.J. here stated that the criteria of *R. v. Brown* [1960] V.R. 382 was the law to be applied, but the statement cited earlier (*supra* n. 11) is a denial of such criteria.
[16] Menzies J. did, however, doubt whether the questions asked before the accused volunteered his prior convictions were not 'as to bad character'.

clear evidence that the error did not affect the course of the trial.[17] Mason J. also agreed with Menzies and Walsh JJ., holding that there was a miscarriage of justice because evidence of the accused's prior convictions was obtained by cross-examination of him in the exercise of the leave which was erroneously granted, that is, it was not the erroneous granting of leave itself that caused the trial to miscarry, but the consequences flowing from it.[18]

A third issue considered was whether the Crown had made use of the permission granted to cross-examine the accused as to his prior convictions. Here the court split 2:2.[19] Barwick C.J. assumed a narrow interpretation of section 399(e)(ii), holding that none of the questions actually asked tended to show that the accused had committed or been convicted of some other offence—'It is protection from such interrogation that s. 399(e)(ii) affords',[20] even though he admitted that the prosecutor's purpose in asking the reason for the accused's assumption of a false name was possibly to 'place him in a position where he might find it *inevitable* that he should disclose the convictions.'[21]

This interpretation in effect denies the accused any protection intended by section 399(e). Menzies J. agreed with Barwick C.J., stating that the evidence of the prior convictions was clearly volunteered by the accused and was not in response to any question asked in contravention of section 399(e)(ii).[22]

The dissenting judgments of Walsh and Mason JJ. offer a more reasonable interpretation of the section, considering its purpose. Acknowledging the effect of pressured questioning by the prosecutor of the accused, and the accused's awareness of the leave granted to cross-examine him as to his antecedents, Mason J. held that:

> Although there the question asked . . . did not contain any express or implied reference to prior convictions, it was a question which, if answered directly and truthfully, would yield an answer disclosing past convictions and a criminal record. In my opinion, that was enough to bring it within the statutory prohibition in the absence of leave.[23]

Mason J. considered the effect of the questions asked by the prosecutor, rather than the purpose with which they were asked, was the most important consideration in determining whether they answered the statutory description.[24] Walsh J. assumed the same approach:

> it cannot be concluded with any degree of satisfaction that the application for leave, upon which [the applicant] had heard an extended debate, and the grant of such leave, played no part in bringing about the disclosure of the convictions.[25]

This is merely a different expression of the possibility, admitted by Barwick C.J., of the prosecutor's questions placing the accused in a position where he finds it inevitable that he should disclose the convictions. Surely the result is

[17] (1973) 47 A.L.J.R. 69, 78.
[18] (1973) 47 A.L.J.R. 69, 82.
[19] Barwick C.J. and Menzies J. held that it had not, *cf.* Walsh and Mason JJ. McTiernan J. made no reference to this question, merely holding that the questions asked in cross-examination of the accused were properly limited to the issue whether or not the accused was that man, he having set up as a defence that he was not present at the bank at the time: (1973) 47 A.L.J.R. 69, 75.
[20] (1973) 47 A.L.J.R. 69, 72.
[21] *Ibid.* 72. The italics are mine.
[22] *Ibid.* 76.
[23] *Ibid.* 82.
[24] *Ibid.*
[25] *Ibid.*

the same whether achieved by direct or indirect questioning. A decision that the admissions were forced from the accused by a skilful prosecutor is to acknowledge the reality of cross-examination tactics.

The fourth issue considered by three members of the court was whether the trial judge has a duty to direct the jury as to the proper use to be made of evidence elicited from cross-examination of the accused as to his prior convictions or bad character.[26] Barwick C.J. considered this question the one of most public importance raised in the case and indeed based his decision upon it:

> the appeal should be dismissed because in the circumstances of the case, the language used by the trial judge in his charge to the jury was sufficient to preclude their use of the evidence of the prior convictions as evidence of propensity on the part of the applicant to commit the crime with which he was charged.[27]

The Chief Justice was very concerned to protect the 'settled policy of the law' that in general, evidence of a propensity to commit a crime is not for the consideration of the jury. He was keenly aware of the difficulties incurred under section 399(e)(ii) in directing the jury as to the subtle, if not unreal, distinction between using evidence of the accused's prior convictions or bad character to attack his credibility as a witness, and using it to prove the guilt of the accused on the present charge. It is a natural tendency of jurymen to reason towards guilt by the use of the fact of prior conviction as indicative of a disposition to crime on the part of the accused and Barwick C.J. considered this tendency was to be countered by imposing upon the trial judge a duty, not a mere discretion, to clearly and emphatically direct the jury as to the proper use of such evidence.[28] Proper use of evidence of prior convictions is a matter of great importance in guaranteeing accused persons a fair trial and justifies the sense of public importance that Barwick C.J. injects into his judgment. Unfortunately no other member of the High Court approached the matter with as much emphasis. Menzies J. agreed with the Chief Justice, but only *dicta,* for he believed the direction as to previous convictions was favorable to the accused here, he having volunteered such evidence:

> until the problem arises for decision in ascertained circumstances, I would not go beyond the generalisation that, in a case, where evidence has been admitted which does not tend to prove the guilt of the accused, but the jury might, without some explanation, regard it as doing so, the direction should explain the significance of the evidence, and warn against its misuse.[29]

Walsh J. disagreed with Barwick C.J., although he confines his comments to the circumstances of the case and does not attempt to suggest a general rule. '[I]n my opinion, the circumstances did not make it obligatory on the learned trial judge to give additional directions concerning the evidence . . . of his prior convictions.'[30]

[26] Barwick C.J., Menzies and Walsh JJ.

[27] (1973) 47 A.L.J.R. 69, 75—the jury were told that they were not entitled to draw any adverse inference against the accused because of his voluntary admission of prior convictions.

[28] *Ibid.* 73. He distinguished authorities that suggested otherwise on the basis that evidence in those cases was admitted for a purpose other than that of impugning indirectly the credit of the accused by denying his claim to good character, *e.g. O'Leary* v. *R.* (1946) 73 C.L.R. 566.

[29] *Ibid.* 77.

[30] *Ibid.* 79.

He argued that if the prior convictions had been properly admitted instead of by the erroneous exercise of the trial judge's discretion, the direction would be very favourable to the accused, but in the present circumstances it afforded no protection to the accused from prejudice resulting from the introduction of his antecedents as evidence. It is surprising however that Walsh J. did not state his approval of a general rule that it is the duty of the trial judge to warn the jury of the proper use of such evidence, because it is a possibility that a jury will confuse such evidence of prior convictions as proof of a criminal propensity rather than as only being relevant to the accused's credibility as a witness, whether or not the discretion was erroneously exercised. And not in every case will the trial judge's exercise of his discretion under section 399(e)(ii) be held to have been erroneous and thereby rendering such a direction superfluous.

A possible difficulty arises in Chief Justice Barwick's judgment. The relevance of the accused's denial of a confession to the police is not clear in his judgment. In holding that the question asked of the landlady by the accused's counsel was the basis for giving the prosecutor leave to cross-examine the accused, Barwick C.J. also added, as what seemed to be a further justification for granting leave, that at the stage at which the permission to cross-examine was sought, the accused had placed himself in contest with police witnesses on a most substantial matter and therefore his credit was a matter of concern.[31] But surely this is to confuse the two limbs of section 399(e)(ii). A denial of a confession by the accused involves the question whether 'the nature or conduct of the defence is such to involve imputations on the character of the prosecutor or the witnesses for the prosecution'. A mere denial of a confession, no matter how emphatic, does not cause the accused to lose the shield of section 399(e),[32] and the denial here was not the basis of the accused's defence. Therefore, although Chief Justice Barwick's reason for holding that the prosecutor was given leave to cross-examine the accused as to his antecedents appears primarily to have been the question asked of the landlady, his incidental reference to the accused's denial of the confession is somewhat confusing.

The issues considered in this case were very relevant to the verdict arrived at by the jury, for the evidence relied upon by the Crown was not conclusive of guilt.[33] Thus evidence of the accused's prior convictions, and its proper use by the jury, was of great significance in the determination of a fair and reasonable verdict.

The contrasting interpretations of section 399(e)(ii) indicate an unsatisfactory operation of the section. Prejudice arising in jurymen from evidence of prior convictions or bad character must be mitigated by a cautious exceptional use of the discretion, a more reasonable interpretation of what amount to 'questions' within section 399(e), and by imposing a duty on the trial judge to warn the jury of the proper use of evidence elicited from the accused.

RUTH PEARCE

[31] *Ibid.* 72.

[32] *Dawson v. R.* (1961) 106 C.L.R. 1, 18.

[33] The Crown relied upon the identification of the accused by two bank clerks—one was mistaken as to the colour of the accused's eyes and to his height, but affirmed that he was the smaller of the two robbers; the other could not identify the accused in a line-up, but stated that he was the smaller of the two robbers. Further evidence included the alleged confession by the accused; the finding of a pair of shoes in his flat which, according to the bank clerk, were 'very much like' the shoes worn by the smaller of the two robbers and reasonably fitted the accused; finding a newspaper in the accused's flat; and the trip to Sydney by him the day after the robbery.

BOOK REVIEWS

Final Appeal: A Study of the House of Lords in its Judicial Capacity, by LOUIS BLOM-COOPER and GAVIN DREWRY. (Clarendon Press, 1972), pp. i-xvi, 1-584. Recommended Australian price $31.00.

This is an excellent account of the practical operation of the highest tribunal in the United Kingdom in modern times. The fruit of five years of devoted study, it is a model of accurate research which every lawyer will admire, every law teacher and student will find both delightful and useful. The learned authors have not only collected a mass of valuable information; they have also arranged it to the best advantage and described its import in crisp, lucid fashion. To fifty-four tables they have added 116 pages of appendices and a further 46 pages of indexed materials. Yet the 422 pages of the text make easy reading, so intelligent are the comments, so pertinent the conclusions drawn from cases and figures, so smooth the writing.

One original reason for such an elaborate study may have been the controversy, endemic for a century and a half, as to whether the House of Lords, both in its legislative and its judicial capacities, had ceased to be worth preserving. (Weston's study of the nineteenth century debates has set out the constitutional debates.)[1] And the authors do devote the first six chapters to such kindred topics as the history of the judicial House of Lords, the nature of the appellate process, judicial review and *stare decisis*, the judicial decision-making process in various jurisdictions and the statutory basis of the modern structure of the role of the Law Lords. But the authors must have quickly realized the need not for quick conclusions about the future of the Upper House but for a complete investigation of its achievements, especially in the years 1952-68 for which pretty complete data are available.

Briefly, the proposal debated recently has been that the appeal system in the United Kingdom should be simplified by setting up, on the apparently rare occasions that might arise, a special Appeals Board of the Court of Appeal itself, with five judges. The authors disposed of that suggestion in an article they contributed to the *Modern Law Review* in 1969.[2] In this book they have discovered numerous other absorbing topics and discussed them fully. Thus their Appendix 2(a) gives a complete list of every appeal to their Lordships' House 1952-68: its title, when reported, subject matter, outcome—and interesting remarks. This is a mine of information for future research workers. And the valuable Table 50 gives the summary of civil appeals to the Lords in the same period. What it reveals is most significant. Of 349 Civil Appeals from the Court of Appeal 126 were allowed. Of all appellants (466) some 183 succeeded. These are perhaps surprising figures: a one-in-three success-tale. But these figures need further interpretation. In 87 non-Scottish reversals there were dissents in the House of Lords itself, one dissent in 44 cases, 2 dissents in 43 cases (see Table 22). Of these 87 dissents only 18 were, however, fundamental conflicts on legal issues, 15 involved inferences from primary facts; 44 turned on differences of opinion on interpretations of documents, statutes or contracts (Table 23). How does one account for these divergences of opinion?

One could not even attempt an answer here. It is not surprising that English Judges disagree on documents, so do all lawyers in all jurisdictions; and 30 per cent of English appeals have been Revenue Cases (p. 317), notoriously difficult. (In the Privy Council between 1966-71, despite the tradition of unanimity, there were 14

1 C. C. Weston: Constitutional Theory and the House of Lords (Routledge, 1965).
2 (1971) 34 *Modern Law Review* 364.

dissenting judgments.) And any disagreements are not on the principles of law as such, but on which of two valid principles is the more relevant to the set of facts. Nor can one attribute differences to the education of their Lordships. Of the 63 Lords of Appeal in Ordinary since 1876, at least 18 had fathers with some legal background; most came from a wide range of middle-class families (few from either aristocratic or lower-income groups); of the 61 whose universities are known 30 were at Oxford and 16 at Cambridge. Some 30 are known to have taken a first-class degree (most in classics or other humanities (pp. 165-7)), though more recently many studied law at universities. Nor probably can one see the answers in the varying proportions, at given times, of Chancery Judges to common law Judges.

What does emerge, among other things, is the authors' conclusion that the House of Lords does perform a very useful function. '. . . in terms of expense and delay, there is little cause for complaint. Indeed the House of Lords is remarkably cheap and quick, considering the high quality of service that it provides.' (p. 236) Again, they stress that it would be 'easy to over-estimate the importance of this single and rather crude factor, party politics, as a part of the inarticulate major premise which shapes the final product of a judge's reasoning.' (p. 169) There seems very little evidence of this kind of prejudice among the highest English Judges, certainly in the last half-century, despite their general middle-class origins. More effective may be the prestige and energy of individual men, as we in Australia well know. Lord Reid has been a powerful figure in debate and judgement; he has been present at about 70 per cent of all appeals 1952-68 and has delivered 14 per cent of all the full judgements in non-Scottish appeals . . . 'a phenomenal record' (p. 175).

The likely reader of *Final Appeal* would profitably consider the criticisms made of it by Sir Victor Windeyer in a recent review. While acknowledging that 'this is an informative and thought-provoking but formidable book',[3] he is not happy with the authors' use of what is called 'sociologese' or with some of their views on precedent. He is more pleased with their recognition that 'it is more relevant to look at the legal background and experience of Law Lords than to speculate on political bias which may or may not infect or shape Judicial attitudes'. Sir Victor willingly admits that 'a Judge's total experiences do, no doubt, "affect" rather than "infect" his intellectual and emotional responses',[4] though part of his experience is that of obedience to the law. He has also some pertinent observations on minor references to decisions of the High Court of Australia. His final judgment is that 'any determined and discriminating reader will gain from it much good food for thought',[5] despite some complexities of language and mathematical tables.

As other critics point out, the crux of the book is whether a third appellate tier is needed. Blom-Cooper and Drewry would like to see the House being somewhat more 'legislative' to rid law of manifest defects—and yet their Lordships have been very cautious in doing just that. The authors clearly, however, approve the continuance of the third tier, despite its conservatism; though one critic, J. A. O. Shand, considers the evidence so amassed points rather to 'abolition and not just reform'.[6] So the debate continues.

So whatever may happen to its legislative scope, there is evidently a strong case for retaining a separate body of judges with a separate role to decide exceptionally difficult and important issues of fact and law—judges with more time than the highly competent, but very busy, members of the Court of Appeal. This we gather with interest from Blom-Cooper and Drewry—thanks to their skill we can learn a great deal more about courts of final appeal as great social institutions. What we in Australia need now is a similar study of the High Court of Australia. Able pioneers like Professor G. Sawer have blazed some paths already; what is needed is a properly equipped expedition to open up the land, analyze the basic information, get out the figures, put up balanced arguments; thus we could explore further for ourselves the territory of our own Final Appeal system.

F. K. H. MAHER*

3 (1973) 89 *Law Quarterly Review* 282.
4 *Ibid* 286.
5 *Ibid* 288.
6 (1973) *Cambridge Law Journal* 152, 153.

* M.A. LL.B., (Melb.), Sir George Turner Lecturer in Law in the University of Melbourne.