a State may impose charges on inter-State transport by appropriately expressed enactments if only the charges are not obviously out of all proportion to the cost of the maintenance of highways. One cannot cavil at social considerations overruling logical *elegantia juris*; but one might be permitted to express the respectful wish that the process were not accompanied by frequent protestations that logical analysis operating with purely legal propositions holds a sufficiently illuminating candle of absolute truth. "Legally" it should be open for anybody aggrieved to prove, for example, that the moneys derived from the transport exactions are disbursed largely on maintaining routes seldom used by inter-State vehicles; and this should lead to a refund of the charges. "Legally" again, it should be possible for an aggrieved person to query each stage of the application and administration of the moneys. As a practical matter, however, the position is that the State can do as it likes short of imposing charges which are *ex facie* preposterous; and that in most cases the potential plantiff will lack all relief.[47]

In fine, *Armstrong's Case*[48] shows that evidence as to the economic and financial basis of the tax will be admitted if offered; but the *Sneddon Cases*[49] leave us with the question, What purpose is really served by offering it?

R. P. MEAGHER. *

IMPUTATIONS ON THE PROSECUTION

R. v. *DUNN; R.* v. *COOK*

In the conduct of a criminal trial it has long been recognised that the character or antecedents of the accused should be treated as irrelevant except in special circumstances. Whether these matters are introduced on the question of guilt or only for testing the accused's credit as a witness, the danger of prejudice to him in the eyes of the jury makes it desirable that such evidence be admitted with great caution.

The problem in its present form did not arise until 1898 when, in England, by s.1 of the Criminal Evidence Act,[1] the accused was enabled to give evidence on his own behalf. In order to prevent his complete assimilation to the position of an ordinary witness certain protection was deemed necessary and this was afforded in proviso (f) to the same section:

> A person charged and called as a witness in pursuance of this Act shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless . . .
> (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. [2]

A similar provision has been adopted in other Australian States[3] but not

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[47] Not the least curious feature of the cases is the paradox involved in that, while the court will not take judicial notice of what a State thinks is a reasonable exaction (see *Hughes & Vale Case (No. 2)* (1955) 93 C.L.R. 127), it will do so in effect if the draftsmen are astute enough. It is ineffectual to say "A charge of x pence per ton per mile will be payable; such charge is reasonable"; but it may be effectual to say "A charge shall be made for reasonable wear and tear of the roads; that charge will be x pence per ton per mile multiplied by 40% of the vehicle's loading capacity; all charges shall be payable into a fund which shall only be expended on road maintenance".

[48] *Supra* n. 23. [49] *Op. cit.* n. 1.

* B.A., LL.B. Formerly Student Editor-in-Chief, *Sydney Law Review*, 1957.

[1] 61 & 62 Vict., c. 36.

[2] *Id.* s.1(f)(ii).

[3] Crimes Act 1958 (Vic.), s.399(e)(ii); Evidence Act, 1929 (S. Aust.), s.18(vi)(b);

in New South Wales, where s.407 of the Crimes Act, 1900-1957[4] after enacting that an accused shall be competent to give evidence at his own trial merely provides: "No such person charged with an indictable offence shall be liable to be questioned on cross examination as to his previous character or antecedents without the leave of the judge."[5]

The interpretation of these respective subsections has recently been under consideration in the New South Wales and English Courts of Criminal Appeal.

The facts of *R.* v. *Dunn*[6] involved the complete incompatibility of the evidence given by the police with that given by the accused, who had been convicted on a charge of larceny of eleven radio sets. In the view of the court his evidence went beyond a question of mistake or inaccuracy or simple denial of facts sworn to by the detectives involved in the case. Not only did he deny that he had made any admission of guilt to them, but he also gave evidence of their reprehensible conduct in detaining him at the police station for four hours before informing him of the nature of the charge. The Chairman of Quarter Sessions, regarding the nature of this evidence and of the accused's alibi as amounting to an allegation that the police witnesses had fabricated the charge, exercised his discretion under s.407 to allow cross-examination as to the antecedents and prior convictions of the accused. The Court of Criminal Appeal held he was entitled to do so.

The Court (consisting of Street, C.J., Owen and Herron, JJ.) adverted to the fact that the rules governing the exercise of the judge's discretion under s.407 have not been codified in this State, but directed that guidance should be drawn from the practice of the English courts.[7] This reference means that New South Wales courts should adopt as implicit the exceptions in proviso (f) of the English Act. As the Court here realised, the dilemma to be faced, arising from the words of proviso (f)(ii), was that on a literal construction a simple denial of the evidence for the prosecution may *per se* involve also an imputation upon the character of one at least of its witnesses; and the Court also realised that some means must be evolved to avoid this inherent difficulty.

In the present case the Court emphasised the allegations of fabrication of evidence by the police and relied on the practical conclusions reached by Lord Goddard in *R.* v. *Clark*,[8] a case of similar circumstances:

> If a prisoner . . . alleges that police have concocted a statement he does so at the risk of having his character laid bare, if he has a character which it is his wish to conceal, because clearly if misconduct is to be attributed to police officers the jury is entitled to know the character of the man making the imputation.[9]

More recently the English Court of Criminal Appeal has again had occasion

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Evidence Act, 1906 (W. Aust.), s.8(e)(ii); Evidence Act 1910 (Tas.), s.85(1)(v)(b). The last two cited Acts have the further provision that the prosecution may call evidence as to character even though its case is closed. Queensland appears to have no comparable legislation.

The effect of the above provisions is picturesquely described by an earlier commentator (B. Buller-Murphy, "'People in Glass Houses Should Not Throw Stones' *Curwood* v. *The King*" (1945) 19 *A.L.J.* 138, 139): "The first part may be said to invest the accused with a new weapon from an ancient armoury; the second to furnish him while wielding it with a shield almost as potent to protect him; and the third part to provide for circumstances in which the newly fashioned shield may be torn from his grasp or carelessly flung away."

[4] Act No. 40, 1900—Act No. 13, 1957. [5] *Id.*, s.407(1).

[6] (1958) 75 W.N. (N.S.W.) 423.

[7] This direction does not appear to be a dictate of necessity. Considering the terms of s.407, it is not easy to see the reason for the implied statutory qualification placed upon it by the courts, especially as the adoption of this course actually gave rise to the dilemma confronting the court.

[8] (1955) 2 Q.B. 469.

[9] *Id.* at 479, cited in *R.* v. *Dunn*, *supra* n. 6, at 425. This statement of Goddard, L.J. may be justified in practice, but it is not logically clear why the accused's own character should thereby become relevant and admissible. The sole justification appears to lie in the words of the legislation. There is a clear difference between this situation and that

to consider this question. In *R.* v. *Cook*[10] the appellant, who was conducting his own defence on a charge of false pretences, suggested, in answer to police evidence of a statement admitting guilt, that the statement had been extorted from him by means of a threat that if he did not speak, his wife would be charged. Counsel for the prosecution then indicated to the presiding Chairman of Quarter Sessions that he wished to put "certain further questions". The Chairman replied that although he thought such questions were not really necessary, counsel was strictly entitled to put them as the matter came within exception (ii) to s.1 (f). Evidence was then adduced under cross-examination of a long record of convictions for dishonesty.

The appellate court, consisting of five judges, in a judgment delivered by Devlin, J., held that when, as here, the nature of the defence involved an imputation against the character of a witness for the prosecution, the issue whether cross-examination as to character was to be permitted was at the trial judge's discretion. As it appeared that the judge below, viewing the question as settled by law, had not exercised his discretion, the Court of Criminal Appeal saw itself free to undertake this task. This it did in favour of the prisoner mainly on the ground that the judge had given no warning to the accused of the dangers involved in his line of defence. However, as the Court was also satisfied that no miscarriage of justice had occurred it dismissed the appeal.[11]

On the main question under appeal of the effect of s.1, proviso (f) (ii), the Court abided by the rule established earlier in *R.* v. *Hudson*[12] and said:

> The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile, and now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced there is nothing to be gained by seeking to strain the words of s.1 proviso (f) (ii) in favour of the defence. We think therefore, that the words should be given their natural and ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of s.1 proviso (f) (ii) that would be too severe.[13]

This approach clearly places the responsibility on the trial judge to determine whether the instant situation warrants depriving the accused of the shield contained within the former part of the section. In the words of Singleton, J. in *R.* v. *Jenkins*:[14]

> He may feel that even though the position is established in law, still the putting of such questions as to the character of the accused may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused almost impossible.[15]

Since the matter is essentially one of holding the scales evenly in the interests of a fair trial, the Court in *R.* v. *Cook* found it both impossible and unnecessary to lay down any definite rules for guidance on this crucial question. However, the Court did indicate that the proper approach was for the judge to extend protection to an accused genuinely attempting to develop a line of defence, and to withdraw it in the case of "a deliberate attack being made on

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referred to in the preceding part of s.1 (f) (ii) when "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character or has given evidence as to his own good character." Here the introduction of the accused's character is voluntary and self-imposed. Discussed in *Maxwell* v. *D.P.P.* (1935) A.C. 309, 318-19.

[10] (1959) 2 All E.R. 97.

[11] Under Criminal Appeal Act, 1907 (Eng.) 7 Ed. 7, c. 23, s. 4. *Cf. R.* v. *Turner* (1944) K.B. 463, 471.

[12] (1912) 2 K.B. 464.

[13] (1959) 2 All E.R. 97, 101.

[14] (1945) 114 L.J.K.B. 425, 432, cited *R.* v. *Cook* (1959) 2 All E.R. 97,100.

[15] *Id.* at 431.

the conduct of the police officer calculated to discredit him wholly as a witness."

Unless some qualification is implied in the type of situation involved in these cases there is a recognised danger that police officers would be tempted to extract confessions by violence from accused persons of bad character, who would then as a practical matter be entirely prevented from challenging the voluntary nature of the confession by the realisation that evidence of their own criminal record would thereby be admitted.[16] The effect of this latter evidence on the jury and the extreme prejudice, if not disaster, resulting to the prisoner are obvious. This is hardly mitigated by the judge's warning to the jury that this evidence is only relevant to the question of the accused's credibility and not to his propensities or the likelihood of his guilt.[17] For all practical purposes these two issues are blended once the facts have been placed before the jury. Further, if the accused is not permitted to make a legitimate use of his right to give evidence without exposing his character, use of it would often be under a disadvantage so crushing that he would at times be compelled to abandon it.[18]

The difficulties and inconsistencies appearing from the earlier reported cases interpreting the English subsection have been adequately canvassed,[19] but it may be useful to sketch briefly the background to the problem. Broadly, two main views had emerged. The first, formulated by Channell, J., in *R.* v. *Preston*[20] was that an accused could safely make imputations which were connected with the facts or evidence of the case, but not if they amounted to gratuitous aspersions on the general character or conduct of the prosecution or its witnesses. The second, based on a strict view of the words of the section, was that *any* imputation made as an integral part of the defence became a positive ground for admitting evidence of the accused's character. This latter view was preferred in *R.* v. *Hudson*[21] where the court expressed its conclusions as follows:

> We think that the words of the section, 'unless . . . the nature or conduct of the defence is such as to involve imputations' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily', or 'unjustifiably' or 'for purposes other than that of developing the defence' or other similar words.[22]

Although no doubts have since been expressed on the correctness of *R.* v. *Hudson* as a principle of interpretation, the underlying trend of subsequent judicial

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[16] *O'Hara* v. *Lord Advocate* 1948 S.C. (J.) 95, 97, *per* Lord Justice-Clerk, and the dilemma within the facts of *R.* v. *Eidenow* (1932) 23 C.A.R. 145, where the defence was in effect withdrawn from the jury because the accused, on a charge of fraudulent conversion, was warned by counsel of the consequences of his allegation that the prosecutor had wrongfully retained the money. It was the situation not the tactics of counsel which was the mischief.

[17] Though it is his duty to do so. *R.* v. *Hutton* (1936) S.R. (N.S.W.) 534, *Curwood* v. *The King* (1944) 69 C.L.R. 561, 578. On the question whether cross-examination under the section goes to credibility or to guilt or to both, see *Maxwell* v. *D.P.P.* (1935) A.C. 309, 321, and comment, J. Stone, "Cross-Examination by the Prosecution" (1935) 51 *L.Q.R.* 441; *id.*, "Further Problems on the Interpretation of the Criminal Evidence Act, 1898, s.1, proviso (f)" (1942) 58 *L.Q.R.* 369.

[18] This latter consideration was the prime reason for insertion of Rule 106(3) into the Model Code of Evidence of the American Law Institute, which forbade evidence as to the accused's conviction of crime unless he first introduced evidence for the sole purpose of supporting his credibility. The drafters also recognised the acknowledged misuse of evidence of conviction by the jury.

[19] See J. Stone, articles cited *supra* n. 17; *Curwood* v. *The King* (1944) 69 C.L.R. 561, esp. judgment of Latham, C.J. *O'Hara* v. *Lord Advocate* 1948 S.C. (J.) 90; W. Paul, "Cross-Examination of Accused Persons" (1935) 9 *A.L.J.* 177.

[20] (1909) 1 K.B. 568.

[21] (1912) 2 K.B. 464, where a court of five judges was convened to consider the question. (A similar number reconsidered the matter in *R.* v. *Cook* (1959) 2 All E.R. 97.)

[22] (1912) 2 K.B. 464, 470, cited in *R.* v. *Cook supra*, at 100.

effort appears to be towards the restriction of the right of the prosecution to cross-examine in matters falling within the statutory exception. These efforts have been prompted by a recognition of the consequences stated above.[23]

In cases of rape *R.* v. *Turner*[24] established a clear qualification to the strictly logical method of interpretation. The rule there enunciated appears to be that where the imputation is directed to establishing the consent of the prosecutrix, the absence of which is an essential ingredient of the charge, the accused does not lose the protection afforded by the opening words of the proviso. Humphreys, J. stated: "In our opinion this is one of the cases where the court is justified in holding some limitation must be put upon the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament."[25] As a necessary exception to *R.* v. *Hudson* this ruling has received general approval, but a further question has arisen from it as to the desirability of its extension to all cases where a witness for the prosecution is cross-examined only with respect to his conduct at the time of the relevant offence.

This question assumed the proportions of a major issue when in the course of delivering judgment in *Stirland* v. *D.P.P.*,[26] Viscount Simon, L.C. concisely enunciated the following broad proposition: "An accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *R.* v. *Turner*."[27]

Could this *dictum* be regarded as an attempt completely to restate the rules relating to cross-examination of the accused under s.1(f)(ii), "to replace the multi-coloured lights of the decided cases"?[28] The authoritative answers appear to be that the proposition so stated is too wide to be reconciled with the plain words of the subsection or with the mass of earlier authority, especially as it would be impracticable for the court to determine whether the conduct of the defence in a particular case was "proper". This view is most clearly expressed in the words of Latham, C.J., in *Curwood* v. *The King*:[29]

> The statement of the Lord Chancellor[30] should not in my opinion, be regarded as laying down a general and very far-reaching proposition which overrules by mere implication and *sub silentio* the many authorities above cited which have adopted the rule that injurious reflections on the character of the prosecutor or his witnesses, even though necessarily involved in the defence actually raised, do operate to admit evidence with respect to the character of the accused.[31]

The High Court in *Curwood* v. *The King*[32] declared this to be the true position. It held that the trial judge had properly allowed cross-examination of the accused under the Victorian equivalent of s.1, proviso (f)(ii)[33] after allegations had been made that a tendered confession was extorted by the threats and physical violence of the police.[34] An identical conclusion was reached in

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[23] In *Maxwell* v. *D.P.P.* (1935) A.C. 309, 319, Viscount Sankey stated that the prohibition within the section "is universal and absolute until the exceptions come into play" but "it does not follow that the permission is as absolute as the prohibition." In *R.* v. *Butterwasser* (1948) 1 K.B. 1, the Court of Criminal Appeal refused to allow evidence as to the prior convictions of the accused when he had not gone into the box (the attacks on the prosecution having been made by his counsel). Lord Goddard, C.J. at 7 said: "The reason why if he gives evidence he can be cross-examined if he has attacked the witnesses for the prosecution is because the statute says he can." In *R.* v. *Woods* (1956) S.R. (N.S.W.) 142, it was ruled that answers given by the accused under cross-examination are *prima facie* not part of "the nature or conduct of the defence."

[24] (1944) K.B. 463. [25] *Id.* at 469. [26] (1944) A.C. 315. [27] *Id.* at 327.

[28] *Curwood* v. *The King* (1944) 69 C.L.R. 561, 591 *per* McTiernan, J.

[29] *Ibid.* [30] *Stirland* v. *D.P.P.* (1944) A.C. 315, 327.

[31] *Curwood* v. *The King* (1944) 69 C.L.R. 561, 575.

[32] *Id.* Latham, C.J., Dixon and Starke, JJ., McTiernan and Williams, JJ. dissenting.

[33] Crimes Act 1958 (Vict.), s.399(e)(ii). But this contains a proviso which materially distinguishes it from the English legislation in the following terms, "Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained."

[34] However, Starke, J. (at 580) rather unsatisfactorily indicated that in his view

England in *R.* v. *Jenkins*,[35] where the accused on a charge of receiving stolen property had endeavoured to show that the prosecutrix was a worthless and abandoned woman whose evidence ought not to be relied upon. Final confirmation, if such was needed, has now been furnished by *R.* v. *Cook*,[36] where Devlin, J. suggested that because of the peculiar difficulties inherent in rape cases it may be necessary that they be regarded as a *sui generis* category in the trend of interpretation. This may be regarded as setting the seal on what was possibly a courageous attempt to remove the logical difficulties inherent in the legislation and to swing the balance in favour of the accused.

It should be noticed that, as pointed out by Latham, C.J. in *Curwood's Case*,[37] Viscount Simon's proposition also cannot be construed as incorporating the qualified interpretation formulated in *R.* v. *Preston*.[38] As indicated earlier, this draws a distinction between attacks on the actual evidence given by the prosecutor, and imputations on his general character or conduct. Nevertheless, the inherent attractiveness of such a distinction is reflected in the repeated instances of its approval in the courts.[39] These have been regarded as illustrating the continued uncertainty of the judges on the merits of a purely literal interpretation,[40] for although the distinction was rejected in *R.* v. *Hudson*,[41] *R.* v. *Preston* was there explained and has never since been overruled. In *Curwood* v. *The King*[42] Dixon, J. (as he then was) discussing *R.* v. *Preston* said:

> I should regard this interpretation of the provision in question if it were accepted as a satisfactory solution of the difficulties that arise upon the enactment. It depends upon the everyday distinction between cross-examination to the issue and cross-examination to credit that could readily be applied and it would operate fairly to the prisoner. But I think that it is an interpretation which encounters difficulty in the text of the provision and is inconsistent with another and more formidable line of authorities.[43]

These considerations inducing Dixon, J. to disregard *R.* v. *Preston* were not operative when in *O'Hara* v. *Lord Advocate*[44] the Scottish Court of Justiciary regarded itself as free to work out a solution against the background of its own criminal law. The Lord Justice-Clerk (with whom Lord Jamieson and Lord Stevenson concurred) there expressly viewed the English position as unsatisfactory and held that a broad line of demarcation should be drawn between two classes of case. First, where the cross-examination of the prosecution witness was necessary to enable the accused to establish his defence, and second, where the cross-examination attacks the general character of the witness—in effect adopting *R.* v. *Preston*. Thus, the accused on a charge of assaulting two constables was allowed to allege self-defence and provocation without exposing his previous character. However, even within the second class, the court recognised that it fell within the discretion of the trial judge to determine in the interests of a fair trial whether cross-examination should be allowed.

In *R.* v. *Cook*[45] moreover, as we have seen, emphasis was laid upon this

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Viscount Simon meant no more than that the prisoner should not lose the protection of the statute unless the imputations made by him were disconnected and aside from the substance of the charge.

[35] (1945) 114 L.J.K.B. 425.

[36] (1959) 2 All E.R. 99.

[37] *Curwood* v. *The King* (1944) 69 C.L.R. 561, 576. Latham, C.J. there said, "an attack upon the character of an adverse witness is as much a part of the conduct of the defence as anything else."

[38] (1909) 1 K.B. 568.

[39] *R.* v. *McLean* (1926) 19 C.A.R. 104; *R.* v. *Watson* (1913) 8 C.A.R. 249; *R.* v. *Biggin* (1919) 14 C.A.R. 871; *R.* v. *Jones* (1923) 17 C.A.R. 117; *R.* v. *Clarke* (1955) 2 Q.B. 469.

[40] See J. Stone, "Further Problems on the Interpretation of the Criminal Evidence Act . . ." (1942) 58 *L.Q.R.* 377.

[41] (1912) 2 K.B. 464.

[42] (1944) 69 C.L.R. 561.

[43] *Id.* at 585.

[44] 1948 S.C. (J.) 90.

[45] (1959) 2 All E.R. 79.

discretionary factor in the latest English attempt to evolve a satisfactory solution to the problem. While in that case the court adhered to *R.* v. *Hudson*[46] as a correct principle of interpretation, it appears also to have indicated that the distinction involved in *R.* v. *Preston*[47] can be useful as a guide to the judge in the exercise of his discretion—that if relegated to this level the case can be maintained concurrently with *R.* v. *Hudson* though previously considered as alternative.

An assessment of the effect of these recent cases would appear to reveal uniform recognition that this is not a sphere wherein ordinary principles of interpretation alone can provide a solution. In New South Wales the actual terms of s.407 of the Crimes Act, 1900 confer a seemingly unfettered discretion upon the trial judge in all cases and it may arise for the High Court on some future occasion to determine whether any implied limits on this discretion are justified at all. At present the courts have resolved to accept the English legislative premiss that if the accused insists on attributing misconduct or *mala fides* to the prosecution it is only proper that his own character be laid bare. But within the framework of this proposition considerable leeway and flexibility is clearly necessary to make allowance for the "hard cases". The actual result in *R.* v. *Dunn*[48] can be partly explained by the consideration that there the court was only concerned to enquire whether the Chairman of Quarter Sessions had rightly exercised his discretion and it is well settled that the court should not interfere unless palpably unreasonable or to correct an error in principle.[49] However, in following *R.* v. *Clarke*,[50] the court also indicated that a discretion to disallow cross-examination should be admitted only where the accused denies (even with emphasis) the evidence of the prosecution or alleges mistake, exaggeration, or forgetfulness. It is submitted that this does not go far enough and the principle enunciated by Lord Goddard should be tempered by discretion even where positive malpractice is alleged. If, as would appear, the New South Wales courts are to follow English judicial guidance, this desirable approach as suggested in *R.* v. *Cook*[51] may now be incorporated into the law of this State.

R. v. *Cook* appears openly to have authorised the trial judge to rely upon his own discretion in determining how a fair balance shall be maintained.[52] Having an opportunity to scrutinise the demeanour of the witnesses whose evidence is in conflict, and to assess their relative merit, he would be most competent to surmount the intrinsic difficulties in the legislation and so accord sufficient protection to an innocent accused.[53] Accepting this, one may perhaps anticipate that the real (though not explicit) criterion will continue to be whether the trial judge regards the imputations made against the prosecution as "reasonably justifiable", and his findings upon this point will now rarely be open to review.

M. C. AHRENS, Case Editor — Fifth Year Student.

[46] (1912) 2 K.B. 464. [47] (1909) 1 K.B. 568. [48] (1959) 75 W.N. (N.S.W.) 423.

[49] *Cf.* the view expressed by R. B. Davidson, "Cross-Examination of Accused Persons and Evidence of Character" (1957) 30 *A.L.J.* 503, 508, that the discretion conferred on the N.S.W. courts is merely to enable the judge to reject otherwise admissible questions under common law rules as to relevancy which might prejudice a fair trial.

[50] (1955) 2 Q.B. 469. [51] (1959) 2 All E.R. 99.

[52] However, in *R.* v. *Cunningham* (1959) Q.B. 288, where the appellant was charged with malicious wounding and alleged provocation consisting of an invitation by the prosecutor to commit an indecent offence, Lord Parker, C.J. (at 290) stated: "even if provocation was a proper defence, a question such as was put in this case must of necessity bring in the character of the accused." If Lord Parker is suggesting that a strict rule of law governs the situation, it is submitted that his error has been revealed by *R.* v. *Cook*.

[53] The discretion given to the judge is, of course, a judicial discretion to be exercised not arbitrarily but within the bounds of reason and justice. Further it seems that reliance should be reposed in "the experience, the good sense and the discretion of those administering criminal justice to ascertain on which side of the line any given case falls, always