THE PROBLEM OF AN ACCUSED WITH A RECORD[1]

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THE PROBLEM STATED

Although the problem which I am about to discuss is notoriously intractable, it can at least be stated succinctly; when should the accused's convictions be admissible in evidence at a trial on indictment before verdict? I think that the time is ripe for a reappraisal of the possible solutions because, in England at any rate, there are two schools of thought which, though diametrically opposed to each other, share an aversion to the present law. According to the first school, the current rules are too favourable to the accused because, subject to unimportant exceptions, they prohibit the proof of the accused's previous convictions as part of the Crown's case; when such convictions are not admissible as part of the Crown's case, the accused may only be cross-examined on them in three carefully defined situations. Cross-examination on previous convictions is permissible when the accused adduces or elicits evidence of his good character, casts imputations on the Crown's witnesses, or gives evidence against a co-accused. While the second school of thought is not opposed to cross-examination on previous convictions in answer to evidence of character, it considers that the current rules are too unfavourable to the accused insofar as they permit cross-examination on convictions when the accused has cast imputations on the Crown witnesses or given evidence against a co-accused.

Under the present law, the Crown is, in general, precluded from proving the accused's previous convictions as part of its case by the principle enunciated in Lord Herschell's advice in *Makin* v. *A.-G. for New South Wales*[2] that evidence which merely shows a disposition towards the commission of crime in general, or even of the crime charged, is inadmissible as evidence of the accused's guilt on the occasion under investigation. In the absence of any evidence concerning the facts on which they were based, previous convictions can at most only show a disposition to commit the crime charged. This point is sometimes most confusingly stated by the assertion that the accused's previous convictions are irrelevant to the issue of his guilt. It is an abuse of language to say that evidence of the existence of such a disposition is irrelevant. It is empirically demonstrable that the fact that A has been convicted of larceny

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[1] This is the text of a lecture delivered in very varying forms to the Canberra Law Society on 13th June, 1968, to the Adelaide Law Society on 14th Aug., 1968, to law students at the University of Monash on 5th Sept., 1968, to law students at the University of Melbourne on 13th Sept., 1968 and to the Law Graduates Association of the University of Sydney on 26th Sept., 1968.

[2] (1894) A.C. 57. The similar fact rule is outside the scope of this lecture.

on ten previous occasions renders it more probable that he, and not B who, though he had the same opportunity of committing the crime as A, had no previous convictions, was guilty on the occasion under investigation.[3] Even a single conviction may be of the utmost relevance; if there is evidence pointing to the fact that either A or B committed a crime, and if the issue is one of identity, the fact that an entirely unprompted witness identified A, who had once been convicted of the kind of crime in question, as the culprit and not B, who had never been convicted of any crime, is of significance because it requires the assumption of a coincidence of no small magnitude if A is innocent.

The *Makin* principle is based on fear of jury prejudice, not on irrelevancy. Unfortunately we shall never know how justified such fears are under modern conditions unless we are prepared to bug a substantial number of jury rooms, and there are undeniable objections, associated with the infringement of the jury's privacy, to the adoption of such a course. There are those who think that, thanks to the dissemination of legal knowledge through the newspapers, radio, films, plays and television, one in every twelve jurors knows that, if the accused does not say he has a clean record, he has a bad one. If this is so, a drastic re-consideration of the law is called for; but how can we know that it is so? For the time being at any rate it is wiser to act on the assumption that there is a real danger that the jury will be unduly prejudiced on being made aware of the accused's record. Trial on the record as opposed to trial on the evidence is something to be avoided at almost any price.

BACKGROUND

In addition to the current rules concerning the previous convictions of the accused, the following features of Anglo-Australian legal procedure have an important bearing on my problems:[4] (a) in the United Kingdom and every Australian state, the accused is a competent, but not a compellable witness; (b) in the United Kingdom and every Australian state the accused may make an unsworn statement from the dock; but (c) there are variations in the laws of the United Kingdom and the Australian states with regard to comment on the accused's failure to enter the witness box. In the United Kingdom, Western Australia, South Australia and Tasmania, such comment may not be made by the Crown, but, subject to appellate control,[5] it is permissible from the mouth of the judge; comment by the Crown is likewise prohibited in Victoria, and the judge may only comment on the accused's failure to go into the witness box if the accused makes an unsworn statement from the dock. Comment by both the Crown and the judge is prohibited in New South Wales, but each of them may comment in Queensland.

If, as members of the High Court consider to be the case,[6] one in every twelve jurors knows that the accused can give evidence like any other

[3] This statement is based on the simple fact that a person's chances of reconviction increase with each conviction. I do not wish to deny the need for and difficulty of much further empirical research in this sphere.

[4] The following remarks are based on Criminal Evidence Act, 1898 (U.K.), s. 1; Crimes Act, 1900-1968 (N.S.W.), ss. 405, 407; Crimes Act, 1958 (Victoria), s. 399; Evidence Act, 1929-1957 (S.A.), s. 18; Evidence Act, 1910-1967 (Tasmania), s. 85; and Evidence Act, 1906-1967 (W.A.), s. 8. Although there is no statutory reference to it, the practice of allowing the accused to make an unsworn statement from the dock has been continued in Western Australia. It was, however, abolished in New Zealand by s. 5 of the Crimes Amendment Act, 1966.

[5] *Waugh* v. *R.* (1950) A.C. 203.

[6] *Bridge* v. *R.* (1965) Argus L.R. 815.

witness, juries will be apt to attribute his failure to give evidence or his resort to the unsworn statement to the weakness of his case. No doubt this is the most common reason for the accused's failure to enter the witness box, but, in the case of an accused with a record, there is always the possibility that he stayed in the dock because he feared cross-examination on his previous convictions, and not because his defence was a bad one. Hart, J., of the Queensland Supreme Court, has recently stressed the point that, though permissible in Queensland between 1892 and 1961, judicial comment on the accused's failure to give sworn evidence when liable to unrestricted cross-examination to credit on previous convictions was of doubtful propriety. His Honour concluded that, now that cross-examination on previous convictions has been restricted in Queensland in accordance with the current rules which have already been mentioned, "The rule should be that generally it is both legitimate and proper for the judge, if he sees fit, to comment on the failure of an accused person to give evidence";[7] but there remains the question of the propriety of comment when the accused has cast imputations on Crown witnesses by, for example, cross-examining them on their previous convictions. Whether comment would or would not be fair in such circumstances, there is no doubt that it is very highly desirable that the law should be such that fear of cross-examination on his record should not be a factor affecting the accused's decision whether to give sworn evidence, for there are certainly cases in which his failure to do so increases the weight of the evidence given against him.[8]

THE FRENCH SOLUTION

The very last thing I want to do is to masquerade as an expert on French criminal procedure. I simply want to make the point that one possible solution to the problem of this lecture would be to follow the course which I understand to be adopted in France, of opening the trial with proof of the accused's previous convictions as background information and not as evidence in the case. The convictions could be proved by a police officer and the judge could tell the jury that they must try the case on the evidence that they are about to hear. The suggestion is not nearly as monstrous as it is sometimes made out to be. It would free an Anglo-Australian trial from the unreality which often attends the suppression of the accused's record; there would be no variations in the exercise of judicial discretion such as those which are the almost inevitable consequence of other solutions; the accused could present his case and give his evidence completely free from the shadow of cross-examination on his record.

The solution under consideration could be implemented at a later stage of the trial, for example, at close of the Crown's case and after the accused had had an opportunity of submitting that there was no case to answer; but, however the solution is implemented, there are undeniable objections to it over and above that of jury prejudice, an objection which is present in the case of every solution other than that of the total suppression of the record.

[7] *R.* v. *Phillips & Lawrence* (1967) Qd. R. 230 at 295. Apparently in the days when, in Queensland, cross-examination on the record was in law unrestricted, it was rare but not unknown.

[8] For further observations on the accused's failure to give sworn evidence, see my note in *Blackacre* (forthcoming).

In the first place, it is not suggested that we should abandon the accusatorial for the inquisitorial procedure in any other respect, and the adoption of part only of another country's method of trial may well be thought to be unwise. Secondly, one would require to be an even firmer believer in the general uprightness of the police than I am not to have misgivings about any system which enables the accused's record to be placed before the jury without restriction; it might have an unfortunate influence on some police interrogations. The temptation to stress the suspect's poor chances at his trial on account of his bad record would take a great deal of resisting by the most honest of interrogators. Thirdly, the public image of a judicial system is something which can never be ignored, and there can be little doubt that there would be a widespread feeling that somthing of real value had been lost in relation to Anglo-Australian criminal procedure if unrestricted reference to the accused's record were permitted at any stage of a trial before verdict. It follows that a fourth objection to the French solution is that it is not one which is at all likely to receive parliamentary approval in the United Kingdom or any Australian state.

CONVICTIONS AS PART OF THE PROSECUTION'S CASE

It is sometimes suggested that the accused's previous convictions should be admissible as part of the Crown's case[9] provided they were for the same or substantially the same offence as that which is charged, and provided the offence charged is alleged to have been committed reasonably soon after the last conviction or the accused's release from a custodial sentence following upon such conviction. Both provisos give rise to definitional problems, but these can hardly be regarded as insuperable. It is, however, open to question whether one or even two previous convictions for the same offence are, without some further connecting link, such as the similarity of the facts on which they are based with the facts alleged against the accused, of sufficient probative value to justify their reception without the most careful scrutiny by the judge. Once such scrutiny becomes necessary, allowance has to be made for a vast field of judicial discretion, and it is difficult to believe that the exercise of that discretion would not vary considerably from judge to judge. In general the resort to judicial discretion in evidential matters is highly commendable. There must be many cases, for instance, in which evidence technically admissible under the similar fact rule is a proper subject of discretionary exclusion on account of its prejudicial tendencies; but, for the discretion to be exercised in the case of bare convictions without knowledge of the facts on which they were based, the judge would have little to work on. He would require full details of the evidence to be called by the prosecution, of any special features, such as an issue as to identity, connecting the convictions with the facts of the case, and of the nature of the defence.

To meet the above point with regard to probative value, it is sometimes suggested that previous convictions for a similar offence should only be admissible if there were three or more of them. One answer commonly made to such a suggestion is that the adoption of such a course would look very much like punishing the accused for his past offences. To this there is the

[9] Something like this appears to be sanctioned by s. 412 of the Crimes Act (N.S.W.), and the section was so construed in *R.* v. *Gibson* (1929) 30 S.R. (N.S.W.) 282, but that case was said to be wrong on this point in *MacDonald* v. *R.* (1935) 52 C.L.R. 739.

obvious retort that, if the accused is a professional criminal (and many of those who have had three or more convictions for the same offence are, in some sense of the word, professional criminals), the sooner that fact is brought before the jury the better; but it cannot be denied that all proposals for introducing convictions as part of the prosecution's case are open to objections similar to those which have been raised against the French solution.

THE CANADIAN SOLUTION

The Canadian solution of the problem is to follow the current Anglo-Australian rules with regard to the exclusion of the accused's previous convictions as part of the Crown's case, but to treat the accused in the same way as any other witness so far as cross-examination is concerned. Under s. 12 of the Canada Evidence Act he is liable to be cross-examined to credit on his previous convictions, but the cross-examination is subject to the discretion of the trial judge. I have no first-hand acquaintance with Canadian criminal procedure, and accordingly I have no notion of the extent to which cross-examination of the accused on his previous convictions is permitted in practice in Canada; but it is possible to point to reported cases in which cross-examination on convictions has been allowed although the accused appears neither to have given evidence of character nor to have cast imputations on Crown witnesses, nor to have given evidence against a co-accused.[10]

My ignorance of the manner in which the discretion is exercised in Canada renders it impossible for me to assess its practical merits; but, so far as the letter of the law is concerned, it is, I think, open to more objections than those attaching to the two solutions which have been discussed so far. If the discretion is exercised generously, the cases in which there would be a danger of jury prejudice might well be cured, but it is difficult to believe that the discretion is not exercised in different ways by different judges. It is anybody's guess whether the jury is more or less likely to be prejudiced if made aware of the accused's criminal record in consequence of his cross-examination rather than at an earlier stage, but the way in which the right to the last word is cherished throughout the common law world is suggestive of a belief that that which the jury hears towards the end of a trial is recalled in the jury room more vividly than that which was heard at an earlier stage. There is the additional difficulty, experienced by anyone who attempts an appraisal of the Anglo-Australian rules of cross-examination, that it is not clear how proof of convictions other than those of perjury or dishonesty has any bearing on the general credit of a witness, yet it appears that questions may be put about any convictions at common law[11] and under many statutes of the British Commonwealth, including s. 12 of the Canada Evidence Act. Even more important is the objection that liability to cross-examination to credit on previous convictions, rather than a consciousness of guilt, may inhibit some accused person from giving sworn evidence. This objection is not one which can be levelled against the first two solutions of my problem.

The Canadian solution is based on the fallacy that it is rational to treat the accused like an ordinary non-party witness. If a defence witness other than the accused is cross-examined to credit, the worst that can happen from

[10] *R.* v. *D'Aost* (1902) 5 Can. C.C. 407. See also *R.* v. *Mulvihill* (1914) 18 D.L.R. 189; *R.* v. *Dalton* (1935) 3 D.L.R. 773; *Colpitts* v. *R.* (1965) 52 D.L.R. (2nd) 416.

[11] *Bugg* v. *Day* (1949) 79 C.L.R. 442.

the point of view of the accused is that his case is in no way advanced by the witness's evidence in chief. If there was room for a reasonable doubt before the witness gave evidence, there would still be room for such a doubt after his cross-examination. If, on the other hand, the credibility of the accused is shaken by cross-examination on his previous convictions, the prosecution's case may well be strengthened. If there are cases in which the accused's failure to testify adds to the weight of the evidence against him because it shows want of confidence in his defence, the fact that he gives evidence which the jury considers to be false adds even more weight to the Crown's case.

A further objection to the Canadian solution, closely connected with that which has just been mentioned, is that it obliges the trial judge to endeavour to instruct the jury that the accused's previous convictions elicited in cross-examination relate only to the credibility of his evidence and have nothing to do with the probability of his guilt. It will shortly be submitted that this is a feat which it is impossible to perform.

THE SOLUTIONS OF THE UNITED KINGDOM AND AUSTRALIA

Section 1(f) of the United Kingdom Criminal Evidence Act, 1898, reads as follows:

> 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—
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> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
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> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or 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; or
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> (iii) he has given evidence against any other person charged with the same offence.

There is a similar provision in the statute law of every Australian state except New South Wales. The relevant portion of s. 407 of the New South Wales Crimes Act reads as follows:

> No such person charged with an indictable offence shall be liable to be questioned on cross-examination as to his character or antecedents without the leave of the judge.

Taken *au pied de la lettre*, this would appear to be a solution of our problem similar to the Canadian one, but, in granting or withholding leave under s.407, the judges of New South Wales have applied the English and Victorian statutes analogically.[12] Thus, before there can be cross-examination on antecedents on

[12] See, e.g., *R.* v. *Heydon* (1966) 1 N.S.W.R. 708. The phraseology of the N.Z. Evidence Act, 1908-1966, s. 5(2)(d) is even more strongly suggestive of something like the Canadian solution. It reads: "A person charged and called as a witness in pursuance of this subsection is liable to be cross-examined like any other witness on any matter, though not arising out of his examination in chief; but so far as the cross-examination relates to any previous conviction of the person so charged, or to his credit, the Court may limit the cross-examination as it thinks proper, although the proposed cross-examination may be permissible

the ground that the accused cast imputations on the character of witnesses for the prosecution, the judge must first be satisfied that there has been an imputation, and then consider whether his discretion should be exercised in favour of permitting or disallowing the cross-examination. As will appear shortly the English courts have adopted a similar approach although there is now a significant divergence between the English courts and the High Court possibly with regard to the construction of the statutory provision, and certainly with regard to the exercise of the discretion.

I do not wish to question the propriety of cross-examination in cases coming within s.1(f)(i) or the first part of s.1(f)(ii). For the sake of brevity I will also leave the propriety of cross-examination under s.1(f)(iii) unchallenged. Fairness to the co-accused seems to require that the accused should, like a Crown witness, be subject to the full rigours of cross-examination on his antecedents; but there may be something to be said for conferring on the trial judge a discretion in this matter which, according to the House of Lords, he does not possess when the proposed cross-examination is on behalf of the co-accused.[13]

It only remains for me to consider cases in which "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". Is it right to permit cross-examination on previous convictions in these cases? One obvious advantage of the Anglo-Australian solution as contrasted with the Canadian solution is that the cases in which there is a danger of jury prejudice will be fewer because, as a matter of law, cross-examination on previous convictions will generally be inadmissible; but, having said that much, I must confess that I find the Anglo-Australian solution thoroughly objectionable. It inhibits an accused with a record who has grounds for attacking Crown witnesses from doing so by giving him the unattractive alternatives of attempting to make the attacks without giving sworn evidence, or making them and exposing himself to cross-examination on his previous convictions. If, quite possibly on the advice of his counsel, he gives sworn evidence but abstains from such an attack on the Crown witnesses as will bring the second part of s.1(f)(ii) into play, he will, if convicted, suffer from a sense of injustice — and the whole of our sentencing policy is geared to the elimination of a sense of injustice in convicted persons.

A further objection to the solution under consideration is that the part dealing with imputations has produced a body of conflicting and confusing case law. The latest contribution of the House of Lords is *Selvey* v. *Director of Public Prosecutions*.[14] The defence to a charge of buggery was that the prosecutor, having told the accused that he had been with another man on the same day, was annoyed with the accused for refusing to give him a pound for his favours, and therefore falsely reported the accused to the police, having taken the precaution of dumping a number of indecent photographs in the accused's room. After an exhaustive review of the authorities, subject to the most regrettable exclusion of every Australian case, the following propositions were treated by Viscount Dilhorne[15] as established by the decisions:

(1) The words of the statute must be given their natural, ordinary meaning.

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in the case of any other witness." In general, however, the N.Z. courts follow the English statute (*R.* v. *Fisher* (1964) N.Z.L.R. 1063; *R.* v. *McLeod* (1964) N.Z.L.R. 545).

[13] *Murdoch* v. *Taylor* (1965) A.C. 574.

[14] (1968) 2 All E.R. 497.

[15] *Id.* at 508.

(2) Cross-examination on convictions is permitted both when the imputations on the character of the prosecutor and his witnesses are cast in order to show their unreliability as witnesses independently of the evidence given by them and when the making of such imputations is necessary to enable the accused to establish his defence.

(3) In rape cases the accused can allege consent without placing himself in peril of cross-examination on previous convictions.

(4) An emphatic denial of the charge should not be regarded as coming within the section.

Viscount Dilhorne also concluded that the judge has a complete discretion, unfettered by any general rule, to allow or disallow cross-examination on previous convictions even when the accused has made imputations on the character of the prosecutor or his witnesses.

What may be termed the "imputations provision" operates most harshly against the accused when the making of imputations is a necessary part of his defence, as when the plea is one of self-defence or when the defence to a charge of blackmail is that money was handed to the accused by the prosecutor, not in consequence of any threat, but as "hush money" in the hope of closing the accused's mouth with regard to the indecent advances made to him by the Prosecutor. In *R.* v. *Flynn*[16] the English Court of Criminal Appeal had allowed an appeal against conviction in just such a case of blackmail. It was said that "where, as in this present case, the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses, the discretion should, in the opinion of this court, be, as a general rule, exercised in favour of the accused".[17] The House of Lords would of course have none of this in *Selvey's Case*.

Unfortunately *Flynn's Case* had already been cited with approval in at least one decision of the High Court,[18] and in important decisions of the Courts of Criminal Appeal of Victoria[19] and New South Wales[20] respectively. It remains to be seen how these difficulties will be solved by the Australian Courts.

One solution which may possibly still be open in Australia would be to do what Dixon, C.J. would have done and construe the words of the relevant statutory provision in some sense other than their ordinary natural meaning. He considered that the relevant Victorian statutory provision does not deal with denials of the truth of the Crown case and of the evidence with which it is supported, but with "the use of matter which will have a particular or specific tendency to destroy, impair or reflect upon the character of the prosecutor or witnesses called for the prosecution, quite independently of the possibility that such matter, were it true, would in itself provide a defence".[21] From time to time there have been similar attempts in England to add a gloss to s.1(f)(ii) by a requirement that the imputations must be unnecessary for the proper development of the defence. To my mind, the objection to all such projects is that they fail to cover the most obvious and most innocuous case in which an accused may wish to attack Crown witnesses: the case in which he can prove or force such witnesses to admit previous convictions

[16] (1963) 1 Q.B. 729.
[17] *Id.* at 737.
[18] *Dawson* v. *R.* (1961) 106 C.L.R. 1.
[19] *R.* v. *Clark* (1962) V.R. 657.
[20] *R.* v. *Heydon, supra* n. 12.
[21] *Dawson* v. *R. supra* n. 18 at 9.

or previous lying unconnected with the case before the court. On what principle other than some notion of tit-for-tat should such cross-examination by the accused render him liable to cross-examination on his previous convictions?

This brings me to the elusive question of the rationale of the imputations provision. The answer is elusive because of the question-begging language with which it is often sought to justify the provision. One typical justification is the assertion that, if an accused gives evidence in the course of which he alleges that one or more Crown witnesses have committed dastardly acts, the jury is "entitled" to know the character of the man who makes those allegations; but what is the force of the word "entitled" in this context? If it means "it would be helpful to the jury", the answer is that, provided the jury would not be unduly prejudiced, it would always be helpful for its members to know of the accused's record because, in spite of all the well-meaning but ridiculous efforts to deny the fact, it is always helpful for a body which has to decide whether a certain person did a certain thing to know what kind of a man that person is. What magic is there in the fact that the accused cast imputations on the character of the prosecutor or his witnesses? If, on facts such as those of *Selvey's Case*, the accused had alleged that the prosecutor called upon him in order to describe an indecent assault of which he had recently been the victim, and that the indecent photographs alleged to have been taken from the assailant must have been inadvertently left by the prosecutor in the accused's room, the jury is just as much "entitled" to know of the accused's previous convictions as they are entitled to know of those convictions when the allegation is that the prosecutor is himself a sodomite. The imputations provision cannot be supported on the ground that imputations have any effect on the probative value or prejudicial tendency of the previous convictions.

The only other justification for the provision that has been advanced is that of fairness to the impugned witness. A respectable man who is obliged to give evidence against his assailant or traducer may well feel a deep sense of injustice if he is subjected to a series of unfounded accusations by someone whom practically everyone except the jury before which the farce is enacted knows to be a man with a criminal record. I cannot deny the force of this argument; but I doubt very much whether it is properly met by permitting the assailant or traducer to be cross-examined on his record under an exception to a general prohibition on such cross-examination. All that the adoption of such a course means is that certain defences, such as self-defence, or the defences raised by Selvey and Flynn, are only open to an accused with a record if he is prepared to subject himself to a type of cross-examination which is prohibited if his defence is that the prosecutor was just lying or mistaken. The unfairness to the Crown witness would be better met by a provision that, at the instance of the prosecutor, the judge could, on facts such as those of *Selvey's Case*, reconvene the jury in the event of a conviction for the offence charged, in order that they might decide whether the accused had been guilty of perjury. An alternative would be a revision of our odd notions of sentencing policy, under which the fact that the accused has manifestly lied and caused pain, in furtherance of a defence known by him to be bogus through and through, may have no influence on the length of the prison sentence. The object of this branch of the law of evidence is to ensure, so far as is humanly possible, that innocent people are not convicted and that

guilty people are not acquitted; the discouragement of bogus and malicious defences is the task of other branches of the law.

To my mind the conclusive objection to the Canadian and Anglo-Australian solution of the problem of the accused with a record is the fact that it requires the judge to attempt to do the impossible in the course of his summing-up to the jury. The rule against proof of guilt by evidence tending to show disposition towards crime in general, or even towards the particular crime charged, applies just as much to evidence elicited in cross-examination as it does to evidence given in chief by Crown witnesses. Hence, as long as the *Makin* principles hold sway, it is only right and proper that the jury should be told that, when evidence of previous convictions is elicited in cross-examination, they must not infer that the accused is guilty of the crime charged because he is the kind of man who would do that kind of thing; but what are they to infer from the previous convictions? Apparently they are to infer that, when the prosecutor assaulted him, gave him hush-money or extorted a confession, there are grounds for doubting the truth of his testimony. Can this be anything other than "double-think"? The jury must not infer that the accused is guilty because he is the kind of man who would do the kind of thing charged, but they may disregard his protestations of innocence because he is the kind of man who would make false imputations against others.

The law reports are decently reticent about the gibberish that judges are compelled to utter to juries by the Canadian and Anglo-Australian solutions to the problem of this lecture. Let me content myself with two examples in which I quote verbatim from the reports, although I naturally appreciate that much more was said in the summings-up to which I have not had access.

R. v. *Heydon*[22] was an important decision of the New South Wales Court of Criminal Appeal, in which the case law on the "imputations" provision is most learnedly reviewed. The charge was one of murder, and an alleged accomplice contended that his confession had been fabricated by the police. The trial judge had allowed cross-examination on the accused's previous convictions for dishonesty, and the case was referred to the Court of Criminal Appeal on petition. The following is an extract from the judgment of Sugerman, J., a member of the majority in favour of upholding the conviction:

> The evidence of his previous conviction . . . [the trial judge] told them, was not admitted and could not be used for the purpose of suggesting that because a man had been guilty of crime in the past he was likely to have committed the particular crime with which he was charged. . . . It was admitted . . . on the basis that the circumstance that the petitioner had had several convictions for dishonesty of some kind or other was relevant to his credit. The petitioner being in direct conflict with Detective Sergeant Dudeney, Detective Bates and Detective Sergeant Wells, it was obviously important for the jury to determine whether the police officers on the one hand, or the petitioner on the other, was telling the truth; and on that issue the jury were entitled to take into account the sort of person a man is.[23]

In *R. v. Flynn*,[24] the case of the hush-money to which reference has already been made, the accused's previous convictions had been for assaults

[22] *Supra* n. 12.
[23] *Id.* at 735.
[24] *Supra* n. 16 at 736.

occasioning actual bodily harm and the trial judge is reported to have spoken to the jury in the following terms:

> I held the view, rightly or wrongly — and if I am wrong in exercising my discretion it will be put right in a much higher hierarchy of the law— and I have ruled there was such an attack on the character of the prosecutor here in the suggestions made in the accused's statement that you were entitled to judge the prosecutor's character and measure it up against the character of the person who is accusing him, that is the prisoner; so you had the opportunity of hearing the sort of young man he is. Do not let those things influence you into finding him guilty.

CONCLUSIONS

Further comment from me would be superfluous. The enforced gibberish speaks for itself. However, I cannot forbear from stressing the point that, in *Selvey* v. *Director of Public Prosecutions*,[25] the judge very sensibly limited to the cross-examination to previous convictions for homosexuality; but what have previous convictions for homosexuality got to do with credibility except when the accused says that he was not guilty of homosexual practices? And then what becomes of the spurious distinction between cross-examining the accused as to credibility on his previous convictions (a permissible course) and cross-examining him as to the probability of his guilt on his previous convictions (usually said to be an inadmissible course)?

It follows from what I have said that I would canvass a fifth solution to my problem: let us stick to something like the phraseology of s.1(f) of the Criminal Evidence Act, 1898, but let us abolish the imputations provision.[26]

I am sometimes asked which solution I prefer. All that I can say by way of answer is that I dislike the Canadian and Anglo-Australian solutions. So far as the other three are concerned, I would, like the rest of us, prefer to preserve the values upon which I have been reared. Therefore, provided other things are equal, I would opt for s.1(f) shorn of the imputations provision. Whether other things are equal and, if not, the extent to which they are unequal, is an empirical question which none of us can answer. How many guilty men are acquitted because the jury was not made aware of their record? How many innocent men would have been convicted if the jury had been made aware of their records? The trouble about the empirical questions to which the law of evidence gives rise is that, not only are we presently ignorant of the answer, but also it is extremely unlikely that we will ever devise a means of discovering what the answers are.

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[25] *Supra* n. 14.

[26] This would make the law substantially as it was in Victoria before 1915: see Sir John Barry, "A Note on the Prisoner's Right to Give Evidence in Victoria" (1952 6 *Res Judicatae* 60. The law was changed to make the Victorian provision comply with s. 1(f) of the U.K. Act because of the belief that an excessive number of perjured imputations against Crown witnesses were being made. As I have pointed out, this is a singularly inept method of discouraging perjury.