phrase to destroy Crown immunity from statutes. Sugerman J. points this out but his other reason is difficult to comprehend. The argument was rejected as it attached too much weight to a formula which is directed to the capacity of the corporation rather than to its status. Section 41A refers to capacity rather than status. But the argument on the word 'suffer' also concerns capacity and not status, that is, whether the Statute of Limitations can be pleaded against the Crown. So it seems that His Honour confused the extent of the privilege of a Crown agent with the question of whether it was an agency at all.

The courts have set their face against discarding Crown privilege in its present form, and adhere to the agency test. Inroads on immunity made in *Skinner's* case and the *Milk Board* case have been halted, and so until the legislature settles the questions of immunity and agency specifically in incorporating statutes the present confusion will remain. The question will be litigated at great expense each time a new body is set up.

R. C. HORSFALL

ATTWOOD v. THE QUEEN[1]

Evidence—Questions tending to show accused of bad character—Relevance—Crimes Act 1958 (Vic.), section 399 (e)

This was an application for special leave to appeal to the High Court against an order of the Victorian Supreme Court rejecting A's appeal against a conviction of murder. The sole point at issue was the permissibility of certain questions asked of the accused which tended to show him to be a person of bad character. It was submitted on A's behalf that the questions asked were contrary to the provisions of the Victorian Crimes Act 1958, section 399 proviso (e). This provides that:

> . . . a person charged and called as a witness in pursuance of this section 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—
> (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
> (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 prosecution or the witnesses for the prosecution . . .

A was charged with the murder of one Mrs P. The Crown alleged that A had strangled her, and brought evidence that she and A had been carrying on an adulterous relationship. A's defence was that he had killed her accidentally whilst attempting to silence her. To rebut such defence and substantiate the allegation of an amorous *contretemps* the Crown cross-examined A, asking questions tending to show that A was

[1] (1960) 33 A.L.J.R. 537. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Taylor and Menzies JJ.

in debt and had borrowed money, that his payments under a maintenance order to his wife and child were in arrears, that he had opened a bank account upon which he had drawn worthless cheques, and generally that he was a person of shiftless and bad character.

The difficulty in this case arose from the fact that these questions were not asked simply in order to discredit A, or to create prejudice against him in the eyes of the jury; some of them, at any rate, were asked because they bore directly on the questions whether A had caused P's death and whether he had done so with malice aforethought.

There have been many problems arising out of evidence given at a criminal trial which suggests that the accused is a man of bad character. Because of the moral foundation underlying most serious crimes, the very suggestion that the accused has committed such a crime implies that he is of bad character. Yet, obviously, if criminal trials are to be held at all, such a suggestion must be made. But can one go further? Can the prosecution allege that the accused is a man of bad character and therefore likely to have committed the crime with which he is charged? Can the accused assert that he is a man of good character and therefore unlikely to have committed it?

At common law, the broad principles governing the answers to these questions have long been settled, though it is not always easy to apply these principles in a specific case. The accused, in his defence, may lead evidence to show that he is of good character, with a view to suggesting that he is unlikely to have committed the crime; but if he does so the Crown may, in rebuttal, call evidence to show that in truth he is of bad character.[2] For reasons of policy and humanity, the Crown is not permitted to lead such evidence as part of its case-in-chief.[3] It may, however, as part of its case-in-chief, lead evidence which, if believed, has the effect of demonstrating that the accused is a man of bad character, provided that it is in some other respect relevant to the issue of his guilt of the crime charged; in other words, the Crown's evidence-in-chief must be relevant to the issue of guilt in some manner other than that of implying that the accused is a man of bad character and therefore likely to have committed the crime charged.[4] Commonly, such evidence consists of material showing that the accused has committed acts similar to the one with which he is charged, with a view to showing the existence of some general scheme or design on his part of which all such acts (those in the past as well as that now alleged) formed part.[5] Again, sometimes such evidence has been justified on the basis that it shows the accused to have an 'unnatural propensity' amounting to an identification mark connecting him with the crime charged.[6] But all these are merely examples of a general principle.

Somewhat different rules from those set out above applied to the character of witnesses at a criminal trial. These were neatly summarized by the High Court in the following extract:

> . . . according to the rules of evidence at common law an ordinary witness may be discredited by cross-examination among other things tending to show that he is of bad character. The expression is not a

[2] *R. v. Rowton* (1865) Le. & Ca. 520. [3] *Ibid.*

[4] *R. v. Geering* (1849) 18 L.J. (N.S.) M.C. 215. *Makin v. Attorney-General (N.S.W.)* [1894] A.C. 57. [5] *Ibid.*

[6] See generally, P. Brett, *'Unnatural Propensity' or Plain Bad Character;* (1954) 6 *Res Judicatae* 471, and the decisions reviewed therein.

description of a category of admissible cross-examination. A witness may be cross-examined in various ways to show that because of his personal qualities his testimony should not be relied upon. But although, for example, to cross-examine him to show that his eyesight, hearing, memory, apprehension or prepossessions should lead to the distrust of his evidence may "go to credit" it does not reflect on character. On the other hand to cross-examine him to show that the honesty of his testimony cannot be trusted goes equally to credit but it may require going into his past conduct in a way involving "bad character".[7]

When, by the enactment in England of the Criminal Evidence Act 1898, an accused at a criminal trial was enabled to give evidence on oath, a protection was given to him against what would at common law have been the normal consequence of allowing him to become a witness. Some protection was needed; for the range of cross-examination on matters of bad character going to credit as a witness went far beyond the existing common law rules on evidence of the accused's bad character. A compromise was reached, which now appears in proviso (e) to section 399 of the Crimes Act 1958.[8] This proviso, together with proviso (d)—allowing any question to be asked notwithstanding that it would tend to criminate the accused as to the offence charged—purports to set out the limits of the cross-examination to which the accused may be exposed. As its text, already quoted, shows, it accomplishes this by prohibiting any cross-examination tending to show that he is of bad character unless certain conditions have been satisfied. Some of these conditions—set out in exceptions (ii) and (iii) to the proviso—relate broadly to the way in which the defence has been conducted, and were not applicable in the instant case. But exception (i) to the proviso expressly allows cross-examination regarding the commission of other offences if such cross-examination is relevant to guilt of the offence charged. In other words, it expressly allows cross-examination on some—but not all—matters as to which the Crown might lead evidence in chief under the common law rules.

It was this exception which raised the problem in the instant case. For the impugned cross-examination, the Crown argued, dealt with matters of which evidence could have been led in chief under the common law rule. But the same matters—not being other crimes—were outside the scope of exception (i). Thus the problem was whether the maxim *expressio unius exclusio alterius* operated so as to bar the cross-examination, or whether some other mode of interpretation justified it.

The High Court interpreted proviso (e) as permitting a cross-examination of this kind. They did this by giving a somewhat restricted meaning to the phrase 'is of bad character', where it first appears in the proviso. This meaning they described as follows:

The words 'bad character', although possessing no technical meaning, are apt to describe a head of exclusion already understood. At common law, no motives of policy or humanity or fairness included the proof of fact and circumstances forming the parts and details of the transac-

[7] (1960) 33 A.L.J.R. 537, 538, 539.

[8] The first Victorian legislation on this matter was enacted in 1893. It was repealed in 1915 and replaced by a provision modelled on the English one, which now appears in the Crimes Act 1958 as s. 399.

> tion, and the incidents or matters tending to explain, identify or lead up to the occurrences forming the subject of the issue, in short what we commonly embrace under the term relevant facts; it did not include such evidence notwithstanding that it might disclose acts or conduct on the part of an accused person which would be considered inconsistent with good character.[9]

This, however, does not entirely solve the problem, for it leaves open the question why exception (i) was ever included; for it would seem that, if this interpretation is correct, exception (i) is redundant. The Court solved this difficult problem by considering the whole of proviso (e) and coming to the conclusion, which, they said, one might reasonably suppose, that the draftsman

> . . . in the case of the offence committed and of the conviction . . . saw that he was expressly prohibiting proof of a fact he definitely identified independently of its operation or of the ground of introducing it in evidence, whereas in the case of "questions tending to show that he (the accused) is of bad character" he was dealing with a description of cross-examination going to credit which he thought of as *ex hypothesi* outside the field of relevancy. In other words in the case of strictly relevant facts he was regarding them as open to proof as part of the Crown case and as necessarily, or at least naturally, the subject of evidence by the accused if he were called as a witness on his trial and he regarded them as not matter going to the proof of his guilt.[10]

This mode of interpretation—examination of the intention of the draftsman and not of the legislature which passed the law—is indeed curious, but aside from this it is submitted that such an interpretation does not follow quite so easily from a reading of the section as a whole. Indeed, the effect of the court's ultimate decision is to interpolate into section 399 (e) (i), after the words 'convicted of other such offence', the words 'or is of bad character'. In many cases, such an approval is justified, for questions which are substantially relevant, but which may have some slight imputation of bad character, must be asked to establish guilt, if the accused has already given evidence-in-chief. But questions which have some slight relevance, the real thrust whereof is to show plain bad character, can be asked, if the High Court's argument is carried to its full conclusion. The matter is one of degree, and it is to be hoped that a trial judge would not permit such questions.[11]

Another matter of considerable importance arises out of this case. It will be observed that the word 'character' appears both in the opening words of proviso (e) and in the second exception to that proviso. This word seems now to have received different interpretations according to its position in the section.

[9] (1960) 33 A.L.J.R. 537, 539. [10] (1960) 33 A.L.J.R. 537, 539.

[11] He has a discretion to exclude certain types of relevant evidence when offered in chief—see *Harris v. D.P.P.* [1952] A.C. 694—and it may be supposed that he has a similar power if the same evidence is sought to be obtained by cross-examination of the accused. But again there is a problem. Exception (ii) to proviso (e)—unlike its English model—expressly empowers a judge to disallow a cross-examination which is justifiable under that exception. In face of this express provision, is it possible to imply a similar power in relation to exception (i)?

In relation to 'character' in the second exception the cases do not draw the distinction, drawn in the instant case, between evidence of character which is relevant to the issue, and evidence of character going purely to a witness's credit. It is true that early cases upon the proviso, such as *R. v. Rouse*[12] and *R. v. Bridgwater*,[13] indicated that denials of prosecution evidence, and allegations that the prosecution's evidence is fabricated, should not be regarded as involving imputations upon the character of the prosecution's witnesses. And in *R. v. Preston*[14] it was said that unless the questions asked of a prosecution witness went right outside the issues in the case, and were solely directed to his credit, they could not amount to 'imputations on character' within the meaning of proviso (ii). This is, of course, consistent with the High Court's present interpretation of 'bad character' in the beginning of proviso (e). But later cases on proviso (ii), such as *R. v. Hudson*[15] and *Curwood v. R.*,[16] have rejected this interpretation in favour of one based on 'ordinary and natural meaning'. The result is that any questions asked of a prosecution witness (apart from a few special cases)[17] which reflect on the witness's good character are treated as imputations on his character, even if they are plainly relevant to the issue of guilt.[18]

There is thus some confusion and one can perhaps hope that a new appraisal of the interpretation of exception (ii) may be made, and that the much criticized decision in *Curwood v. R.*[19] might be reconsidered.

In the result, the High Court considered that those questions which involved bad character, but which had some aspect of relevancy, were permissible, while those that could not be considered relevant were improper; these latter, however, though not permissible, did not give rise to such a miscarriage of justice as to justify the Court exercising its discretion in A's favour. Consequently, the application for special leave was refused.

D. GRAHAM

THE COMMISSIONER FOR RAILWAYS (N.S.W.) v. CARDY[1]

Occupier's liability—Licensees—Duty to trespassers

The Commissioner for Railways (N.S.W.) v. Cardy[1] is a most important case in the law of torts. Its more immediate effects concern the duty of care owed to trespassers, but it is by no means true to say that this part of the law has been left very clear: similarly, the effect that the decision will have upon the law of occupier's liability as a whole is very uncertain.

Whereas the tort of negligence has not been worked out until recently, the law of occupier's liability was well settled by the last part of the nineteenth century. It is therefore not surprising that, instead of the occupier's duty being couched in wide terms, using the criterion of reasonable care, his liability depends upon the application of a number of strict tests; the particular test that is to be applied depends upon whether the injured person is an invitee, a licensee or a trespasser. A licensee is a person who enters with the leave of the owner. If he and the

[12] [1904] 1 K.B. 184. [13] [1905] 1 K.B. 131. [14] [1909] 1 K.B. 568.
[15] [1912] 2 K.B. 464. [16] (1944) 69 C.L.R. 561.
[17] *E.g. R. v. Turner* [1944] 1 K.B. 463.
[18] But *cf. R. v. Brown* [1960] V.R. 382. [19] *Supra*, n. 16.
[1] (1960) 34 A.L.J.R. 134. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.