IMPEACHING THE CREDIT OF A WITNESS.

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The old-fashioned maxim—" Everyone is presumed to know the law "—is now thoroughly discredited. It has however an unformulated successor. Experience of practice in the courts might lead the cynic to assert that everyone is presumed to know the law of evidence. For if objection is taken to the admissibility of certain evidence it is generally argued in a manner which suggests that we all know the rules and it is only a question of finding a plausible argument for or against admissibility. Authority is rarely cited and if cited generally proves to be no more than one or other of the better known textbooks.

This is all the more strange because in no department is English law so woefully lacking in really scientific literature as in the law of evidence. We have no books to compare with the monumental work of Wigmore and the masterly preliminary treatise of Thayer. And there is still scope for a critical survey of the justification for the rules of exclusion which most of us learn in our youth and thereafter apply with a blind adherence equalled only by our ignorance of their origins.

In justification of these sweeping statements let one small example suffice at present.

Law Students in Melbourne have for some years been initiated into the mysteries of the Law of Evidence by way of Cockle's *Cases and Statutes on Evidence.* The sixth edition of this textbook (p. 320) lists among its leading cases *R. v. Brown*[1] as authority for the proposition that a party may call witnesses to swear that, in their opinion, based on their knowledge of his general character and reputation, a witness called by the other party ought not to be believed on his oath. This seems a curious rule to be laid down in a leading case and it is followed in a footnote by the following passage—" Notwithstanding the clear and emphatic language of the Judges in this case, there appears to be some question as to how far it can be relied on in practice. It certainly is not at all usual to call such evidence. But it seems clear that the evidence must relate to general reputation only and not to specific acts of misconduct."

Now *R. v. Brown* was decided by a court consisting of Kelly C.B., Martin B., Byles and Keeting JJ. who were all quite definite that such evidence had been invariably admitted in the courts for a very long time. So well established was the rule that it was not thought necessary to cite any authority for it. But most counsel in Victoria would regard as an understatement the assertion that it is not at all usual to call such evidence.

This provokes further enquiry and since the question arises in the law of evidence it is natural to turn at once to other textbooks. Article 133 of Stephen's *Digest of the Law of Evidence* (11th edition) reads—" The credit of any witness may be impeached by the adverse party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and

1. L.R. 1 C.C.R. 70.

their answers cannot be contradicted. No such evidence may be given by the party by whom any witness is called, but, when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit."

It will be noted that no doubt is thrown on the reliability of the rule and also that we have here no reference to " reputation."

Wills[2] states the rule without criticism. Phipson[3] quotes the rule without disapproval and gives a little more detail. He suggests that a witness may be thus attacked not only for chronic inability to tell the truth but " perhaps for moral turpitude generally." The strange observation is added that " the impeaching witness should come from the locality of the other and not be a stranger sent expressly to learn the latter's reputation." This is difficult to reconcile with the statement in Wills[4] that the impeaching witnesses " must speak from their own personal knowledge of the matter "—since Phipson clearly regards the impeaching witness as deposing to general reputation only which is not based on personal knowledge. Taylor on *Evidence* is the oldest, the largest, and the least scientific of all the current English textbooks. The twelfth edition devotes four sections (1470-1473) to this topic and is obviously the source from which Phipson derived his learning. Taylor treats the rule as dealing exclusively with evidence of general reputation not based upon personal knowledge. Authorities in plenty are cited in the footnotes extending back to 1680 and many of them reported in the State Trials. This was no doubt pardonable when the first edition of Taylor's work appeared in 1848. But modern research into the history of the rules of evidence has shown that early cases on the subject betray no grasp of principle at all. As early as 1883 Stephen J. referred to the " utter absence which the trials " of the 17th Century " show of any conception of the true nature of judicial evidence on the part of the judges, the counsel and the prisoners. The subject is even now imperfectly understood, but at that time the study of the subject had not begun."[5]

An illustration of the rule as it worked in practice as late as 1722 will be found in the trial for treason of Christopher Layer an adherent of the Old Pretender[6]. Three of the Crown Witnesses were attacked by calling no less than twenty-six witnesses as to their veracity. The results hardly seem to justify the trouble taken as the following extracts will show.

Lord North and Grey being called as to the veracity of one Lynch, said—" My Lord, that gentleman that goes by the name of Lynch I saw twice ; he came twice to my house in Essex. I little thought that my having seen him twice at my house should be the occasion of my coming here in such a manner. The gentleman was wholly a stranger to me, and I have never seen him since. As for myself I cannot say I know anything of him personally. The only thing I can say is what he said of himself. It is a little hard for a man of honour to betray conversation, what passed

2. 3rd ed. 345.
3. 8th ed. 470.
4. *loc. cit.*
5. Hist. Criminal Law, I., 399.
6. 16 St. Tr. 94.

over a bottle of wine in discourse ; but since your Lordship requires it I must submit."

He then proceeded to give an account of admissions made by Lynch, when objection was taken by Sgt. Pengelly for the Crown and upheld by Pratt C.J. in terms which are not without importance for our present purpose—" Mr. Hungerford, you know what the rule of practice and evidence is, when objections are made to the credit and reputation of the witness ; you cannot charge him with particular offences. For if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to the particular facts to charge the reputation of any witness ; but only in general you are to ask what his character and reputation is . . . You know, if there be any objections to him, to his general character, he can answer them ; but if objections are grounded on particular charges of his being a base, an infamous and an ill man, not having any notice of this, it is impossible for him to defend himself. If you will ask my lord North and Grey what general character he gave of himself, you may.

Hungerford—If my brief be true, the whole Ten Commandments have been broken by him.

Pratt C.J.—Very well ; and so you charge him with the breach of the Ten Commandments, and he must let it go for fact, because he cannot have an opportunity of defending himself."

Mr. Hungerford finally accepted the ruling, put the question in a general form and obtained no useful answer. Whereupon with a good grace, he said—" We will not press it any farther."

" Lord North and Grey—I must beg your Lordship's leave, if the gentlemen have no farther to say to me, and your Lordship have no further commands, that I may return to my prison.

Hungerford—I hope you will make way for my Lord North and Grey through the crowd ; and if your Lordship pleases, we will go on with our evidence."

The next witness Geo. Talbot was asked—" Have you had a character of him ?" He replied—" The worst I could ever hear of any person ; I know nothing of myself, but what I have heard from others."

Mr. Winchman the next witness was asked by Mr. Hungerford—" Is he accounted an honest man or a knave ?"

Winchman—I will not trust him for anything.

Hungerford—The wiser you.

Mr. Ketelby (junior counsel for the prisoner)—Is he a man to be credited ? Can you believe what he says ?

Winchman—I think I would not believe him.

Ketelby—You are right."

Then follow a number of witnesses, some of whom have no personal knowledge of Lynch, while others have known him for a few months only. The witnesses to attack Plunkett's character were then called, the first of whom gave him a very bad character, " that he was a drunken, idle fellow, always kept company with other women."

So far little impression seems to have been made on the jury, so Mr. Hungerford announced—" My lord, here we produce a man of quality,

Sir Daniel O'Carroll." This witness said of Plunkett, " I would not take his evidence to hang a dog." Whereupon Mr. Hungerford observed—" And here he attempts to hang a Protestant."
Alice Dunn's evidence was brief and to the point. In answer to the question—" Do you know what character Plunkett hath ?"—she replied " His character I had from himself, that he lived with another man's wife.
Ketelby—Hath he a good or bad character ?
Dunn—He hath a bad character.
Ketelby—Is he to be believed ?
Dunn—He is not to be believed."
Pratt C.J. protested at the futility of calling witnesses with little or no knowledge of the man whose character they were attacking, but still they came.

Enough has now been quoted to show that there is at this time no very clear cut rule of evidence and very little advantage to be gained by calling such witnesses.

If we are to find any satisfactory statement and explanation of the rule we must leave the English textbooks and reports and turn to the third edition of Wigmore on Evidence.

Wigmore treats the subject both historically and logically. He shows that down to the 18th century a witness's character might always be attacked by the testimony of others detailing the events of his past life and misconduct. " It must be remembered that under the orthodox rule then prevailing as to proof of general character by opinion the witness could give his personal judgment of the impeached witness's character, based on the former's acquaintance and dealings with him ; it was thus an easy concession to allow the impeaching witness to describe among his reasons such specific conduct, good or bad, as might have become known to him . . . But the production of such evidence by witnesses who spoke merely to specific acts of misconduct led gradually to a canvassing of the objections against such a mode of proof. Towards the end of the 1600's appears a tendency to exclude it. Though the rule of exclusion did not become settled until the first half of the next century, and though there are instances enough of its being ignored down to that time, nevertheless it was always treated, from the beginning of the 1700's as a rule that might be invoked. The reasons that were then advanced and accepted in its support have ever since been maintained and conceded as the correct and valid ones[7]."

It appears then that on grounds of relevance any evidence as to the character of a witness was originally admissible. The rule of exclusion which grew up was limited to the exclusion of evidence of particular acts. This rule is based not on lack of relevance but on policy. The chief reasons given are that such evidence would tend to confuse the issues before the jury and that it might unfairly surprise the party whose witness was attacked in this way. Wigmore returns to the matter at a later stage.[8] He shows that in the 18th and early 19th centuries the established practice in England was that the impeaching witness must have personal

7. Wigmore, 3rd ed., s. 979.
8. s. 1982.

knowledge of the witness impeached. If he had no personal knowledge, he could give no evidence of general character.[9] But if personal knowledge was shown then a general question was put as to the character of the witness impeached. But 'character' here did not mean 'reputation.' The only doubt was whether, since credibility was the important thing in a witness, the attack could be made upon his general character—i.e. his qualities as a man generally—or only upon the specific trait of credibility.

Towards the end of the 18th century the opinion grew up that general character—character as a whole—had little to do with credibility, and that the testimony must be specifically directed to credibility only. But a compromise was finally reached and the witness was allowed to employ his knowledge of the general character of the impeached witness and to lay it before the court with reference specifically to credibility—that is, to say whether he would believe the other upon his oath.

In a footnote[10] Wigmore criticises the judgment of Martin B. in *R. v. Brown* for failing to perceive any distinction between evidence based on knowledge of general reputation and evidence of general character based on personal knowledge as leading to an opinion of lack of trustworthiness on oath. This same confusion pervades all the English text books except Wills and Stephen.

It is submitted that the rule in *R. v. Brown* properly limited to exclude evidence based on general reputation is good law notwithstanding the doubt expressed by Cockle and that our unfamiliarity with it in practice is to be explained, as is so much else in the law, by historical considerations. At the present time if a witness is called who is so notoriously untruthful that the opposing party is able to obtain reputable witnesses to his lack of veracity, it is almost unbelievable that he could survive even a moderately competent cross-examination. In that event it becomes unnecessary to call impeaching witnesses who must necessarily, to some extent, tend to emphasise the importance of the evidence given by the witness whose credibility they seek to destroy.

The only modern instance of the application of the rule in *R. v. Brown* known to me occurs in the American trial of Hauptmann for the kidnapping and murder of the infant son of Col. Lindbergh in 1931. And in this case the impeached witness presented opportunities for cross-examination which were almost entirely missed. But according to Stephen, in the 17th century the prisoner had no counsel. "He was indeed allowed to cross-examine, but cross-examination was hardly understood at all, and everyone who has any experience of the matter knows that to cross-examine on bare speculation, and without previous knowledge of what the witness is going to say, is likely to do even a good case more harm than good."[11] And later the same author remarks—"If Oates and the others had been cross-examined with what would now be considered even a moderate degree of skill, they could scarcely have been believed, and they must either have exposed themselves to contradiction

9. O'Connor's Trial, 27 St. Tr. 32.
10. Vol. VII., (3rd ed.), 151.
11. *Hist. Criminal Law*, I. 382.

or have forfeited all credit by forgetting everything upon which they could have been contradicted; but practice and time are essential to the efficiency of cross-examination, and without proper instructions to the cross-examiner it is to a last degree dangerous to a prisoner's interests. In the 17th century the judges seem to have done most of the cross-examination; the prisoner could have no instructions and it was a rule that trials must be finished at a single sitting."[12]

12. Ibid. 403.