[HIGH COURT OF AUSTRALIA.]

BUGG . . . . . APPELLANT;
PLAINTIFF,

AND

DAY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1949.

SYDNEY, *Nov.* 14-16; *Dec.* 12.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Appeal—Negligence—Motor vehicles — Collision—Action—Summing up — Fairness to parties—Issues—Clarity—Evidence—Expert—Qualification—Speed—Data—Traffic offences—Convictions—Admissibility—Cross-examination as to credit—Fresh evidence—Availability and character of evidence—Inquiries before trial—Diligence—Influence on result—Evidence Act 1898-1940 (*N.S.W.*) (*No.* 11 *of* 1898—*No.* 8 *of* 1940), *s.* 56—*Supreme Court Rules* (*N.S.W.*), *r.* 151B.

A failure on the part of a trial judge to emphasize a portion or portions of the evidence deemed by a party to be important is not a justification for a new trial.

Although the summing up of a trial judge may be more critical of the evidence called on behalf of one party than of that called for the other party, it is not necessarily unfair.

A motor car repairer, with ten years' experience as such, who had not seen the collision between a taxi-cab and a motor cycle gave evidence as an expert of the damaged condition of the motor cycle, and said that he deduced from that damage that it was caused by a vehicle travelling at a speed exceeding forty miles per hour. Upon cross-examination he said that he was not informed as to the weight of the taxi-cab, or as to the distance, after the collision, of the two vehicles from the point of impact, or that the taxi-cab had crashed into a telegraph pole and the motor car into a tree. The trial judge in his summing up merely said that the jury should consider the criticism by counsel of that evidence and give such weight to it as they thought proper. There was not any request for any further direction on this subject.

Held that a new trial on the ground that the jury had not been properly or adequately directed on the matter, should not be granted,

(1) by *Dixon*, *McTiernan* and *Williams* JJ., because the issue raised being one of direction of travel, the evidence of speed was of such slight importance that its misreception did not warrant the granting of a new trial; and

(2) by *Latham* C.J. and *Webb* J., because a request for a further direction was not made, therefore leave should not be granted under r. 151B of the Supreme Court Rules of New South Wales.

The defendant, the driver of a taxi-cab, said, in evidence in chief, that he had "been driving motor vehicles practically continuously from 1914 to the present time," and in cross-examination he admitted that he meant thereby that he was a careful driver. Despite objections by his counsel, the plaintiff's counsel then was allowed to cross-examine the defendant to show that he had been convicted for exceeding the speed limit and disobeying light signals, and that he had been warned that if he were convicted again he would lose his licence as a taxi-driver. He said that he had received the warning only in respect of "meter offences." Although the summing up as a whole was objected to there was not any application made for a direction as to the purpose for which the evidence of the convictions might be used by the jury.

Held, that a new trial on the ground that the evidence of the defendant's convictions for traffic offences was wrongly admitted, should not be granted,

(1) by *Dixon*, *McTiernan* and *Williams* JJ., on the ground that the evidence was admissible as going to the credit of the defendant, and

(2) by *Latham* C.J. and *Webb* J., on the ground that the granting of a new trial was precluded by r. 151B of the Supreme Court Rules.

A defendant, against whom a jury had returned a verdict in an action for damages resulting from a collision between a motor cycle and a taxi-cab driven by him, applied for a new trial on the ground, *inter alia*, that evidence not available at the trial had since become available. The fresh evidence was that of a person who heard although he did not see the impact; but he saw the motor cycle travelling in the direction claimed by the defendant but denied by the plaintiff.

Held (1), by the whole Court, that a new trial should not be granted on this ground because the fresh evidence sought to be adduced could with due diligence have been discovered before the trial, and

(2), by *Dixon* and *McTiernan* JJ., on the further ground that they were not satisfied that the fresh evidence was likely to put such a complexion on the case as to lead to a different result.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by James Bugg against James Victor Day the plaintiff claimed damages on the ground that upon a public highway the defendant drove and managed a motor vehicle so negligently, improperly and

H. C. OF A. 1949. BUGG v. DAY.

unskilfully that the plaintiff whilst driving along the highway collided with the defendant's vehicle whereby he was injured and suffered other damages.

Bugg's place of employment was at Flemington and was situate west of a line of railway, and to reach his home at West Ryde it was necessary for him to cross the railway line and proceed in an easterly direction until he reached a road running north and then proceed along that road which led in the direction of his home. On Friday, 5th March 1948, he had finished work soon after six o'clock p.m. By his employer's permission, he used a motor cycle with a side-box attached, the property of his employer, to take him to his home. According to Bugg's evidence, he rode the motor cycle across the railway line at North Strathfield bridge, turned immediately to his left into Queen Street and rode north along that street close to the railway line until he reached Yaralla Street which runs west and east. He turned into Yaralla Street with the intention of riding easterly along it until he reached Concord Road, he intending then to turn to the left into that road, which runs north and south, in order to proceed to the north along it.

To reach Concord Road from Yaralla Street, Bugg had to cross two streets running north and south, first Consett Street and then Mackenzie Street.

A taxi-cab was being driven by Day, the defendant, down Mackenzie Street in a southerly direction and was approaching Yaralla Street from the north. A collision between the motor cycle and the taxi-cab occurred at the intersection of Yaralla Street and Mackenzie Street.

According to the evidence called on behalf of Bugg, when the collision occurred he was riding along Yaralla Street from west to east, so that the taxi-cab was on his left and was therefore the vehicle which should have "given way" in compliance with the traffic rules.

Evidence called on behalf of Day was to the effect that when the collision occurred Bugg was riding along Yaralla Street from east to west, so that the taxi-cab was on his right and it was his duty to "give way".

Bugg gave evidence that after crossing the railway line he rode north up Queen Street and, when he had reached Yaralla Street, turned to the right and rode in an easterly direction towards Concord Road. He remembered passing Consett Street, but had no further recollection. (The collision occurred at the next intersection.)

His evidence had some corroboration from a fellow employee who saw him turn up Queen Street. An independent witness gave

evidence that immediately before the collision he was standing on the western side of Mackenzie Street about one hundred yards to the north of its intersection with Yaralla Street. He noticed the taxi-cab coming down the street at a very fast pace, the speed having attracted his attention. He saw the motor cycle approaching along Yaralla Street from the direction of the railway and making for Concord Road (that is, in an easterly direction). He saw the collision, and walked down and looked at Bugg and at the position of the two vehicles. Each had come to rest on its wrong side of Mackenzie Street. The taxi-cab had travelled eighty feet from the point of impact and had snapped off a telegraph pole which had blocked its further progress, and the motor cycle had travelled to and collided with a tree situate on the eastern side of Mackenzie Street, about forty-six feet from the point of impact.

Evidence given by the defendant was that when approaching Yaralla Street he looked to his left and saw Bugg's motor cycle coming from the direction of Concord Road, that is, travelling in a westerly direction. A police constable, who arrived at the scene of the collision about half an hour after its occurrence, said that he saw tyre marks on Mackenzie Street leading back from the motor cycle to the centre of the intersection where the collision had occurred, and other tyre marks which he attributed to the motor cycle leading from the centre of the intersection towards Concord Road. (If the police constable was correct in thinking that the latter tyre marks were those of the motor cycle, it would show that Bugg had been riding in a westerly direction and that he should have " given way ".)

A witness, William John Carroll, who said that he was a motor repairer and had been engaged in the trade of motor repairing and engineering for ten years and three months, and who did not witness the collision, was called as an " expert " by the plaintiff to show that the damage was the result of an impact received from the left. An objection by counsel for Day as to Carroll's qualifications as an " expert " was overruled by the trial judge. Carroll, in answer to a question put by counsel for the plaintiff, said that the damage to the motor cycle indicated to him that " the car, or whatever vehicle caused that impact, and to do the particular damage to the machine—another vehicle travelling from the near side, to hit it on the near side, would have to exceed forty miles an hour." Objections to the question and answer were overruled. In cross-examination the witness said that he did not have a formula for arriving at his estimate as to speed and that his opinion, which he said was a " scientific opinion," was based solely upon an

H. C. OF A. 1949. BUGG v. DAY.

examination of the damage done to the side-box and wheels of the motor cycle and he did not know that it had run into a tree before he had seen it.

In his evidence in chief the defendant said that he had "been driving motor vehicles practically continuously from 1914 to the present time." Counsel for Bugg, in cross-examination, reminded Day of his evidence as to the length of time he had been driving and asked him if he meant by that that he was a careful driver. Day answered—yes. Bugg's counsel was then permitted, counsel for Day objecting, to obtain from Day admissions that he had been convicted of various traffic offences including exceeding the speed limit, disobeying traffic lights, and failing to give way to a vehicle coming on his right, and also that he had been threatened by the Transport Department with the forfeiture of his licence.

In the course of summing up the trial judge said, *inter alia*, "There is a duty on the driver of the taxi-cab to drive his vehicle with proper care and proper caution. If he did not do it and if in consequence the plaintiff has been injured, then the plaintiff is entitled to succeed. The case as put by 'the plaintiff' and other witnesses to whose evidence I shall refer directly is that at that intersection" (Mackenzie Street and Yaralla Street) "he, having the right of way and travelling at a normal speed, was struck by the taxi-cab driven by the defendant, then travelling at an excessive speed and crossing the intersection in breach of a traffic regulation which would require the taxi-cab to give way to the vehicle that is coming on its right. You know that regulation which has been mentioned throughout the case—give way to the man on the right if the circumstances are such that both vehicles are approaching so that if one or other does not give way there will be a collision." After giving a summary of the evidence given by and on behalf of the plaintiff his Honour continued: "In addition to that there was a Mr. Carroll called. He is a repairer and he gave evidence as to the damage to the motor cycle and side-box and said that the box wheel spokes were pulled out from the hub, and the mudguard was crushed and the side-car light was flattened out; the box was dented on the near and off side. The near side of the tank was indented as if by the knee. The back wheel was bent near the side of the machine. The tyre and the rear wheel were inflated but blue metal screenings had become wedged between the tyre and the rim on the off side of the wheel. He said that as one experienced in effecting repairs to damaged vehicles, he formed the opinion that the impact which caused these items of damage to the motor cycle and side-car was an impact which came from the near side, that is

the left side, and from a vehicle or car which he considered would be travelling at possibly forty miles an hour. You have heard that opinion criticized. Carroll's evidence as to the actual damage to the motor cycle is not contradicted. The opinions which he expressed as to the speed of the motor car and as to the impact coming from the left side has been criticized by learned counsel for the defendant, and you will give such weight to that criticism as you think proper. It is a matter for you."

Dealing with Day's case his Honour said, *inter alia*, "The defendant's case is simple to understand. There is no subtlety about it. It is that the accident did not happen at all as it is put on the part of the plaintiff but, on the contrary, the accident happened because the motor cycle was coming from the Concord Road direct and was going towards the west. There is a very clear cut issue in this case and it may well be that the decision which you will ultimately reach will depend on your view as to where the truth lies. It is put therefore that the whole basis of the plaintiff's case of negligence falls to the ground because the facts are not as the plaintiff alleges at all." His Honour referred to the defendant's convictions as follows: "It is possibly proper for me to point out that there are one or two matters that you might think are somewhat curious in the case put forward by the defendant. Although he is a man of considerable experience—it is put forward that he is a careful driver—that certain evidence of certain troubles (I use that expression from the traffic point of view) he has had has been given, and you will remember what has been said about those; and you will give to that such weight, not over-much weight, but still not discrediting such evidence altogether, as you think proper."

At the end of the summing up, and after the jury had left the court, counsel for the defendant sought to rectify what he considered to be the prejudicial position in which the defendant might be placed if in addition to the issue of "was the plaintiff travelling west or was he travelling east," or, in other words, "who broke the 'give way' rule," a separate issue of negligent speed was left open to the jury. He objected to the whole of the summing up, except on the question of damages, on the ground that it had been unduly favourable to the plaintiff, and asked the trial judge to withdraw it and to direct the jury that if they found that the plaintiff was travelling west then their verdict must be a verdict for the defendant; if they found that he was travelling east then there must be a verdict for the plaintiff; and if they could not make up their minds which direction he was travelling there must be a verdict for the defendant, because the only case the defendant was called

H. C. OF A. 1949. BUGG v. DAY.

upon to meet was the plaintiff's case that he was travelling east. A discussion then ensued as to whether there was another case open to the plaintiff, that is, whether, if the evidence of the defendant was accepted that the plaintiff was proceeding in a westerly direction, there was evidence on which the jury could find that the effective cause of the collision was not the failure of the plaintiff to give way but the excessive speed of the taxi-cab. The trial judge said that it would no doubt be possible for the jury, even if they accepted the defendant's version, to find that nevertheless he was more or less to blame. He further said that counsel for the plaintiff had not asked him at any stage to put that it was on any basis that the motor cycle was travelling westwards, and he, the trial judge, consciously refrained from putting anything like that to the jury. He referred to the fact that the defendant's counsel had not made any submission relating to contributory negligence. The trial judge was not asked to give a direction with respect to the evidence relating to the defendant's previous convictions.

The jury returned a verdict for the plaintiff for £2,928.

The defendant appealed to the Full Court of the Supreme Court for an order that the verdict be set aside and a new trial granted on the grounds:—1. that the trial judge did not sufficiently or properly direct the jury, and that his summing up was unduly favourable to the plaintiff and unduly unfavourable to the defendant; 2. that he failed to make it clear to the jury that the only issue between the parties (apart from damages) was, which was the give-way vehicle; 3. that he was wrong in admitting evidence by one Carroll that in his opinion the taxi-cab was travelling at a speed exceeding forty miles per hour; 4. that he was wrong in admitting evidence of previous convictions of the defendant for traffic offences; and 5. that fresh evidence was then available to the defendant.

The facts relevant to the ground relating to the availability of fresh evidence were as follow: The collision occurred on 5th March 1948. The writ in the action was issued on 12th May 1948, and the defendant's solicitor received instructions on 26th May. Shortly after he received them, the defendant told him that a man had come to the scene of the collision almost immediately after its occurrence and had rendered some assistance. He believed him to be an eye-witness, but the man had refused to give his name and address. The defendant believed him to be attached to a professional carnival which was at that time operating in the park situate at the corner of Mackenzie Street and Yaralla Street, but had since left the locality.

The defendant's solicitor caused inquiries as to the whereabouts of the carnival to be made from shopkeepers and residents of Concord, the police, the Chief Secretary's Department and the Taxation Department, but without success, and employed a private investigator who also was unsuccessful. The trial of the action began on Wednesday, 16th March 1949. It occupied the whole of that day and also of 17th and 18th March, and until 3.35 o.clock p.m. on Monday 21st March, when the jury returned their verdict for the plaintiff for £2,928.

On 1st April 1949, the defendant's solicitor happening to notice a carnival in a Sydney suburb, caused inquiries to be made at the carnival from which he learned that a man named Donaldson was connected with the carnival which had been at Concord in March 1948. Information was obtained from Donaldson that one Somerville was probably the person who was being sought. Somerville was found and a statement was obtained from him on 27th April 1949. On 12th May he made an affidavit stating that he had been operating a miniature railway at the Concord carnival, that he saw the plaintiff's motor cycle travelling along Yaralla Street in a westerly direction, that he heard the impact but did not see the collision though immediately afterwards he ran to the scene, that he saw where the vehicles had stopped after the collision, that he saw the track marks of both vehicles and they were still visible the next day, that he noticed that the taxi-cab had been damaged on the left hand front mudguard, that he then by telephone rang for the ambulance, the police, and the motor cyclist's employer, informing them of the accident, that an investigator employed by the defendant's solicitor spoke to him on 26th April 1949, and he made a statement on 27th April 1949.

An affidavit was filed by the plaintiff's solicitor to the following effect: After receiving the defendant's affidavits he, on 24th May 1949, ascertained from the office of the Concord Municipality that the Council, in which the park was vested, had granted to one Davies of 76 Queen Street, Concord, permission to conduct a carnival in the park from 26th Febraury 1948 to 4th March 1948, and on the same day he interviewed Davies, the honorary secretary of a local sports club, who told him that for the purposes of the carnival he had hired, among other devices, a miniature railway from one W. J. Donaldson of 69 Forsyth Street, Kingsford, that the holding of the carnival was advertized in the local newspaper, that a sign was exhibited at the carnival notifying that it was being held on behalf of the club, that he knew the defendant, that the defendant knew that he was the honorary secretary of the club, that an

H. C. OF A. 1949. BUGG v. DAY.

inquiry had not been made of him about the carnival by anybody, and that if anyone had inquired he could have given the name and address of Donaldson.

The issues of the local newspaper had shown the name of Davies as promotor of the carnival and his telephone number. The plaintiff's solicitor also ascertained from the Chief Secretary's Department that Davies had obtained a permit for a lottery or raffle at the carnival, and that Donaldson had hired, *inter alia*, the miniature railway for the purposes of the carnival. He also ascertained from the police station, Concord, that it was known there that Davies held a permit for the carnival and that the sergeant had attended it on several occasions in the course of his duties. An inquiry had not previously been made at the police station as to on whose behalf the carnival was conducted. The plaintiff's solicitor ascertained also the address at which Somerville had resided from April to August 1948 and from November 1948 to the present time.

The defendant's appeal to the Full Court of the Supreme Court was, by majority, (*Maxwell* and *Owen* JJ., *Jordan* C.J. dissenting), allowed, the verdict set aside and a new trial ordered. The court was unanimous that in the circumstances a new trial was not warranted on ground 5 alone.

From that decision the defendant, by special leave, appealed to the High Court.

G. E. Barwick K.C. (with him *J. F. Nagle*), for the appellant. If a special direction to a jury be required the trial judge must be asked to give it (*Cotton* v. *Commissioner for Road Transport and Tramways* (1)). The case considered at the trial was based on a breach of the rule of the road. The evidence of the witness called as an expert was admissible. There was not any request on behalf of the respondent that that evidence should be the subject of a special direction to the jury, nor was the witness examined on the *voir dire*. *McAllister* v. *Richmond Brewing Co. (N.S.W.) Pty. Ltd.* (2) is somewhat similar to what would happen in this case if there were some direction given as to a possible case. The summing up left to the jury one case, which was the agreed case. The respondent " chose his own battleground " (*Burston* v. *Melbourne and Metropolitan Tramways Board* (3)). The criticisms of the majority of the court below are founded on a misconception of what was said by the

(1) (1943) 43 S.R. (N.S.W.) 66, at p. 72; 60 W.N. 42, at p. 45.
(2) (1942) 42 S.R. (N.S.W.) 187, at p. 191; 59 W.N. 147, at p. 151.
(3) (1948) 78 C.L.R. 143, at pp. 154, 156.

trial judge. It is quite a *non-sequitur* that the jury must have taken or might have taken from the summing up something which was neither said nor suggested. The questions asked by the appellant's counsel relating to the respondent's convictions for traffic offences were fair and reasonable and were properly admitted. The matters involved were properly explained to the jury by the trial judge. The order for a new trial was not warranted.

N. A. Jenkyn K.C. (with him *J. T. Hiatt*), for the respondent. The appellant's case was that he was travelling in an easterly direction but the evidence of the only witness who deposed to that effect shows that he was not an accurate observer of the facts. The appellant admitted that beyond a certain point he had not a very clear recollection. The issue put to the jury on behalf of the appellant was that if the respondent had been guilty of careless driving and that careless driving resulted in injury to the appellant, then the appellant was entitled to a verdict. The issue as put on behalf of the respondent was—Who had the rule of the road in his favour ? That issue, which was the real issue, was not dealt with or adequately dealt with in the summing up. The way the matter had been left to the jury it was open for them to think that they could return a verdict in favour of the appellant, even though the rule of the road was against him, therefore that position should have been rectified by a further direction. Upon objection being taken it was clear that the trial judge shared the view that the way in which it had been left to the jury showed that there were two separate allegations of negligence in respect of which a finding could be made adverse to the respondent. Nevertheless the trial judge wrongly refused to give that further direction. In order to avoid the possibility of a finding on a wrong issue, the trial judge should have acceded to the request to make the issue clear to the jury. Before a person be permitted to give " expert " evidence on a particular subject he must satisfy the trial judge that he is qualified as an expert in respect of that subject. It is the duty of the trial judge to decide this as a preliminary point. There was not any evidence on which a finding could be made that the witness called as an expert was qualified to speak as an expert witness on the subject to which he was directing his attention. The subject of his evidence, insofar as the objection relates, was the scientific deduction of speed from proved damage. Where, as in this case, the evidence of such a witness has been discredited during cross-examination the trial judge should warn the jury not to accept at its face value any of that witness' evidence. The jury were not so warned. The matter

H. C. OF A. 1949. BUGG v. DAY.

of expert evidence is dealt with in *Smith's Leading Cases*, 13th ed. (1929), p. 561, and *Best* on *Evidence*, 12th ed. (1922), p. 440.

[McTIERNAN J. referred to *Commissioner for Railways* v. *Wise Bros. Pty. Ltd.* (1).]

Even though a direction relating to the admissibility or value of the evidence with regard to the respondent's convictions for traffic offences was not specifically asked for the matter was within the discretion of the court below upon an application for a new trial. So far as rule 151B of the Supreme Court Rules is concerned different considerations apply when dealing with evidence which is admissible evidence but is admissible only for a particular purpose. Negligence does not bear any relation to the question as to whether the witness is a witness of truth. Evidence otherwise inadmissible should not be allowed in under the guise of cross-examination as to credit. The main principles which exclude this type of question in both criminal and civil cases do not depend upon code at all. It is of the utmost importance that questions going to credibility ought not to be admitted if there is any risk of the jury being misled into thinking that they have not gone to credibility only. Unless such questions can be put on the ground of credit only they cannot be put at all (*Maxwell* v. *Director of Public Prosecutions* (2); *Noor Mohamed* v. *The King* (3); *Makin* v. *Attorney-General for New South Wales* (4); *R.* v. *Sims* (5); *R.* v. *Bond* (6); *R.* v. *Ball* (7); *Brown* v. *Eastern and Midlands Railway Co.* (8)). In motor car cases it is not open for the jury to have brought before their notice as part of the case the respective convictions of the plaintiff and the defendant. The evidence as to his experience was evidence which the respondent was entitled to give without any penalty of cross-examination as to previous convictions. That evidence was relevant to skill as distinct from habitual carefulness and it was not competent to the appellant to meet evidence of skill by evidence of habitual carelessness. *Noor Mohamed* v. *The King* (3) and cases referred to therein establish a principle which is just as applicable to civil as it is to criminal cases and limits the rule that in civil cases the defendant is exposed to cross-examination as to previous convictions. That type of questioning, whether it be similar conduct or convictions for similar conduct, is regarded by law as inadmissible in either criminal or civil cases.

(1) (1947) 75 C.L.R. 59; (1946) 47 S.R. (N.S.W.) 233; 64 W.N. 34.
(2) (1935) A.C. 309.
(3) (1949) A.C. 182.
(4) (1894) A.C. 57.
(5) (1946) K.B. 531.
(6) (1906) 2 K.B. 389, at pp. 397, 398.
(7) (1911) A.C. 47.
(8) (1889) 22 Q.B.D. 391.

[LATHAM C.J. referred to *James* v. *Audigier* (1).]

The credit in that case was the alleged failure of the defendant to disclose that he had had a previous accident; it was not put on credit but went to his discredit that he had been involved in an earlier accident. It was not a matter of motive on the part of the respondent because there was not any evidence that he was in peril of losing his commercial licence. If such questions be admissible on the ground of motive it must necessarily follow that they are admissible in all cases. The established practice in New South Wales is not to cross-examine in motor-car cases about previous convictions on the ground that they go to credit. That practice should be adhered to. Evidence of a conviction is not admissible (*Hollington* v. *Hewthorn & Co. Ltd.* (2)). The summing up was inadequate and was unduly critical of the respondent's case. It went beyond fair criticism, therefore the court below was right in ordering a new trial (*McVicker* v. *Forbes* (3); *Holford* v. *Melbourne Tramway and Omnibus Co. Ltd.* (4)). The new evidence desired to be submitted for the consideration of a jury is of vital importance and is calculated to, or might, lead to a different result. The respondent was taken by surprise. The real significance of this evidence did not, and could not, become apparent until during the course of the trial of the action the appellant introduced the, until then unthought of, controversy, as to the direction in which he was proceeding. Search made during the trial to locate the witness proved abortive but he is now available. In the light of (*a*) the criticisms, if they are justified, of the summing up; (*b*) the matters which the court below felt were of such importance as to justify a new trial; and (*c*) the very strong probability that a miscarriage of justice has in fact taken place, there are very strong grounds for suspecting that the evidence of the respondent with regard to the direction from which the appellant was proceeding was correct. The new evidence agrees with the evidence of the respondent in this regard. The trial should be regarded as an unsatisfactory trial.

G. E. Barwick K.C., in reply. An affidavit before the court shows that the respondent did not take any real steps to locate the proposed witness. The summing up was not unfair. The trial judge made only such criticisms as he was entitled to make. Those criticisms were fair. All matters were left to the jury and the jury were properly directed thereon. The effect of s. 56 of the *Evidence Act*

(1) (1932) 48 T.L.R. 600; 49 T.L.R. 36.
(2) (1943) 1 K.B. 587, at p. 593.
(3) (1941) V.L.R. 266, at pp. 271, 274.
(4) (1909) V.L.R. 497, at pp. 504, 505, 508, 509.

H. C. OF A. 1949. BUGG v. DAY.

is to give a discretionary control to the trial judge to prevent the asking of a question if it does not bear on credit. It should be assumed that in the proper exercise of his discretion the trial judge admitted the questions relating to the respondent's prior convictions as going, undoubtedly, to credit.

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales directing a new trial (*Maxwell* and *Owen* JJ., *Jordan* C.J. dissenting) in an action of negligence in which James Bugg sued James V. Day for damages in respect of injuries suffered as the result of a collision between a taxi-cab driven by the defendant and a motor cycle ridden by the plaintiff. The jury gave a verdict for the plaintiff for £2,928. The defendant successfully applied to the Full Court for a new trial. The grounds of the application were:—(1) That the summing up as a whole was unfair to the defendant in that it did not properly put his case to the jury. (2) That the learned trial judge did not clearly tell the jury that there was only one issue between the parties, namely as to the direction in which the plaintiff was travelling along Yaralla Street on the motor cycle when the accident happened at the intersection of that street and Mackenzie Street, that is, whether he was travelling east as he said or west as the defendant said. The defendant was travelling south along Mackenzie Street. If the plaintiff was travelling in an easterly direction he was on the defendant's right and it was the duty of the defendant to give way to him under a regulation made under the *Motor Traffic Act* 1909-1937 (N.S.W.), which provides that a driver must give way to another driver on his right-hand side if the circumstances are such that both vehicles are approaching so that if one or other does not give way there will be a collision. If the plaintiff was riding in a westerly direction he should have given way to the taxi-cab. It was said that the judge did not put it clearly to the jury that this was the sole issue in the action, with the result that, even if the jury found that the plaintiff was, contrary to his own case, travelling west, the jury might have given him a verdict because there was some evidence that the taxi-cab was being driven at a high rate of speed. If such a case had been made by the plaintiff it would have been open to the defendant to seek to make a case against the plaintiff on contributory negligence. But nothing was said about contributory negligence in the course of the trial or in the summing up. (3) That evidence of one Carroll that he concluded from an inspection of the motor cycle

after the accident that the taxi-cab was travelling at forty miles an hour was wrongly admitted. (4) That evidence of convictions of the defendant for offences in relation to motor cars was wrongly admitted. (5) That there should be a new trial because fresh evidence had been discovered which was not available to the plaintiff, with the exercise of reasonable diligence, at the time of the trial.

As to (1): The learned trial judge in his summing up was more critical of the evidence called on behalf of the defendant than of that called for the plaintiff. But I agree with all the learned justices of the Supreme Court that the summing up was not unfair.

(2) The learned trial judge put the plaintiff's case in the following words:—"The case as put by him and other witnesses to whose evidence I shall refer directly is that at that intersection he, having the right of way and travelling at a normal speed, was struck by the taxi-cab driven by the defendant, then travelling at an excessive speed and crossing the intersection in breach of a traffic regulation which would require the taxi-cab to give way to the vehicle that is coming on its right. You know that regulation which has been mentioned throughout the case—give way to the man on the right if the circumstances are such that both vehicles are approaching so that if one or other does not give way there will be a collision." It will be observed that this presentation of the plaintiff's case depends upon the fact that the plaintiff claimed that he "had the right of way"; that is, that he was travelling from west to east. There is not any suggestion that the jury could find for the plaintiff if he was travelling from east to west.

The defendant's case was put in the summing up in these words:—"The defendant's case is simple to understand. There is no subtlety about it. It is that the accident did not happen at all as it is put on the part of the plaintiff but, on the contrary, the accident happened because the motor cycle was coming from the Concord Road direct and was going towards the west. There is a very clear cut issue in this case and it may well be that the decision which you will ultimately reach will depend on your view as to where the truth lies. It is put therefore that the whole basis of the plaintiff's case of negligence falls to the ground because the facts are not as the plaintiff alleges at all." In my opinion there can be no substantial objection to this description of the basis of the claim made by the plaintiff and of the defence of defendant to that claim. Perhaps, instead of saying that "it may well be that the decision which you will ultimately reach will depend on your view as to where the truth lies," his Honour might have said that the decision would certainly depend upon which story the jury accepted

H. C. OF A. 1949. BUGG v. DAY. Latham C.J.

—whether that of the plaintiff or that of the defendant, but an absence of emphasis of this kind cannot be a justification for ordering a new trial.

After the summing up was concluded counsel for the defendant objected to the whole of the summing up and contended that the summing up left it open to the jury to find for the plaintiff, even if the plaintiff was travelling from east to west, because some evidence had been given to the effect that the taxi-cab was being driven very fast. A discussion took place in the absence of the jury and it has been argued that some of the comments of the learned judge in the course of the discussion showed that his Honour himself thought that his summing up would allow the jury to find for the plaintiff, even if the jury believed that the plaintiff was travelling from west to east. But I do not so read the report of what his Honour said. The learned judge was referring in the course of general discussion to the subject of speed, which was relevant even if the only question was a question as to who had the right of way, because if the taxi-cab were being driven very fast the driver would not be in as good a position as he ought to be in order to observe the rule of the road. On this part of the case, however, I consider only what was said in the presence of the jury, and in my opinion the summing up fairly put the cases of both parties and was not such as to mislead the jury into thinking that they could determine the case on the question of speed alone.

(3) A witness Carroll called by the plaintiff had had experience as a repairer of damaged motor vehicles. He described the state of the damaged motor cycle after the accident. There is no question as to his qualification to give such evidence. But he also said that in his opinion the taxi-cab must have been travelling at forty miles an hour. It is submitted for the defendant that Carroll was not an expert upon speed and that his opinion ought not to have been admitted as evidence. It is true that, even if Carroll had been qualified to give an opinion as to the speed of one vehicle which had collided with another vehicle when he had only seen the second vehicle, he had not been provided with data which would have been necessary to enable any person to form even an approximate estimate of the speed of either vehicle at the moment of the collision. He was not informed as to the weight of the taxi-cab or as to the distances, after the accident, of the two vehicles from the point of collision. The effect of his evidence was completely destroyed in cross-examination and the learned trial judge paid no attention to it in his summing up except to refer to the criticism of it and to say that the jury should consider that criticism and give

such weight to it as they thought proper. No request was made for any further direction on this subject, and rule 151B of the Rules of the Supreme Court provides that no direction or omission to direct given by a judge presiding at a trial shall without the leave of a court be allowed as a ground for a notice of motion for a new trial unless objection was taken at the trial to the direction or omission by the party on whose behalf the notice of motion has been filed. If objection had been taken at the trial it would have been a simple matter to point out to the jury more strongly that little or no weight should be given to Carroll's evidence. But the necessary objection was not taken and in my opinion the defendant cannot rely upon this omission to direct as a ground for a new trial.

(4) In his evidence in chief the defendant said "I have had experience in driving since 1914. I have been driving motor vehicles practically continuously from 1914 to the present time." In cross-examination he gave an affirmative answer to a leading question—"Were you meaning to put it to this jury by that (that is, his evidence in chief already mentioned) that you were a careful driver?" Counsel for the plaintiff then was allowed to cross-examine the defendant in order to show that he had been convicted for exceeding the speed limit and disobeying light signals. Counsel for the plaintiff elicited from him an admission that he had been warned that if he was convicted again (apparently "of failing to give way to a vehicle on the right") he would lose his licence as a taxi-driver. In re-examination the defendant said that he had been convicted of "meter offences," that is, not pulling his flag down when his taxi was engaged, and that it was in respect of these offences that he had received the warning.

It is contended that no cross-examination as to the defendant's convictions should have been allowed. It was held in the Supreme Court by *Maxwell* J. that the evidence was entirely inadmissible and by *Owen* J. that it was admissible, but that a warning should have been given to the jury that the evidence could affect only the credit of the defendant, and that it could not be used to show that he had been negligent on the occasion of the accident in question. *Jordan* C.J. held that the evidence was admissible in this case because the defendant had given evidence that he was an experienced driver and that on behalf of the plaintiff it was proper to cross-examine him upon the nature of his experience and what had happened in the course of his career as a driver for the purpose of meeting the inference which the jury was invited to draw in favour of the defendant that a man of his age (sixty-one years) and with

H. C. OF A. 1949. BUGG v. DAY. Latham C.J.

large driving experience would prima facie be disposed to take care to obey all traffic regulations.

One of the commonest methods of seeking to destroy the evidence given by a witness by cross-examination is to show that because of convictions for breaches of the law he is a person who should not be believed upon his oath. There are special rules which limit such cross-examination in the case of persons charged with criminal offences. But the court was not referred to any authority showing that questions as to convictions were not admissible in cross-examination in civil proceedings. It is true that such questions may in a particular case unfairly prejudice a witness or a party. There are two safe-guards against this danger. In the first place, s. 56 of the *Evidence Act* 1898 (N.S.W.) provides as follows:— "When any question put to a witness in cross-examination is not relevant to the cause or proceeding, except so far as the truth of the matter suggested by the question affects the credit of the witness by injuring his character, the Court shall have a discretion to disallow the question, if in its opinion the matter is so remote in time, or of such a nature that an admission of its truth would not materially affect the credibility of the witness." In the present case the learned trial judge allowed the question only as to recent convictions and excluded evidence of "remote" convictions. The fact that the witness had been warned that if he broke the traffic regulations again he might lose his licence was a special circumstance which could fairly be used to show that the defendant was, even more than in the case of an ordinary defendant, vitally interested in the result of the proceedings, and that such an interest might affect his veracity. In the second place, the danger of which mention has been made may be avoided in a case where there is a jury by the trial judge expressly telling the jury that the fact that (if, e.g., it is a negligence case) a person had been convicted of negligence on some prior occasion or occasions does not help, or even begin, to establish the truth of an allegation that he has been negligent on the particular occasion which is in question. It was upon the failure of the learned trial judge to follow this course that *Owen* J. based his decision that by reason of the admission of evidence of convictions of the defendant it was proper to order a new trial. But the trial judge was not asked to direct the jury in the manner stated. The summing up as a whole was objected to, but no application was made for a direction as to the purpose for which the evidence of the convictions might be used by the jury, and in my opinion rule 151B, to which reference has already been made,

provides a complete answer to this objection on behalf of the defendant.

(5) The members of the Full Court of the Supreme Court were unanimously of opinion that the "fresh evidence" sought to be adduced could with due diligence have been discovered before the trial. I agree with their Honours as to this matter and have nothing to add.

In my opinion the objections of the defendant to the trial fail and the order of the Full Court should be set aside and the verdict of the jury and judgment for the plaintiff for £2,928 should be restored.

DIXON J. This is an appeal by leave from an order of the Supreme Court of New South Wales granting a new trial. The action was for damages for personal injuries sustained by the plaintiff, who is the appellant, in a collision between a motor cycle ridden by him and the defendant's taxi-cab.

The cause of action was negligence. The accident occurred at the intersection of two streets. The defendant's taxi-cab was travelling south upon a street running north and south. The plaintiff was riding his employer's motor cycle, to which was attached a side box, along the intersecting street running east and west. His case was that he was travelling in an easterly direction so that, as he approached the intersection, he was upon the taxi-driver's right hand. He complained that the taxi-driver failed to observe the regulation requiring him in such circumstances to give way to the vehicle approaching him from his right and that on the contrary he maintained an excessive speed. The defendant's case was that the plaintiff was travelling in the opposite direction, so that it was the plaintiff's duty to give way and the accident was caused by the plaintiff's riding over the crossing in neglect of the rule.

The jury found a verdict for the plaintiff. But for a number of reasons a majority of their Honours in the Full Court (*Maxwell* and *Owen* JJ., *Jordan* C.J. dissenting). considered that the trial had been unsatisfactory and a new trial should be ordered.

I have come to the conclusion, though not without hesitation, that the verdict should stand.

The complaints which the defendant makes concerning the admission of evidence and the charge to the jury of the learned judge at the trial should no doubt be considered in combination but, on examination, I do not think that together they disclose sufficient ground for setting aside the verdict.

H. C. OF A. 1949. BUGG v. DAY. Dixon J.

The evidence adduced by the plaintiff tended to show that the defendant drove his taxi-cab down to the intersection at a high rate of speed, that the plaintiff entered the crossing from the defendant's right, that the defendant failed to give way and after colliding with the plaintiff continued for another eighty feet with such momentum that his cab brought down a telegraph pole which it struck.

Properly considered the plaintiff's case depended on the fact that he was on the defendant's right hand and that the defendant, driving at too high a speed, did not give way.

If the defendant's case were accepted as correct, namely, that the plaintiff was proceeding in the opposite direction and came into the crossing on the defendant's left, that would have been a complete answer to the plaintiff's case. But the defendant's counsel appears to have been under some apprehension lest the jury might, even on that footing, treat the evidence that the defendant was travelling at an excessive speed as enough to justify a verdict for the plaintiff notwithstanding that it was the plaintiff who had the defendant on his right hand and who failed to give way.

If such a view of the matter had been put to the jury, it might have been answered, and perhaps effectually, on the ground that in the circumstances supposed the plaintiff would have been guilty of contributory negligence.

But on the plaintiff's real case, contributory negligence had of course no place, and the defendant did not raise it. The plaintiff's counsel did not in fact put to the jury as an alternative case the possibility of their accepting the defendant's evidence as to the direction in which the plaintiff was travelling and nevertheless finding for the plaintiff on the ground of excessive speed on the part of the defendant. Obviously, forensically, it would have been both difficult and dangerous for him to have attempted to put such an alternative case. But it is said that he presented the plaintiff's case in a general way and avoided pinning his case to the single definite issue of the direction in which the plaintiff was travelling.

In these circumstances the defendant contends that in his charge to the jury the learned judge at the trial should have directed the jury not to treat excessive speed as an independent head of negligence which would suffice even though they were of opinion that the plaintiff crossed from the east and not the west, and therefore had the obligation of giving way. The defendant complains that so far from giving such a direction to the jury his Honour encouraged them to treat excessive speed as an independent head of negligence.

I do not think that the jury would so understand the summing up and I do not think that what the learned judge said to the jury

bears this interpretation. The general effect of the charge appears to me to be to submit to the jury the question in which direction was the plaintiff travelling as the issue upon which the case turned, and I think that the references to speed which the summing up contains are either bound up with the plaintiff's case that he was on the defendant's right hand or else are merely statements of what particular witnesses said made by the learned judge in the course of summarizing the evidence.

But at the conclusion of the summing up, when counsel for the defendant sought a re-direction upon this matter, his Honour made observations some of which suggest that he did regard speed as an independent and alternative head of negligence. This, fortunately for the plaintiff, was said in the absence of the jury and the charge as transcribed does not in my opinion bear out the impression which these particular observations of his Honour give.

It remains true however that nothing was said in the summing up which positively excluded the possibility of the jury's finding for the plaintiff on the ground of the defendant's excessive speed notwithstanding that they accepted the defendant's version as to the direction in which the plaintiff was travelling.

I do not think that a new trial should be ordered because of the want of a positive instruction to the jury not to take this course or not to do so without considering whether the plaintiff's contributory negligence in failing to see the defendant earlier and give way was a bar. We have not the advantage of a report of the addresses of counsel to the jury, but reading through the evidence and the summing up, I do not think that we should conclude that the risk was so real of the jury's accepting the defendant's case as to the plaintiff's coming from the east and yet finding that the excessive speed of the defendant was the cause of the accident as to make it imperative for the learned judge to give them a direction upon the subject.

A further complaint of a more general character was made concerning the summing up. It was that it did not fairly present the case for the defendant and that it put too strongly the considerations favouring the plaintiff.

No doubt the defendant's case might have been presented to the jury as possessing greater strength and no doubt some of the subsidiary considerations in favour of the plaintiff which were mentioned were susceptible of answers to which the attention of the jury was not specifically drawn. But the summing up did not introduce any matter of prejudice, it did not tend to distract the jury's attention from the real issue, there was nothing to confuse

H. C. OF A 1949. BUGG v. DAY. Dixon J.

them, and nothing to lead them to suppose that the responsibility of applying their minds to the facts and deciding the case upon the true issue was not theirs. To grant a new trial in a civil case upon the ground that the charge to the jury did not fairly and adequately submit the case of one or other party to them is a course which the court may take where the court is satisfied that it would be a manifest injustice to leave the verdict standing. But it must be a very strong case and that is a description which certainly cannot be applied in the present instance.

Besides advancing the foregoing considerations in favour of a new trial, the defendant relied upon the discovery of fresh evidence as a further ground and also upon the wrongful admission of certain evidence or the failure to give a direction as to the limited use which might properly be made of the evidence.

As to the ground that fresh evidence has been discovered I shall say little. The considerations which govern the grant of a new trial on such a ground have lately been discussed in this Court in *Orr* v. *Holmes* (1). It is enough to say that I am not satisfied that either of the two requirements are fulfilled which govern the Court's discretion in granting a new trial when it is alleged that fresh evidence has been discovered. I am not satisfied that the new evidence puts such a different complexion on the case that the opposite conclusion ought to be reached by a jury with that evidence before it, and I am not satisfied that no reasonable diligence would have enabled the defendant to adduce the evidence at the former trial.

The questions of the wrongful admission of evidence are two in number. The first of them presents little difficulty. A witness was called for the plaintiff who described himself as a motor repairer and said that he had been engaged in the business of motor engineering for over ten years. After the accident he had repaired the motor cycle ridden by the plaintiff. He was permitted to express an opinion, based on his inspection of the damage done to the machine, that the motor car or other vehicle hitting the near side and doing the damage must have exceeded forty miles an hour. This opinion was received in evidence over the objection of the defendant's counsel. In my opinion it ought not to have been received in evidence. It plainly involved assumptions of fact that were not adverted to by the witness. Even if the data were ascertainable and available, his conclusion would involve a problem far beyond his capacity and qualifications and one to which he did not purport to address himself. It was not evidence based upon

(1) (1948) 76 C.L.R. 632.

a branch of knowledge or an art in which the witness was skilled but a wild and unsophisticated conjecture.

But in my opinion the mis-reception of this evidence ought not to lead to a new trial. It ought not to do so because the statement of the witness was of such slight importance.

The question of speed was dealt with by the direct evidence of a bystander and by the evidence of the defendant himself, who explained that his foot slipped from the brake to the accelerator. It is true that he said it did so almost at the point of impact, but he said " you had only to touch the accelerator and the car jumped out of her skin " and he accounted thus for the impact with which his taxi-cab hit the telegraph post. The opinion of the motor repairer could add little to this, but, what is decisive, in cross-examination its effect was destroyed by an admission obtained from the witness that he had not known that the motor cycle had hit a tree as a result of the collision.

The second question as to the admissibility of evidence is of a very different kind. In his evidence in chief the defendant had said that by occupation he was a taxi-driver, that he was sixty-one years of age, that he had had experience in driving since 1914 and had driven motor vehicles continually from that year to the present time. In the course of his cross-examination he assented to questions by counsel for the plaintiff suggesting that he had meant by that to put to the jury the view that he was a careful driver. Counsel then proceeded to obtain from the witness a series of answers to the effect that when the policeman saw him at the scene of the accident (about half an hour after it had taken place) he knew that if he admitted that he failed to give way to a vehicle on his right he might lose his licence because, having been convicted of exceeding the speed limit, of disobeying traffic lights, failing to give way to the right and of taxi-meter offences, he had been warned finally that if he offended again he would lose his taxi licence.

It ultimately appeared that the warning he had received was from the Road Transport Department and was to the effect that, if he failed to take advantage of the leniency that had been extended to him and came again under notice for any breach of the regulations relating to the operation of public motor vehicles, consideration would be given to the suspension or cancellation of his licence. The cross-examination as to the traffic convictions and warning was objected to, but the objection was overruled.

It appears to me that the cross-examination was admissible as going, in the particular circumstances, to the credit of the witness.

H. C. OF A. 1949. BUGG v. DAY. Dixon J.

The plaintiff was challenging his statement that the plaintiff was travelling west as a concoction.

The warning of the Road Transport authority might properly be relied upon by the plaintiff as affording a strong motive for inventing an answer to the obvious charge that he had not given way to a vehicle on his right entering a crossing. The convictions were the basis of the warning and not to be separated from the warning and the fact that one of them was for failing to give way to a vehicle crossing from the right lent point to the argument. The defendant's answer was that the meter offences formed the specific basis of the warning, offences more relevant to the functions of the Road Transport authority. But that was a question for the jury to consider and did not go to admissibility.

It is hardly necessary to say that the matter elicited by the cross-examination could only be admissible as going to the credit of the witness and could not be admitted as relevant to the issue of negligence (cf. *James* v. *Audigier* (1)).

It was suggested that the cross-examination was made admissible by the evidence in chief of the defendant to the effect that he was sixty-one and had been driving a taxi-cab continually since 1914. This, it was said, amounted to a claim to be an old experienced driver who might be expected to proceed in a restrained and careful manner. To rebut this implication evidence of his traffic offences might be elicited. This view was accepted in the Supreme Court by *Jordan* C.J. and *Owen* J. but I am inclined to think that the defendant's counsel is right in saying that the evidence in chief strictly read goes no further than experience, including no doubt skill, and does not touch prudence, moderation, or propriety of conduct in driving.

Moreover, on further consideration, I do not think that the evidence of the defendant's traffic convictions are admissible as impeaching credit simply because they are convictions for offences. Notwithstanding that I think that they were admissible for the first reason I have mentioned, it is desirable to say something of this suggested ground.

It appears that s. 6 of Mr. Denman's Act (28 and 29 Vict. c. 18) (*The Criminal Procedure Act* 1865) has not been transcribed in New South Wales. The opening words of that provision say that a witness may be questioned as to whether he has been convicted of any felony or misdemeanour. It may be doubtful whether misdemeanour covers all summary offences. But the corresponding provision in Victoria (s. 31 of the *Evidence Act* 1928) has the words

(1) (1932) 48 T.L.R. 600; 49 T.L.R. 36.

" any indictable or other offence," instead of felony or misdemeanour. Mr. Denman's Act was preceded, in respect of civil causes, by s. 25 of the *Common Law Procedure Act* 1854 (17 and 18 Vict. c. 125) but apparently that section too is not part of the statute law of New South Wales. The admissibility of convictions to impeach the credit of a witness is therefore governed by the common law. Unfortunately there is not a little obscurity about the extent of the common-law principle concerning the use of convictions for this purpose.

It must be remembered that until the *Evidence Act* 1843 (6 & 7 Vict. c. 85) conviction of felony or any *crimen falsi* rendered a man incompetent as a witness. This limited the possible occasions of the question arising but did not exclude the possibility altogether. For competency might be restored by a pardon unless the statute creating the offence otherwise provided, and by 9 Geo. IV., c. 32, if an offender convicted of felony not punishable by death or of a misdemeanour, except perjury or subornation of perjury, endured the punishment to which he was sentenced it had the same effect and consequences as a pardon under the great seal. The question how far convictions could be used to impeach the credit of a witness might, therefore, arise if a witness were called who had obtained a pardon or who had endured the punishment, notwithstanding that he had been convicted of a felony or a *crimen falsi*.

It might also arise if a witness were called who had been convicted of an offence other than a felony or *crimen falsi*. But the general rule had been established that the credit of a witness could be impeached only in cross-examination and not by evidence of collateral facts. To this the exceptions were admitted of the production of the record of a conviction of the witness for some crime and the adduction of evidence that he is unworthy of belief upon his oath (*R.* v. *Watson* (1); *Spenceley* v. *De Willott* (2)). But no direct authority has been found dealing with the question whether on the one hand only convictions for crime naturally tending to destroy or weaken confidence in a witness' veracity or honesty might be used to affect his credit or on the other hand any conviction was available for that purpose. In *Wigmore* on *Evidence*, 3rd ed. (1940), pars. 980-987, pp. 538-988, the learned author raises the question what crimes are relevant to indicate bad character as to credibility. He proceeds " There are here three answers possible on principle: (*a*) Whatever offences were formerly treated as dis-

(1) (1817) 2 Stark. 116, at pp. 149-158 [171 E.R. 591, at pp. 604-607]; 32 St. Tr. 1, at p. 490.

(2) (1806) 7 East 108 [103 E.R. 42]; 3 Smith K.B. 389.

H. C. OF A. 1949. BUGG v. DAY. Dixon J.

qualifying one entirely as a witness shall now be treated as available for impeachment. This is the commonest solution, and has come about usually by express proviso in the statutory abolition of the former disqualification; (He is speaking of America) (*b*) If in a given jurisdiction general bad character is allowable for impeachment, then any offence will serve to indicate such bad character; (*c*) If character for veracity only is allowable for impeachment, then only such specific offences may be used as indicate a lack of veracity-character."

Among the many citations which follow as illustrations, there are few English judicial authorities. But the author does mention the following observation of Lord *Holt* C.J. in *R.* v. *Warden of the Fleet* (1) " and in respect to a person who had been burnt in the hand, if it were for *manslaughter*, and afterwards pardoned, it were no objection to his credit; for it was an accident which did not denote an ill habit of mind; but *secus* if it were for *stealing*, for that would be a great objection to his credit, even after pardon: but the record of conviction ought to be produced, which here they had not." Probably however, this passage relates to competence.

There is a discussion by *Holmes* J. in *Gertz* v. *Fitchburg Railroad Co.* (2) of the principle on which convictions of crime are used to discredit testimony. He says " when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit."

Holmes J. makes it clear that he considered that the common law had not sanctioned the use of all convictions for this purpose but only of those having the tendency he has described. For, in discussing a Massachusetts statute of the same kind as Mr. Denman's Act he says " The statute puts all convictions of crime on the same footing—those which formerly excluded, those which always have gone only to credibility, and it would seem, those which formerly would not have been admissible at all."

It is interesting to notice that in some States of the Union statutes have been passed particularly excluding from use prior convictions

(1) (1700) 12 Mod. 337, at p. 341 [88 E.R. 1363, at p. 1366].

(2) (1884) 137 Mass. 77.

for offences against motor traffic laws in any civil or criminal proceeding arising out of a motor accident: *Wigmore* on *Evidence*, 3rd. ed. (1940), par. 987 (*ad fin.*).

But probably the need for such legislation was felt as a result of statutes which made a conviction for any offence evidence for the impeachment of the credit of a witness.

The fact seems to be that much uncertainty existed prior to the passing of s. 25 of the *Common Law Procedure Act* 1854 as to the state of the law.

A good deal of uncertainty appears in the passage dealing with " Impeachment of Character " in the Second Report of the *Common Law Commission* (1853), at pp. 21-22, a passage too long to quote and one which does not elucidate the point now in question.

Scanty as is the material obtained to form a conclusion I think the better view is that at common law a conviction of a witness for an offence could not be used for the purpose of discrediting him if the offence was not of such a nature as to tend to weaken confidence in the credit of the witness, that is to say in his character or trustworthiness as a witness of truth. Traffic offences cannot often fulfil this condition.

It is sufficiently obvious that if a party is shown by cross-examination or otherwise to have been guilty on previous occasions of the same kind of conduct as that alleged against him in the litigation the tribunal of fact is likely to reason that what he would do once he would do again. The danger is of course great that the rule against using propensity to do a thing as a ground for finding that it has been done on a particular occasion will be disregarded.

The general discretion which at common law belonged to a court (*R.* v. *Taylor* (1)) and the wider discretion given by s. 56 of the *Evidence Act* 1898-1940 (N.S.W.) provides however, a safeguard against the use of convictions under the pretext of discrediting a witness for the substantial purpose of directly affecting the judgment of the jury upon the substantive issue.

In the present case *Owen* J. was of opinion that, having admitted the evidence which included the references to prior convictions of the defendant for traffic offences as affecting credit, rightly as I think, the learned judge should have given a specific direction warning the jury that they must not use the evidence for any purpose except as it affected the general credibility of the defendant as a witness.

Such a warning would no doubt have been proper. But I am not prepared to regard the failure to give it, particularly as it was not expressly sought by the defendant, as a ground for a new trial.

(1) (1892) 18 V.L.R. 497.

H. C. OF A. 1949. BUGG v. DAY. Dixon J.

In my opinion the cross-examination was admissible because it tended to show that the defendant had a strong temptation to deny that the plaintiff was approaching on the defendant's right hand, but not because of either of the other two reasons suggested. Being admissible the learned judge's failure to exercise his discretion against allowing the cross-examination does not form a ground for a new trial, at all events in the circumstances of the present case.

Two observations made by the learned judge on matters of fact in the course of his charge to the jury were made the subject of criticism and were relied upon as adding to the reasons for granting a new trial. One related to an error in the statement taken by the police-constable from the defendant. The error was as to the side of the cab struck by the cycle. The other observation concerned the side of the cycle damaged. Toward the end of his judgment *Owen* J. has dealt with these two questions and explained them. His Honour said that he would not have been disposed to attach much importance to either of the two points had they stood alone but when taken with the other matters to which his Honour had referred they served to increase his feeling that in certain respects the trial miscarried.

It is unnecessary for me to say more than that, taking the view I do of the other matters, these two additional points are quite insufficient to warrant a new trial.

In my opinion the appeal should be allowed with costs, the order of the Supreme Court should be discharged, in lieu thereof the new trial motion dismissed with costs, and the verdict and judgment for the plaintiff restored.

McTIERNAN J. A new trial of this action was ordered for defects in the summing up and error in the admission of evidence.

In regard to the summing up, it is criticized upon two grounds :— partiality to the plaintiff and lack of certainty in stating the issue of negligence to which each party directed his evidence.

I agree with *Jordan* C.J. that there is no real substance in the first complaint. The summing up does not in any respect exceed the latitude allowed to a trial judge to comment on facts. *Jordan* C.J. dealt with the complaint in the following way—" There is nothing in the summing up which in the remotest way suggests that in his Honour's criticism of the evidence he was taking the decision of the facts out of the hands of the jury and into his own. He made it perfectly plain that he was doing nothing of the sort." This statement is in accordance with established principle (*Hobbs* v.

Tinling (1) and *Thompson* v. *Truth and Sportsman Ltd.* (2)). These cases are cited by *Jordan* C.J.

The only issue of negligence which was in contest was:—Who broke the rule requiring a driver to give way to a vehicle on his right ? This issue is clearly put in the summing up. The language of the summing up does not give any room for a real doubt that the jury would not have thought that such issue was the only issue for them to decide. The contrary view is that the references to speed could have led the jury into thinking that it was not the only issue ; and that these references might have led them to decide the issue of negligence apart from the question whose duty it was to give way. The jury could not properly decide the case in that way without a direction on contributory negligence. No such direction was given. The direction may have been necessary to provide for the event of their rejecting the evidence adduced on behalf of the plaintiff that his direction was east. If his direction were west, it would have been his duty to give way ; and it may have been contributory negligence on his part not to do so. Having regard to the issue put to the jury, a direction on contributory negligence was not necessary. The case which the summing up put to them as the plaintiff's case was the only case which he made. It was that the accident was caused by the defendant's neglect of the rule about giving way, not by negligence consisting in driving at an excessive speed across the intersection. If the jury proceeded to their verdict according to the express directions in the summing up, it seems almost certain that they found the plaintiff was driving east, the defendant, who was driving south, failed to observe the rule requiring him to give way to the plaintiff, his failure was negligence and was the cause of the plaintiff's injuries. The criticism that the summing up invited the jury to consider any other issue of negligence attributes more to the references which the trial judge made to speed than they can fairly bear. The speed at which the defendant was travelling was one of the facts of the case and it was not necessary for the trial judge to refrain from referring to it. There is nothing in the summing up to support the suggestion that the jury gave their verdict upon any other issue of fact than the issue whether the plaintiff was driving east or west at the time the collision occurred. There is no defect in the directions given to the jury about that issue of negligence.

A witness, who was allowed to give his opinion as an expert, said that the defendant was travelling at a speed of forty miles an hour when the collision occurred. This witness professed that, in the

(1) (1929) 2 K.B. 1, at p. 49. (2) (1930) 31 S.R. (N.S.W.) 292 ; 48 W.N. 57.

H. C. OF A. 1949. BUGG v. DAY. McTiernan J.

course of his trade as a motor-car repairer, he had gained experience of the damage done to vehicles struck in collisions with vehicles travelling at various rates of speed. Relying upon that experience he formed the opinion that the plaintiff's vehicle was struck by one travelling at forty miles per hour. The trial judge disallowed an objection to the competency of this witness to give this evidence as an expert. "The competency of the expert is a preliminary question for the judge, and is one upon which, in practice considerable laxity prevails" (*Phipson Law of Evidence*, 4th ed., (1907), p. 356. See *Wise Bros. Pty. Ltd.* v. *Commissioner for Railways (N.S.W.)* (1)). The evidence of this witness about his experience was slight but sufficient to enable the judge to say that the witness was competent enough to give an opinion as an expert about the probable speed of the defendant's car. The weight of the opinion was a matter for the jury. It seems obvious, upon a perusal of the cross-examination of the witness, that his opinion and reasons were destroyed. The admission of the opinion in evidence is not a sufficient ground for a new trial.

The defendant was asked in cross-examination whether he had been convicted of offences against the traffic laws. Objections made to these questions were overruled. It is argued that, in a case like the present, a party against whom an allegation of negligence is made may never be asked whether he has been convicted of an offence against any traffic law, because, if it were shown that he was convicted of such an offence, the jury's attention would be diverted from the issue of negligence to collateral issues, and prejudice and injustice to the party would result.

In the present case there are special circumstances. The defendant said in evidence in answer to his counsel that he had been driving since 1914 and in cross-examination he said that he meant the jury to understand by this evidence that he was "a careful driver." A jury would think that a characteristic of a careful driver is a strict adherence to rules designed to promote the safety of drivers, their passengers and pedestrians. The defendant gave this favourable testimony of himself to impress them and to assist his case, which was a denial of the plaintiff's allegation that he violated an important traffic rule by failing to give way to the plaintiff. The questions to which objection was taken were whether the defendant had been convicted of exceeding the speed limit, disobeying traffic lights and failing to give way to a vehicle coming on his right. The objections to these questions were rightly overruled. The defendant admitted these convictions. It was right to allow the questions,

(1) (1947) 75 C.L.R. 59; (1946) 47 S.R. (N.S.W.) 233; 64 W.N. 34.

even if nothing more could be said to justify the asking of them, than that the fair trial of the action required that if the jury took into consideration the evidence which the defendant gave as to his experience as a driver, they ought not to be left in ignorance about the facts that these questions were asked to elicit. *Jordan* C.J. put the matter this way—" The facts that the defendant had had experience in driving since 1914, and had been driving motor vehicles practically continuously from 1914 to the present time, had no relevancy whatever to the question whether the plaintiff's motor cycle was being ridden in an easterly or a westerly direction along Yaralla Street. But they might well incline a jury to think that such a seasoned veteran as the defendant would be likely to be both experienced and careful, and therefore as unlikely to commit a breach of an elementary rule of the road as an old salt would be to commit a breach of the collision regulations. Learned counsel may not have realized that he was taking a risk in asking the questions, he almost certainly did not know of the convictions or counsel of his experience would have been scrupulously careful to do nothing which would make evidence of them admissible. However, he did ask them, presumably because he thought that they would be of some advantage to his case, and, in my opinion, this made it legitimate for counsel for the plaintiff to use all legitimate " means to prevent such advantage. In the circumstances, I think that the evidence complained of was properly admitted." I entirely agree with this statement.

Apart from the special circumstances which have been mentioned, it was right to allow these questions. Subject to s. 56 of the *Evidence Act* of New South Wales, a witness may be asked any question which tends to discredit him (*Mutch* v. *Sleeman* (1)). It tends to his discredit to ask him whether he has ever been convicted of a criminal offence. An offence against the traffic laws is not an exception to this rule. The objects of the traffic laws are order and safety on the roads. A conviction for an offence against any such law may reflect upon the credit of the offender according to the circumstances. In a civil case, a party may subject to s. 56 be asked whether he has ever been convicted of an offence against those laws. An action in which damages are claimed for injuries caused by the negligent driving of a motor vehicle is not an exception. If counsel thinks that it would be to the advantage of his client to ask a party in such an action whether he has been convicted of an offence against the traffic laws, he is, subject to s. 56, free to ask the question.

(1) (1928) 29 S.R. (N.S.W.) 125, at p. 135.

H. C. OF A. 1949. BUGG v. DAY. McTiernan J.

Where such a question has been asked the circumstances may call for a direction by the trial judge with the object of doing what is possible on his part to prevent the jury from acting upon an erroneous view as to the relation of the fact of the conviction to the issue of negligence which they are trying. There was no such direction given in this case. The question whether the circumstances of the case called for it does not arise. The defendant's counsel, no doubt wisely, refrained from asking for such a direction. For this reason rule 151B creates an obstacle to his raising on appeal the point whether the direction ought to have been given.

The defendant also submits that he has discovered fresh evidence and that this evidence and the circumstances of its discovery satisfy all the conditions which make the discovery of fresh evidence a ground for ordering a new trial. These circumstances were examined in the Full Court but were found to be insufficient. I agree with that view.

In my opinion the appeal should be allowed: the judgment for the plaintiff and verdict should be restored.

WILLIAMS J. This is an appeal from an order of the Full Supreme Court of New South Wales which by a majority (*Maxwell* and *Owen* JJ., *Jordan* C.J. dissenting) set aside a verdict and judgment for the appellant (the plaintiff in the action) for £2,928 and ordered a new trial. The action resulted from a collision at the intersection of Yaralla and Mackenzie Streets, Concord, between a motor bicycle with a side-box attached ridden by the plaintiff and a taxi-cab driven by the defendant on 5th March 1948. The case for the plaintiff was that he was riding along Yaralla Street in an easterly direction whilst the defendant was driving along Mackenzie Street in a southerly direction so that the plaintiff had the right of way, and that the accident was caused by the failure of the defendant to give way. The case for the defendant was that the plaintiff was riding along Yaralla Street in the opposite direction so that the defendant had the right of way, and that the accident was caused by the failure of the plaintiff to give way. Evidence was also tendered for the plaintiff that the defendant was driving at an excessive speed.

At the end of the summing up counsel for the defendant, in the absence of the jury, objected to the whole of the summing up except on the question of damages on the ground that it had been unduly favourable to the plaintiff and asked the learned trial judge, *Dwyer* J., to withdraw it and substitute one more to the defendant's liking. He asked his Honour to direct the jury that if they found

the plaintiff was travelling west then their verdict must be a verdict for the defendant, if they found he was travelling east then there must be a verdict for the plaintiff, and if they could not make up their minds which way he was travelling there must be a verdict for the defendant, because the only case that the defendant was called upon to meet was the plaintiff's case that he was travelling east. A discussion then took place, still in the absence of the jury, as to whether there was another case open to the plaintiff, that is to say whether, if the evidence of the defendant was accepted that the plaintiff was riding in a westerly direction, there was evidence on which the jury could find that the effective cause of the accident was not the failure of the plaintiff to give way but the excessive speed of the taxi-cab. In the course of the discussion his Honour said that it would no doubt be possible for the jury, even if they accepted the defendant's version, to find that nevertheless he was more or less to blame. But his Honour could not have meant that he thought this case was open to the jury on his summing up because he added that counsel for the plaintiff did not ask him to put such a case to the jury at any stage, and that he had consciously refrained from doing so.

The real question is, of course, what his Honour told the jury and not what was said in their absence, and having read his summing up, the most important passages of which appear in the judgment of *Jordan* C.J., I am unable to find anything from which the jury could have reasonably believed that they could find for the plaintiff otherwise than on the basis that he had the right of way and that the accident was caused by the defendant failing in his duty to give way. I am unable to agree that this issue was clouded by the introduction of evidence as to the speed of the taxi-cab. A full account of the accident would naturally include the speed at which both vehicles were travelling, and excessive speed on the part of the vehicle which was under a duty to give way would at least afford an explanation of why it failed to do so and therefore form part of the *res gestae*. His Honour did, I think, sum up in favour of the plaintiff, but he made it clear to the jury that they and they alone were the judges of fact and were entitled to disregard any opinions he might express on the facts and I agree with *Jordan* C.J. that there is nothing in his Honour's summing up which would justify a new trial.

It was objected that the learned trial judge should not have admitted certain evidence. It was contended that his Honour should have rejected the evidence of one Carroll, a motor repairer and engineer, who did not witness the accident but examined the

H. C. OF A. 1949. BUGG v. DAY. Williams J.

damage to the motor bicycle and side-box and stated that in his opinion the damage was such that the taxi-cab must have been travelling at forty miles per hour. But his evidence was not evidence that any jury could reasonably have accepted after his cross-examination and there is plenty of other evidence that the taxi-cab was certainly not loafing along the road. To this objection the words of *Willes* J., delivering the judgment of *Keating* J. and himself in *Henman* v. *Lester* (1) are not inapposite—"Furthermore, we apprehend that, even if the judge had decided wrongly upon this collateral point, we ought not to grant a new trial; the judge's mistaken ruling as to matter collateral to the issue, not being ground for a bill of exceptions, never ought to be ground for a new trial, unless the court can see that injustice has been occasioned by the mistake: see *Black* v. *Jones* (2). And in this case we can plainly see not only that no injustice has been done, but that the objection is an unreal one, and that, if we sent down the case to a new trial, we should pronounce a decision equally far from the merits of the case as it is from truth and fact."

It was also contended that his Honour should not have allowed the defendant to be cross-examined about convictions for previous traffic offences. *Jordan* C.J. and *Owen* J. considered that this line of cross-examination would not have been admissible but for the fact that the defendant's counsel commenced his examination in chief by eliciting from the defendant the fact that he had been driving motor vehicles since 1914. *Owen* J. added that where such evidence is given it is essential that the presiding judge should be at pains to explain to the jury, either at the time the evidence is given or in the course of his summing up, the legitimate purpose for which such evidence can be used and the unfairness and impropriety of treating it as going to the issue of liability. *Maxwell* J. considered that the evidence was inadmissible. He said that no authority is needed for the proposition that where negligence is charged on a particular occasion it is not permissible to set up a general propensity for careless driving by reference to earlier acts of negligence or cognate matters such as convictions for or warnings in respect of traffic offences. We were assured by Mr. *Jenkyn* that in an experience of twenty years in running-down cases, he had never known this class of evidence to be admitted. In face of such a "*communis opinio*" I hesitate to say such evidence is admissible without it being opened up in some particular manner (*Hollington* v. *F. Hewthorn & Co. Ltd.* (3)). But after consulting many learned

(1) (1862) 12 C.B. (N.S.) 776, at p. 789 [142 E.R. 1347, at p. 1358].
(2) (1851) 6 Exch. 213 [155 E.R. 518].
(3) (1943) 1 K.B. 587, at p. 593.

text books on the law of evidence, I am satisfied that it was always permissible at common law to seek to impeach the credit of a witness in civil cases by cross-examining him as to previous convictions for felonies and misdemeanours. If the witness denied the conviction, and the evidence was not relevant to any issue, he could not, as in the case of other irrelevant matters, be contradicted. The law in this respect has been altered in England by statute for nearly a century and there, if the witness denies or does not admit the conviction or refuses to answer, the cross-examining party may prove the conviction, but there is no corresponding statute in New South Wales. Accordingly in New South Wales counsel is entitled to cross-examine a witness in civil cases as to previous convictions in order to impeach his credit but on irrelevant matters the witness cannot be contradicted and his answers will be conclusive. But the court has a discretion under s. 56 of the *Evidence Act* 1898 (N.S.W.) to disallow such questions in the circumstances therein mentioned. I am therefore of opinion that the questions as to convictions for previous traffic offences which the defendant was asked in cross-examination were admissible subject to the discretion of the learned trial judge to disallow them. If such questions are usually not asked in the cross-examination of witnesses in New South Wales in running-down cases, it must be because the court in the exercise of its discretion will usually disallow them. The defendant was entitled to the direction to the jury to which *Owen* J. referred if his counsel had asked for it, but this was not done, and in view of the terms of rule 151B a new trial should not, in my opinion, be granted on this ground.

Another ground relied on by the respondent to support a new trial was the discovery of fresh evidence. I agree with the Supreme Court that a new trial should not be granted on this ground because the fresh evidence is evidence which might have been produced at the trial if the defendant had been reasonably diligent. Counsel for the defendant informed us that this evidence was not available at the trial because, in view of the defendant's instructions to his solicitors that the plaintiff was travelling along Mackenzie Street to the west, the plaintiff's evidence that he was travelling in the opposite direction was unexpected. But the fresh evidence was evidence which if believed would have corroborated the defendant's evidence whatever case the plaintiff made and should therefore have been available in case it was required.

For these reasons I would allow the appeal.

H. C. OF A. 1949. BUGG v. DAY. Webb J.

WEBB J. I agree with the judgment of the Chief Justice.

However, but for rule 151B of the Rules of the Supreme Court of New South Wales I would have taken the view that a new trial was warranted because of the absence of a direction to the jury that the evidence of the defendant's conviction for breaches of the traffic laws went only to his credibility and not to the issue of negligent driving. It was necessary that the jury should have understood this to ensure a proper trial. But in *Cotton* v. *Commissioner for Road Transport and Tramways* (1) there was an unsuccessful objection to the admission of evidence going only to credibility. The purpose of admitting this evidence was not explained to the jury; still it was held by the Full Court of New South Wales that rule 151B prevented an order for a new trial, although the rule provides for leave of the court allowing the non-direction to be made a ground of appeal. No such leave was sought here; nor can it be implied from the order for a new trial, as only *Owen* J. considered the non-direction on this evidence to warrant a new trial. *Maxwell* J. relied on other matters.

Appeal allowed with costs. Order of Full Court set aside. In lieu thereof dismiss motion for new trial with costs. Restore verdict of jury and judgment for plaintiff for £2,928 *with costs.*

Solicitors for the appellant, *Hunt & Hunt.*
Solicitor for the respondent, *Maxwell F. Connery.*

J. B.

(1) (1942) 43 S.R. (N.S.W.) 66; 60 W.N. 42.