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DOCTOR OF PHILOSOPHY

A comparative study of the law relating to disposition and character evidence

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A comparative study of the law relating to disposition and character evidence

Tokunbo Charles Akomolafe

1986

University of Dundee
A COMPARATIVE STUDY OF THE LAW RELATING TO DISPOSITION AND CHARACTER EVIDENCE

BY

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DOCTOR OF PHILOSOPHY - PhD

UNIVERSITY OF DUNDEE

VOLUME 1

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    1908

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Thayer - A Preliminary Treatise on Evidence at Common Law
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ABBREVIATIONS

A - Alabam; Arkansas; Atlantic Reporter
A.C. - Appeal Cases; Appellate Court
A.Cr.C. - Allahabad Criminal Cases (India)
A.Cr.R. - Allahabad Criminal Reports (India)
AC CP - Appeal Court, Confirmation Proceedings in Criminal Cases (Sudan)
A. D. - American Decisions
- New York Supreme Court Appellate Division Reports
A. D. 2d. - New York Appellate Division Reports, second series
A. I. R. - All India Reporter, 1914 -
A.I.R.A. - All India Reporter, Allahabad Series
A.I.R.And - All India Reporter, Andhra Series. 1954-6
A.I.R.Bom. - All India Reporter, Bombay Series. 1914 -
A.I.R. Cal. - All India Reporter, Calcutta Series. 1914 -
A.I.R.Mad. - All India Reporter, Madras Series. 1914 -
- Australian Law Journal, 1927 -
A.L.J.R. - Australian Law Journal Reports
A.L.R. - Alberta Law Reports (Can) 1908-32
- American Law Register. 1852-1907
- American Law Reports
- American Law Reports, Annotated
- Argus Law Reports. - Victoria (Aus.) 1895 - 1959
- Australian Law Reports. 1973 -
A.L.T. - American Law Times. 1868-77
- Australian Law Times. 1879-1928
A.M.A.J. - American Medical Association Journal
Ad. & El. - Adolphus and Elis' Reports (110-3 E.R.) 1834 - 40
C.A. - California Appellate Report
  - Court of Appeal
  - Court of Appeal Reports (New Zealand)

C.A.R. - Criminal Appeal Reports, 1908 -

C.C. - Crown Cases

C.C.A. - Circuit Court of Appeals (USA)
  - Court of Criminal Appeal

C.C.C. - Canadian Criminal Cases - 1898-
  - Cox's Criminal Cases, 1843 - 1945

C.C.P. - Court of Crown Pleas

C.C.R. - Crown Cases Reserved, 1865 - 75

C. Cr. Pr. - Code of Criminal Procedure

C.J. - Chief Justice
  - Lord Chief Justice

C.L.J. - Cambridge Law Journal, 1921 -
  - Criminal Law Journal (Aus.), 1977 -

C.L.R. - Canada Law Reports, 1923
  - Common Wealth Law Reports (Aus), 1903 -

C. Sess. - Court of Session (Scot)

C&P - Carrington and Payne's Nisi Prius Reports (171-3 E.R.), 1823-41

Ca. 2d. - California Supreme Court Reports, Second Series

Cap. - Chapter

Camp. - Campbell's Nisi Prius Reports

Cas. App. - Cases of Appeal to the House of Lords

Cert. - Certified

Ch. - Chancery Court Division
  - Law Reports Chancery, 1891 -

Chitty - Chitty's Bail Court Reports, 1770-1822
Col. App. - Colorado Appeal Reports
Comm. - Commonwealth (U.S.)
Cox C.C. - Cox's Criminal Cases 1843 - 194
Cr. - Criminal
Cr. App. - Criminal Appeal
Crim. L.Q. - Criminal Law Quarterly (Can) 1958 -
Crim. L.R. - Criminal Law Review. 1954 -
Crim. L.R.C. - Criminal Law Revision Committee
Ct. Sess. Cas. - Court of Session Cases (Scot.)
D.C.2d - Pennsylvania District and County Reports, 2nd series
D L.R. - Dominion Law Review (Pennsylvania) 1908 -
- Dominion Law Reports (Canada) 1912 -
D&E - Durnford and East's Term Reports, King's Bench (99-101 E.R.) 1785 - 1800
D.P. - Darfur Province (Sudan)
Del. - Delhi
Div. - Division
Dow&Ry - Dowling and Ryland's King's Beach Reports (24-30 E.R.) 1821 - 27
Dunlop - Dunlop, Bell and Murray's Reports, Session Cases Second Series (Scot) 1836 - 62
E.R.N.L.R. - Eastern Region of Nigeria Law Reports. 1956 -
Eccl. - Ecclesiastical
e.g. - exempli gratia (Lat.) for example
Ed. - Edition
Esp. - Espinasse's Reports, nisi prius (1793 - 1810)
et al - et al (Lat.) and other things
- et alibi (Lat.) and elsewhere
- et alii (Lat.) and others

et seq - et sequens, et sequentes or sequentia (Lat.) and the following;
- et sequitur (Lat.) and as follows

etc. - et cetera (Lat.) and therest

F. - Federal Reporter, U.S.A. 1880 -
Fraser, Session Cases, 5th Series (Scot.) 1898 - 1906

F. 2d. - Federal Reporter, second series

F. S. C. - Selected Judgements, Federal Supreme Court (Nigeria) 1956-61

Fed. - Federal

Fed. Cas. - Federal Cases (USA) 1789 - 1880

Fed. R. D. - Federal Rules Decisions (USA) 1941 -

Fed. R. Evid. - Federal Rules of Evidence

Fed. Supp. - Federal Supplement (USA) 1932 -

Fla. - Florida

G. - Georgia Supreme Court Reports - 1846 -

Ga. App. - Georgia Appeal Reports, 1807 -

H. C. - High Court (Sudan)

H. L. - House of Lords

H. L. C. - Clarke's House of Lord's Cases (9-11 E.R.) 1847 - 66

H. L. R. - Harvard Law Review, 1887 -

i.e. - id est (Lat.) that is

I. L. R. - Indian Law Reports, 1826 -
- Irish Law Reports, first series, 1838 - 50

I. L. T. - Irish Law Times (Dublin) 1867 -
I.L.T.R. - Irish Law Times Reports (Ire) 1867 -
I.R. - Irish Reports. 1894 -
Ib. - Ibidem (Lat.) in the same place
Ibid - Ibidem (Lat.) in the same place
id. - idem (Lat.) the same
Ill. - Illinois Supreme Court Reports. 1819 -
In re. - In reference to
Ind. - Indiana Supreme Court Reports. 1848 -
Int. Rev of Crim. Policy - International Review of Criminal Policy (U.N.) 1952 -
Ir.R. - Irish Reports. 1894 -
Irv. - Irvine's High Court and Circuit Court Justiceiry Reports (Scot) 1851 - 68
J.C. - Justiciary Cases (Scot) 1917
J.J - Judges, Justices
J.R. - Juridical Review (Scot) 1889 -
K.B. - King's Bench
KP;KRT;KTM - Khartoum Province (Sudan)
KDM - Kordofan Province (Sudan)
KAS;KASS;KSA - Kassala Province (Sudan)
Ky - Kentucky Supreme Court Reports, 1879 - 1951
L.C.J. - Lord Chief Justice
L.R.(N.S.W.) - Law Reports, New South Wales (Aus.) 1880 - 1900
L.Q.R. - Law Quarterly Review
La. - Louisiana Supreme Court Reports, 1901 -
loc. cit. - loco cita to (Lat.) the place already cited
M.L.R. - Modern Law Review. 1937 -
MP - Mongola Province (Sudan)
Mad. - Madras
Maj. Ct. - Major Court (Sudan)
Mass. - Massachusetts Supreme Judicial Court Reports. 1804 -
Memo. - Memorandum
Miss. - Mississippi Supreme Court Reports. 1850 - 1966
Mo. - Missouri Supreme Court Reports. 1821 - 1956
Mood - Moody's Crown Cases Reserved (1824 - 1844)
N.B. - New Brunswick, (Can.)
N.L.R. - Nigeria Law Reports. 1881 - 1955
N.P. - Nisi Prius
N.P. - Nile Province (Sudan)
N.R.N.L.R. - Northern Region of Nigeria Law Reports 1956 -
N.S.W.R. - New South Wales Reports
N.W. - North Western Reporter (National Reporter System) (USA)
N.Y. - New York
N.Y.App. - New York Supreme Court Appellate Division Reports 1896 -
N.Z. - New Zealand
N.Z.L.R. - New Zealand Law Reports. 1883 -
O.L.R. - Ontario Law Reports
Ont. - Ontario
Ore. L.R. - Oregon Law Review
P. - Probate, Divorce and Admiralty Division, High Court of England and Wales;
   - Pacific Reporter, Pennsylvania
P.C. - Province Court (Sudan)
P.J. - Province Judge (Sudan)
Para. - Paragraph
Penn. St. Tr. - Pennsylvania State Reporter. 1845 -
Pp. - pages
Q.B. - Law Reports, Queen's Bench, 1891 - 1901, 1952 -
Qd. R. - Queensland Reports 1958 -
Qld. - Queensland
R - Regina (Queen)
   - Rex (King)
Russ.&My. - Russell and Mylne's Chancery Reports (39 E.R.) 1829 - 31
Russ.&Ry. - Russell and Ryan's Crown Cases Reserved (168 E.R.) 1799 - 1824
S.A.S.R. - South Australian State Reports (Continuation of South Australia Law Reports) 1921 -
S.C. - Session Cases (Scot) 1906 -
   - Supreme Court
S.C.C. - Supreme Court Cases (India)
S.C.R. - Canada Law Reports, Supreme Court (Can) 1923 -
S. Ct. - Supreme Court Reporter (USA) 1882 -
S.L.R.(Crim) - Sudan Law Reports (Criminal) Vols. I and II, Faculty of Law, University of Khartoum
SLJR - Sudan Law Journal and Reports
S.L.T. - Scots Law Times. 1893 -
S.L.T. (Notes) - Scots Law Times, Notes of Recent Decisions. 1946 -
S.L.T. (Sh.Ct.) - Scots Law Times, Sheriff Court Reports. 1893 -
S. N. - Session Notes (Scot) 1925 - 48
Sch.- Schedule
Sess.Cas. - Session Cases (Scotland) 1821 -
- S. first series (Shaw) 1821 - 38
- D. second series (Dunlop) 1838 - 62
- M. third series (Macpherson) 1862 - 73
- R. fourth series (Rattie) 1873 - 98
- F. fifth series (Fraser) 1898 - 1906
Sh. Sheriff
Sh. Ct. Rep. - Sheriff Court Reports (Scot.) 1885 -
So. - Southern Reporter, National Reporter System (USA)
T.L.R. - Times Law Reports. 1884 - 1952
Tas. S.R. - Tasmania State Report
Temp. L.Q. - Temple Law Quarterly (USA) 1927 -
U.S. - United States Supreme Court Reports 1790 -
U.S.A. - United States of America
U.S. Rep. - United States Reports 1875 -
V. - versus, against
Vand. L.R. - Vanderbilt Law Review 1947 -
Vict. - Victoria Reports (Australia)
Vol. - Volume

Vt. - Vermont Reports. 1826 -

W.A.C.A. - West African Court of Appeal Reports. 1930 - 55

W.A.R. - Western Australian Reports 1898 -

W.L.R. - Weekly Law Reports, 1958 -

W.R.N.L.R. - Western Region of Nigeria Law Reports. 1955 -

Wa. - Washington Reports. 1890 - 1939

Y.L.J. - Yale Law Journal. 1891 -
This work could not have been accomplished without the help and support of some people who richly merit a most fulsome tribute.

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T C AKOMOLAFE
DECLARATION

This thesis is submitted in fulfillment of the conditions governing the award of the Doctor of Philosophy degree from the Faculty of Law, University of Dundee.

And I hereby declare that, I, Tokunbo Charles Akomolafe, am the author of the thesis; that all references cited have been duly consulted; that the thesis is my own original work, being the result of a comprehensive research study undertaken by me; and that this work has not been previously accepted for a higher degree.

T C AKOMOLAFE
SUMMARY

The first chapter is the introduction. It deals with some important issues like the source in the different countries to be considered, of the law relating to disposition and character evidence; the issues of relevancy and admissibility, with particular regard to disposition and character evidence; the meaning of some words like "character", "disposition", "reputation" and "rumour" - pointing out the difficulties and distinctions in the meanings, and lastly there is an important brief discussion of disposition and character evidence with special reference to non-jury trials.

Chapter two centres on the admissibility of similar fact evidence. It begins with a discussion of the general rule of similar fact evidence. The discussion here includes a consideration of "the requisite degree of similarity", and the degree of probative value required, as well as the use of similar facts evidence to rebut certain defences or explanations otherwise open to the accused. This chapter also contains the discussion of miscellaneous issues like, the discretion of the court where the evidence of similar facts is admissible in law; evidence of similar facts in civil cases, the issues of habit and custom or routine practice; a consideration of statutory provisions which are exceptions to the general rule of similar facts evidence like: Section 15 of the Prevention of Crimes Act, 1871; Section 1 (2) of the Official Secrets Act 1911; Section 27 (3) of the Theft Act, 1968. Other issues discussed under miscellaneous include the previous convictions of the parties as evidence of similar facts and the Rehabilitation of Offenders Act, 1974.

Chapter three deals with character evidence. It begins with an
explanation of the general rule at common law and then a discussion of situations when character is in issue and when it is not in issue, in civil and criminal cases. The other main issues discussed under this chapter include that of damages as it is affected by character; the cross-examination of witnesses as to the accused's character; the character of third parties and also the issue of the psychiatric evidence of character.

The fourth chapter provides a detailed and full study of the provisions of Section 1 (f) of the Criminal Evidence Act, 1898, as well as a consideration of Section 5 (2) (d) of the New Zealand Act 1908 and a brief statement of the position in New South Wales.

Chapter five serves as the conclusion. It presents an evaluation of the whole discussion and then furnishes some suggestions for reform.
CHAPTER 1

INTRODUCTION

The introduction to this thesis discusses certain important issues necessary for a proper understanding and a thoroughly detailed comparative study of the law relating to "Disposition and Character Evidence". Towards this end it will be essential to consider the sources of the law regarding the topic in the countries to be discussed especially as some of them have codified laws, while some others have non-codified laws. I will also consider briefly here, the position of the law relating to disposition and character evidence in a non-jury system as it operates in a number of the countries to be discussed. This discussion is given added piquancy when one realises that it is sometimes contended (though hotly disputed) that exclusionary rules which include the topic under discussion, are designed ostensibly to meet the exigencies of jury trials. This argument seems to have its roots in the history of the development of the exclusionary rules. Finally, I intend in the introduction to discuss the meaning of some salient words like, "Character", "Disposition", "Reputation", "Rumour", and to distinguish each of these words from the other.

(1) THE SOURCES

The bulk of legal doctrine in England is based on the Common-Law, the Law of Evidence being no exception; which inevitably means that the law relating to "Disposition and Character Evidence" is governed by the English Common-law. Most of the countries to be discussed
like, Australia, New Zealand, Canada, Nigeria, India, and the United States of America, for obvious historical reasons have their laws fashioned by and large on the Common-Law of England. And today, only a small part of the legal doctrine of England on evidence is statutory - most of the statutes are of general application throughout the United Kingdom of Great Britain and Northern Ireland. Such statutory amendments have been piecemeal and fragmentary. The major statutory changes were made during the era of court reform in the 19th century, and as would be expected the Common-Wealth jurisdictions usually followed suit. It is thus clear that the laws relating to character and disposition evidence in the United Kingdom derive their sources from the Common-Law and the fragmentary amendments made by the Parliament. The positions in New Zealand and the States of Australia are similar to that of the United Kingdom.

In Canada, the statutory amendments are now mainly gathered in Evidence Acts of the various provinces and in the Canada Evidence Act passed by the Federal Parliament; others are contained in the Criminal Code and in rules of Court.

The position in the United States of America is fairly similar to that in Canada. Backed by the extraordinary pioneer work of Professor Bradley Thayer in the late 19th century and John Henry Wigmore in the early 20th century, in 1942 the American Law Institute published the Model Code of Evidence as a substitute for its usual Restatement of the Law. In the view of the Institute and its expert reporter, Professor Edmond Morgan, only a systematic code
presenting new solutions to recurrent problems could respond adequating to the state of existing doctrine in the United States. But, mainly because it contains some revolutionary provisions, the Model Code has not been statutorily adopted anywhere and has had small impact on judicial decisions. In 1953, The National Conference of Commissioners on Uniform State Laws approved and promulgated the Uniform Rules of Evidence, based on the Model Code. Perhaps because they depart much less from traditional doctrine, the influence of the Uniform Rules has been more pervasive. They were immediately approved by the American Bar Association, adopted almost verbatim in Kansas, and formed the basis for the New Jersey Rules of Evidence and the California Evidence Code. Then in 1975, the United States Congress enacted the Federal Rules of Evidence for use in federal courts. These adopt with small changes rules drafted by an advisory committee appointed by the Chief Justice of the United States, which had drawn heavily upon the Model Code, the Uniform Rules and the evidence codes of New Jersey and California. Since then, some other states have also adopted codes in turn influenced by the Federal Rules and a new version of the Uniform Rules largely reproducing their provisions. Clearly, in the United States, the law relating to disposition and character evidence is to be found in the different codes of each of the states and at the Federal level, in the Federal Rules of Evidence.

In India, the greatest bulk of the general law relating to evidence
is to be found in the Indian Evidence Act of 1872, the work of Sir James Fitzjames Stephen. This was one of the group of brilliantly drafted codifications of 19th century, as it endeavoured to put within a narrow compass the whole of the English Law on the subject, but in a rationalised form and in one which would be easily comprehensible to the lay magistrates of the Indian Civil Service who have to administer it. And despite criticisms which have since validly been leveled against it, it has like its great counterparts, the Indian Penal Code and the Indian Criminal Procedure Code, stood the test of time and its influence has extended far beyond the Indian sub-continent. For instance the Indian Evidence Act was for a considerable period in force in Tanganyika (ie, mainland portion of Tanzania) Kenya and Zanzibar and though it has been replaced by local enactments¹, these together with the Uganda Evidence Act², are closely modelled on the Indian Act.

The 1872 Act repealed all rules of evidence not contained in any statute, Act or regulation in force in India. Although, since a number of rules of evidence are contained in other laws in force in India, in particular in the Indian Criminal Procedure Code, the Evidence Act is not a complete statement of the Law of Evidence, nevertheless, it, together with these other enactments, is intended to be so, and its there that the law relating to disposition and character evidence is to be found.

In Nigeria the law of evidence applicable in the Superior Courts and Magistrates' Courts is to be found almost exclusively in the

1) Tanganyika in 1967 (Act No. 6 of 1967); Kenya in 1963 (Ord. 46 of 1963) and Zanzibar in 1917 (Cap. 5)
2) Cap. 43, enacted in 1909
Evidence Act, Laws of the Federation of Nigeria\(^1\). Up to the year 1945, the Nigeria Law of Evidence in those courts established by the British government was the English Common Law of Evidence, as there was no local legislation dealing with that matter previous to that year. In 1943, an evidence Ordinance\(^2\) based largely on Stephen's Digest of the Law of Evidence was passed, but it was not brought into operation until 1945 and until that year the law of evidence applicable in those courts continued to be the English Common Law of Evidence. On June 1, 1945, the Evidence Ordinance was brought into operation\(^3\), and has, until the present day, remained almost the same in substance and in form although it has been amended from time to time. It is necessary to point out that Nigeria came under military rule with effect from December 31st 1983, but only those parts of the 1979 Constitution relating to Presidential government have been suspended. The position in regard to the law of evidence remains unchanged except that a Decree of the Federal Military Government is superior to all other laws of the country including the 1979 Constitution. In effect, the Federal Military Government can now legally legislate for the whole country touching any subject whatsoever including the law of evidence and any legislation (including state legislation) which is inconsistent with any Decree of the Federal Military Government is null and void to the extent of such inconsistency.

In view of the fact that a number of countries have codified laws,

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1) Cap. 62
2) Ord. No. 27 of 1943
3) See Notice 618 in Gazette 33 of 1945
one may then ask, what authority have decisions of the English courts, as in this case on the subject of character and disposition evidence. In the words of Fitzjames Stephen, the object of the Act "would be defeated by elaborate references to English cases". Nevertheless, it is generally recognised by the courts in these countries that although English authorities have no binding authority but merely persuasive force, they could be of considerable help in elucidating the provisions of the Act and reference to such decisions was frequently made, though a body of local case-law have since grown to formidable proportions on which the courts principally rely now.

(2) EVIDENCE OF DISPOSITION AND CHARACTER: RELEVANCY AND ADMISSIBILITY

The first inquiry for all circumstantial evidence is whether it is relevant. If it is not relevant, it cannot be admitted at all, and so no further question arises. But if it is relevant, it may still be obnoxious to some independent policy of exclusion such as unfair surprises, or undue prejudice; and so far as such a doctrine applies, the evidentiary fact though relevant and therefore otherwise admissible is to be excluded. And, although logic is the basic test of relevance, not all evidence which is logically relevant is legally admissible. It sometimes happens that the logical connection between a fact and the issue to be determined is so slight that the fact is treated as too remote and evidence of it is inadmissible.

The first theory of relevance which might perhaps be called the "orthodox" one is that any fact is relevant which a judge thinks a

1) An introduction to the Indian Evidence Act, 2nd impression, 1904, p. 175
reasonable jury could reasonably consider goes to the probability or improbability of the fact in issue. The other view is that apart from some exceptions you can only give evidence of facts from which a deduction may be drawn as to one of the facts in issue. I find the first definition more acceptable than the second which I regard as altogether too narrow. According to the first definition of relevance which I accept, the character and disposition evidence of the parties would be relevant in considering the probability or otherwise of their having acted in the manner alleged by one and denied by the other. There is no doubt that in point of human nature in daily experience, an accused's disposition and character is essentially relevant as indicating the probability of his doing or not doing the act charged. Character is perhaps the most important single factor when we have to make decisions about the conduct of others. And it is common sense when asked to judge a man's conduct on a particular occasion to enquire how he behaved on other occasions. But it would seem from the authorities that evidence of character is excluded in civil, no less than criminal cases, where the object is to persuade the tribunal that it is likely or unlikely that a party acted in a particular way.1 There is no doubt that the rule excluding evidence of character is treated sometimes as an application of the doctrine of relevance. But the relevance of evidence of good character in criminal cases, on this view must be treated as an exception. It is equally valid to treat character as

1) See Goodwright V. Hicks (1789) B.N.P. 296; Att. Gen. V. Bowman (1791) 2 B & P 532 note a; Cornwall V. Richardson (1825) Ry. & Moo 305
always relevant, but sometimes excluded for convenience (as in the
case of direct evidence of character in civil cases where character
is not in issue), sometimes for prejudice (as in the case of evidence
of bad characters in criminal cases).

It is interesting to note that it is not unusual to find
commentators define evidence of similar facts or character solely in
terms of relevancy. In the words of J. Stone: "....... a fact is
similar to another only when the common characteristic is the
significant one for the purpose of the inquiry at hand. When facts
having characteristics in common with the main fact are tendered in
evidence the court must ascertain which common characteristics are
the significant ones in order to determine relevance". 1

The chief merit of this definition is that it is in no way
connected with the exclusionary rule. The test it embodies applies
whenever the question of relevancy arises: only after the prepared
evidence has passed this test is it necessary to decide whether it
should be subjected to one or more of the exclusionary rules. As
earlier pointed out, if the court rejects the evidence as totally
irrelevant, there is obviously no need for subjecting it to any
further exclusionary test. 2 This primary need for applying the
relevancy test, even before considering the exclusionary test, is
frequently overlooked. Judges usually prefer to use the relatively
sharp tools of the exclusionary rules, instead of applying the prior
relevancy test; and this is due to the fact that in the routine
process of adjudication their attention is diverted from the logical

48 H.L.R. 954, 955
2) See Thayer "Law and Logic" (1900) 14 H.L.R. 139, 140; Thayer's
Treatise at p.264
way of deciding admissibility and they are reluctant to take clear-
cut decisions. This reluctance to exercise discretion in the ques-
tion of relevancy, an area that leaves room for wide independence,
and this preference to rely upon technical rules, however complex and
even somewhat arbitrary, are a matter for regret. As L. Orfield
observed: "A trial court has a wide latitude in the admission or
exclusion of evidence where the question is one of relevancy, and its
ruling will not be disturbed on appeal except for a grave abuse of
discretion". 1

It has been suggested that by resorting quite often to evasionary
tactics - (using the sharp rules of exclusion) judges are largely
responsible for the lack of clarity that accompanies the exclusionary
rules in Anglo-American Law. Exceptions and exceptions to the
exceptions have been suggested to justify many rules, until their
multiplicity creates utter confusion as to what is the rule and what
are the exceptions. No wonder that a scholar such as Stephen
regarded the exclusionary rules as part of the relevancy concept. 2
The failure to differentiate between the two is serious: owing to
the difficulty of limiting the rule excluding evidence of similar
facts and the lack of any unequivocal feature characterising the
disqualified evidence, the relevancy test has often been suggested as
the basis of the rule. Nokes suggests that: "The main ground for
excluding similar facts would appear to be that they are often
irrelevant to the facts in issue". 3 And Halsbury's Laws of England

§ 26: 440, p. 768
2) Stephen, A Digest of the Law of Evidence (12th ed.) (1946) Intro-
duction Evidence Act, 1872 pp. 122 - 126
states that: "The rule is based on the ground that evidence of similar facts may be irrelevant". I disagree, with all respect, that this is the analytical justification of the rule. One must, however agree that this is the use frequently made of the rule. And may I point out that the essence of the criticism against Stephen's suggestion\(^1\) is that what he calls "irrelevant" means nothing more than "inadmissible though relevant".

It is true to say that relevance, is the basic test of admissibility. Admissibility has been described in the following formula: Admissibility = Relevancy - Exclusion. I do not find anything overtly controvertible in the formula and infact credence is given to it by Thayer when he said: "Admissibility is determined, first by relevance - an affair of logic and not of law; second, but only indirectly by the law of evidence which, in strictness, only declares whether any given matter which is logically probative is excluded".\(^2\) Such instances of exclusionary discretion are presumed to be only exercisable in the interest of fairness. In a fairly simplistic but interesting manner, the process of admissibility of an item of evidence can be analogised to an object being placed on a conveyor belt. It goes this way: the object is intially placed on the conveyor belt if it has logical probative value towards proof of a fact in issue. As the item travels along the line there are a number of quality-control check points which it must pass. These points consist of intermediary rules of exclusion, such as the rules of exclusion, such as the rules of character and similar facts

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1) For an extensive criticism See Wigmore, Evidence, Vol. 1. § 12 (1) (a); Thayer's Treatise at 266
2) Thayer, Preliminary Treatise on Evidence (1898) 269; See also Thayer, "Presumption and the Law of Evidence" (1898) 3 H.L.R. 141, 147; See also Wigmore - A Treatise of Anglo-American System of Evidence in Trials at Common Law (3rd ed. 1955) vol. 1 § 12 (1) (a)
evidence, the rule against hearsay, the rule against opinion evidence, the privileged communication rule etc. The evidence must pass each of these in order to get to the end of the line. At the very end of the line is a final check point - the discretion to exclude prejudicial evidence. Here the probative value of the evidence is weighed against its prejudicial value and, if it passes the test, it is allowed to drop off the line into the trial proper. This is receivability or ultimate admissibility, as opposed to initial admissibility (ie, being first placed on the line).

The problem with the formulation of rules relating to character and disposition evidence is that rather than accept the fact that evidence of bad character, disposition or propensity, may to some degree render it more probable that the accused committed the offence charged, and that if such evidence should be excluded, it should be due to the danger of the evidentiary balance tipping in favour of prejudice rather than probative value, the courts have instead attempted to determine admissibility too early in the "conveyor belt" process, ie, prior to the final "discretion to exclude" check point. They have recognised that the evidence may have some limited probative value, but have chosen to eliminate it from the line at an intermediary stage on some policy ground, supposedly based on some external criteria, as is the case of hearsay evidence where lack of trustworthiness due to the second-hand nature of the evidence is the criterion for exclusion. Such an approach may work well for concepts
like hearsay, where the policy grounds are based on external criteria which are different in composition from the inherent composition of the item on the conveyor belt line. Factors such as credibility and lack of trustworthiness, although affecting the subjective analysis and acceptance of the conclusion to which the evidence points, are external to logical probativeness, which comprises the essence of the item on the line.

Concepts such as the probative force are, of course, inherent in the heart of the item of evidence on the line. Exclusion which must be made as a result of a balancing of probative versus prejudicial value is better attuned to the working of a discretionary weighing balance than a rigid rule of exclusion. A rigid rule denies the existence of a balancing process. An inflexible rule of exclusion, triggered by the presence of prejudice, must logically exclude all evidence which is susceptible to prejudice, whether that prejudice outweighs probative value or not. This has been the approach of the law in dealing with character evidence and with similar fact evidence. However, we know that at times pure character evidence, as well as similar fact evidence is admitted. Employing a rigid rule basis, one may ask, "What are the criteria which indicate when to pull the evidence out of the line and when to leave it on, and once pulling it all off, when to put some of it back on?" With respect to barriers such as hearsay, the answer is easy. If the evidence fits within an exception, it is allowed to return to the line. The criteria for the exceptions appear to be the opposite of the reason for exclusion.
For example the exceptions to the hearsay rule can rationally be considered as instances where a circumstantial guarantee of trustworthiness exists, thus allowing the evidence back onto the line. But, what sort of criteria are used with respect to character and similar fact evidence where probative value and prejudice are intermingled, and where the presence of the former is the reason for the items being on the line in the first place? I must say that the answer to that question constitutes the bulk of this thesis and as such will be better and adequately answered through the subsequent discussions of similar facts evidence and character evidence.

Evidentiary facts which are usually offered to prove the doing or not doing of a human act can be grouped as follows: Character or Disposition; Habit or Custom; Emotion or Motive; Design or Plan; and so on. Such evidentiary facts as these are generally referred to as having "Prospectant Indications". The usual nature of the argument or inference in each instance of evidentiary facts having "Prospectant Indications" is this: Because A had a Disposition, Habit, Emotion, Design or Capacity to do (or not to do) an act X, therefore he probably did (or did not do) the act X alleged. Thus we see that while the party alleging the act argues that the disposition indicates a doing of the act, the party denying the act argues that the (opposite) disposition indicates a not-doing of the alleged act. The nature of the argument or inference in both cases is basically the same with the only difference being in the

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1) The classic criteria for the admission or exclusion of similar fact evidence have been those stated by Lord Herscheel in Makin v. The Attorney General for New South Wales (1894) A.C. 57 at 65.

2) Some other Evidentiary Facts could have Concomitant or Retrospectant Indications - See Wigmore On Evidence, 3rd ed. at § 51.

3) See Ibid.
A number of important questions readily come to mind. First, what is character? Second, does the law of evidence relating to character and disposition take the same view as that which we will take in our daily lives? But, before considering the principles and rules relating to evidence of character and disposition, I will examine the meaning of some important words (like "Character", "Disposition", "Reputation", "Rumour") of which proper understanding is essential. I will also endeavour to distinguish each of these words from the other. The need for such an exercise is described by Wigmore: 1

"Character and reputation are as distinct as are destination and journey. Nevertheless the occasional use of the single term "character" for both actual disposition and reputation of it, and the circumstance that the reputation is the most usual way of evidencing this actual disposition, has sometimes led even careful judges to define reputation and actual disposition, for all purposes of evidence, as the same, and to intimate that reputation alone is the thing involved".

(3) MEANINGS AND DISTINCTIONS

Sir Carleton Allen once remarked: 2 "The plain and unambiguous meaning to be governed (frequently with inconvenient consequences) is really a delusion, since no words are so plain and unambiguous that they do not need interpretation in relation to a context of language or circumstance".

1) Wigmore On Evidence, 3rd ed. at § 52
2) Law In The Making (7th ed.) p.506
(1) What does the Word "Character" Mean?:- The word "character" has caused much perplexity both in the courts and in the circle of jurists. It has always been explained in terms of one's "Disposition" or one's "Reputation", or both together. So, whatever the case may be, one thing at least is clear, and that is that the true meaning of the word "character" in the law of evidence falls nothing short of either one's "Disposition" or "Reputation" and nothing more than one's "Disposition and Reputation".

Generally, a person's character is usually expressed in terms of moral and mental qualities, and it is not uncommon to refer to someone as being a good or bad character, in other words character has a creditable as well as a discreditable connotation. According to Webster's Dictionary, "Character" means "the peculiar qualities impressed by nature or by habit on the person, which distinguishes him from others; this constitutes his real character. The qualities which he is supposed to possess constitute his estimated Character or Reputation". The matter of interest in Webster's definition which is supposed to be the ordinary grammatical meaning of the word is the fact that it combines in its meaning both the scientific or psychological meaning of character with the legal connotation of the word in a comfortable manner.

The task of defining character has also been undertaken by academic commentators and authors. The term "character" says Taylor,¹ is not as some judges have considered it to be, - synonymous with "disposition", but it simply means "reputation", or the general

¹) Taylor On Evidence, 12th ed. by Groom - Johnson & Bridgman, Vol. 1 at S. 350
credit which a man has obtained in public opinion. On the other hand, Wigmore\(^1\) opined that Character does and should only refer properly to disposition, with reputation being only a mode of proving disposition. Wigmore, while denying that there is any real legal ambiguity inherent in the term "Character", but admitting that there is a semantic ambiguity writes that character, for the purpose of relevancy as evidence, is to be considered as the actual moral or psychical disposition or sum of traits, and must be distinguished from reputation or any other source of evidencing character.

McCormick also gave a broad definition of the word character as: "a generalised description of one's disposition or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness".\(^2\) Cross particularised the concept somewhat and defines it as a "disposition" or "tendency to act, think or feel in a particular way".\(^3\) Schieff concluded that character has been interpreted to mean "the elements of a person's moral or mental disposition understood and stated in general terms" and that if such a definition is accepted "it seems clear that the concept was (and remains) the product of a naive method for analysing human personality and predicting consistent conduct, born before the advent of modern scientific psychology".\(^4\) For me, however, I will not haste into expressing any views of approval or disapproval until the arguments of the protagonists and antagonists of the propositions have been thoroughly considered.

1) Wigmore On Evidence, 3rd ed. at p.446
2) McCormick, Evidence 2nd ed. (1972) p.462
3) Cross on Evidence, 5th ed. at p.354
4) Schieff, Evidence in the Litigation Process (Toronto (1978)) p.793
For very long, as evident from the case law, there had been attempts by the judges to determine what amounts to a person's character and how best it could be evidenced. Some of these early authorities seem to say that character must be explained in the sense of one's disposition, and that individual opinion of disposition founded upon actual observation is admissible. For instance in R V. Murphy\(^1\) evidence was admitted in support of the prosecutor's character, and the individual opinion of each witness was taken without objection. In R V. Davison\(^2\), Lord Ellenborough asked a witness: "From your knowledge of Mr Davison's character and conduct, do you think him capable of committing fraud?" The direct import of that question is all too clear. However, in an amazing volte-face, Lord Ellenborough remarked in R V. Jones\(^3\) that: "It is reputation; it is not what a person knows. There is hardly one question in ten applicable to the point; it is very remarkable, but there is no branch of evidence so little attended to". This sort of contradictory statements by the same judge in two different cases tends to confirm Wigmore's\(^4\) observation of a possible lack of comprehension of the matter by some judges.

Erskine in his speech to the jury in Hardy's trial,\(^5\) said that the witness is not to say: "What A, B, or C, told him about the man's character, but what is the general opinion concerning him. For 'character' is the slow spreading influence of opinion arising from a man's deportment in society and extending itself in one circle beyond another till it unites into one general opinion. That general

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1) 19 St. Tr. 725  
2) 31 St. Tr. 310  
3) 31 St. Tr. 310  
4) Wigmore on Evidence, 3rd ed. (1940) at § 52  
5) (1794) St. Tr. 199 at 200
opinion is allowed to be given in evidence". Erskine's statement was closely followed by a firm though pithically phrased statement by Duncan J in Kimmel v Kimmel¹ that: "Character and reputation are the same, the reputation which a man has in the society is his character". This definition of character continued to gain more recognition and backing. Redfield C.J. in Powers V. Leach² said: "'character' and 'general character' are the same, of course, if by 'character' we understand the common estimation in which the man is held, by his acquaintances, for truth; and the books upon evidence so use the term. The word 'character' no doubt has an objective and subjective import, which are quite distinct. As to the object, character is its quality; as to the man, it is quality of his mind, and his affections, capacity and temperament. But as a subjective term certainly in the minds of others, one's character is the aggregate or the abstract of other men's opinion of one...... It is the conclusion of the mind of the witness, in summing up the amount of all the reports he has heard of the man, and declaring his character for truth as held in the minds of his neighbours and acquaintances; and in this sense, 'general character' and 'general report or reputation' are the same, as held in the books". Similarly, in a well argued statement, Pearson J., in Bottoms V. Kent³ said: "Is a man honest; is he good-natured, is he of a violent temper, is he honest and retiring or imprudent and forward, - these all constitute traits of character and are facts ...... A witness

¹) (1817) 3 S. & R. 338
²) (1854) 26 Vt. 278
³) (1855) 3 Jones L. 160
called to prove them can only give the opinion which he has formed by his observation of the conduct of the person under particular circum-
stances...... Has a man the estimated character or reputation of being honest, or of being good natured, or passionate, or humane or cruel, - this general character as it is called, is also a fact, it is the opinion which those who are acquainted with him have formed in respect to his several traits of character. This is also a mode of proving real character, which is the object in view. But it is objectionable, because it is a mere approximation, and does not arrive at the fact itself. The opinion of a man's acquaintances that he is honest or good natured etc, does not prove he is so. Still, this mode of proof is less objectionable than that which depends on the individual opinion of witnesses,......... therefore it is admissible in more instances than the other". It is certain that some of the arguments by Pearson J., will be considered later, so I might as well reserve my comments for now.

The modern case law in the United Kingdom has come out in support of the older cases which decided that "character" means only general reputation, and that it is this evidence which is admissible and not disposition. There is no doubt that this evidence of reputation is a form of hearsay and it is admitted on the ground of necessity. The leading modern case on the matter is R V. Rowton;¹ and as as we know, though it was not the first case to confine the meaning of character to reputation, no other case has been the subject of continuous discussion, publicity and criticism as Rowton.

¹) (1865) Le & Ca 520; 169 E.R. 1497; (1865) 34 L.J.M.C. 57
In that case, the accused was tried for an indecent assault on a small boy. The accused gave evidence of good moral character upon which the prosecution by way of rebuttal gave evidence of a person who said that he had no knowledge of the opinion of the neighbourhood, but his own opinion and that of his brothers who were pupils of the defendant was that the accused was "a man capable of the grossest indecency and the most flagrant immorality". It was held by the majority of the judges including Cockburn C.J. that the opinion of a witness based on his personal experience of the disposition of the prisoner is inadmissible. Two judges Erle C.J. and Willes J. dissented. Cockburn C.J., dealt with the pertinent issue when he said: "...what is the meaning of evidence of character. Does it mean evidence of general reputation or evidence of disposition? I am of opinion that it means evidence of general reputation. What you do want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question - what is the tendency and disposition of the prisoner's mind? - put directly. The only way of getting at it is by giving evidence of his general character founded on his general reputation in the neighbourhood in which he lives". 1

This passage from the judgement of Cockburn C.J. is reflective of his belief in the earlier quotation he made while exchanging views with the defence counsel in R v. Rowton; he said: "I have always

1) (1865) Le & Ca. 520 at 529 - 530
understood the law to be correctly stated in Phillips on Evidence where it said: "The inquiry must be as to the general character; for it is general character alone which can afford any test of general conduct or raise a presumption that the person who had maintained a fair reputation down to a certain period would not then begin to act a dishonest, unworthy part. Proof of particular transactions in which the defendant may have been concerned is not admissible of his general good character. What then is evidence of character? The best medium of proof is by showing how the person stands in general estimation; proof that he is reputed to be honest is evidence of his character for honesty, and the species of evidence most properly resorted to in such inquiries. It frequently occurs, indeed, that witnesses after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner than strictly as evidence of general character".

It is important to point out that both the majority and the minority judgements agree that strictly speaking, character means actual disposition. The disagreement is as to the means of evidencing such "actual disposition". While the majority said that it could only be evidence by the general reputation of the accused in the society, the minority judges dissented on the grounds that apart from the evidence of general reputation, evidence of actual moral disposition as known to an individual witness should be allowed.

1) Phillips On Evidence, Vol. 1, 10th ed. at p.506
Both sides agree that no evidence could be given of particular concrete examples of conduct. However, though the majority and the minority are in agreement on certain basic principles, the difference in the judgement is so fundamental that it makes all the difference. Both judgements will be further discussed later.

In the meantime, judges in a number of other common law countries approved the majority decision in *R v. Rowton*,\(^1\) by following it in their own decisions, while it was actually enacted into statute in some others. For example, in the Canadian case of *R v. Triganzie*,\(^2\) Armour, C.J. said: "I find it uniformly laid down in the books of authority that the evidence to character must be evidence to general character in the sense of reputation: that evidence of particular facts although they might go far more strongly than the evidence of general reputation to establish that the disposition and tendency of the man's mind was such as to render him incapable of the act with which he stands charged, must be put out of consideration altogether".\(^3\)

In *R v. Long*,\(^4\) Wurtele, J., stated that: "The evidence offered for the prisoner and that adduced by the prosecution in reply must be of the same description, that is, it must in each case consist of evidence of general reputation only; no evidence on either side is admissible of particular acts of conduct on the part of the prisoners on the personal opinion of the witness as to the prisoner's disposition, however exceptional may have been his opportunities of

\(^{\text{1)}}\ (1865) \text{Le} \& \text{Ca} 520 \\
^{\text{2)}}\ (1888) 15 \text{O.R.} 294 \\
^{\text{3)}}\ \text{Ibid at 300} \\
^{\text{4)}}\ (1902) 5 \text{C.C.C.} 493 \text{ at 499}
observation".

The above observations makes the position in Canada clear; and it is common knowledge that English cases are freely cited and often followed by the courts in Australia and New Zealand, so one can safely say the R V. Rowton represent the position in those countries especially since no contrary decision has been given.

Similarly in most of the states of America proof of character is usually limited to evidence of Reputation. For example in Bucklin V. State, 1 Caldwell J., said: "... a man's character may really be good when his reputation is bad, and on the other hand, his reputation may be good when his character is bad. But as we have intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction, - the term 'general character' being used in legal signification; as it is frequently used in common parlance, to express the opinion that has generally obtained of a person's character, the estimate the community generally has formed of it. When you ask a witness, then, in the sense of the term, what a man's general character is for truth and veracity, he is called on to answer as to what opinion is generally entertained and expressed of him by those acquainted with him".

Durfee, C.J. in State V. Wilson 2 said: "Doubtless there is a distinction observed by careful writers between 'character' and 'reputation'; 'character' (where the distinction is observed) signifying the reality, and 'reputation', merely what is reported, or

1) 20 OH 23 (1851)
2) (1885) 15 RI 180
understood from report, to be the reality, about a person or thing". Though it might not have been clearly represented, it is implicit in the statement that what the law admits as character evidence is the reputed character, i.e., the opinion formed by others of a person, which is known as reputation.

In State V. Chapman,¹ the Supreme Court of Louisiana held that letters expressing the opinion of the writer as to the good character of a defendant in a criminal case were irrelevant and hence excludable by the trial court ex proprio motu. One of the reasons for saying that the letters were inadmissible was because according to the court it is quite clear that good character should have been shown by general reputation and not by individual personal opinion.

It will be wrong to imply that the American cases merely followed R V. Rowton, since there were decided American cases, as earlier cited, that predate Rowton's case and which were decided to the same effect as Rowton. Rowton's case probably reinforced the confidence in those earlier cases. In Nigeria, R V. Rowton seems to have been institutionalised by the provision of section 71 of the Nigerian Evidence Act which provides: "... the word 'character' means reputation as distinguished from disposition" and that except as previously mentioned in sections 66-70 of the Act, "evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown".

It must be said however, that there are certain legitimate

¹) 251 La. 208 So. 2d 686 (1968)
questions one can raise by way of comment regarding some aspects of the majority decision in Rowton. The first is the actual concept of authenticity of "Reputation", because when a witness speaks to reputation, disguise it by whatever terminology, he is merely speaking to rumour. Erle C.J., mentioned this point in his judgement, but Willes J., hammered more on it, and I consider it as a very important and crucial issue, because in that case of Rowton, the witness was neither stating what the neighbourhood's opinion of the accused was, nor was he ready to speak without any personal knowledge, but he was actually talking from his own opinion plus that of his brothers who were pupils of the accused. This problem must have been central to Mayne's thought when he said: "A witness who begins as he always does begin, by giving his own opinion, is stopped, and told that he must only say what character the accused bore among those who were acquainted with him generally. The curious result follows, that a witness is not allowed to describe a man's character from his own personal knowledge and experience, but is required to say what people in general think of him, of which he can know little or nothing". A witness therefore, who is called to speak to character, - unlike a master who is asked for the character of his servant, cannot give the result of his personal experience and observation, or express his own opinion, but, in strict law, he must confine himself to evidence of mere general repute. Kenny called such a practice a peculiarity of character evidence.

Another point is, what is actually meant when it is said that

1) J.D. Mayne, Criminal Law of India, 2nd ed. at p.1004
2) Kenny's Outline of Criminal Law, § 611
evidence must be as to general reputation. As Sir James Stephen\(^1\) observed, the question asked must be, what is the prisoner's character for honesty, morality or humanity? as the case may be; that is to say you must define your question in some respects just as in comparisons you must compare two persons or things in respect of some one quality. It is interesting to note that Cockburn C.J. referred to this issue as part of the quotation he made from Phillips on Evidence.\(^2\) To say that a man is good or bad simply does not meet the case. Good and bad are relative terms and are indefinite and so must be defined for the purpose of the case in hand. And it appears the commentators themselves admit this when they frame the question: "What was the general reputation of the accused for honesty? The last two words in part specialise the case and the question cannot be satisfactorily answered by repeating, "what was generally known about the accused in the neighbourhood where he lived", unless by the words "what was generally known" one is allowed to state particular facts, and then at all events and in most cases one will merely be stating facts on hearsay. Such a problem will not arise at all if evidence of the witness's personal knowledge and experience of the accused's character is made admissible. However, I will still like to see statements of particular instances made inadmissible.

But even that point is debatable. The question is why should such evidence not be made admissible? For instance it is objected that most villains could prove some occasions on which they have acted

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1) Stephen Dig. note XXV, p.179
2) See (1865) Le & Ca. 520 at 529 - 530
with humanity, fairness or honour, but why should they not have the credit of this and their character be estimated according to the balance of their actions proved? After all even though the law of evidence disapproves of specific acts of conduct being adduced, is it not superficial since it is all too clear that character even where it is confined to reputation alone in theory, in the reality of practice, extends to issues of his conduct and convictions on previous occasions. Is character not simply a compendious summary of a person's past activities? It is well known that one single act of misconduct or conviction is enough to tarnish a "good name" built over the years. In such a case can one not argue that a specific act of misconduct has been received? Even the law recognises that in some circumstances to be discussed later, evidence of previous conviction is admissible to prove bad character. Why is it that people with good character could easily get it damaged by one single act without being allowed to point to their specific good acts? Also why is it that people with already bad character should find it very hard to repair their image even when they have decided to change for the better? These questions and many more, are some of the reasons why I feel that there is a basis of fact and a definite matter to be looked into. But may I just say that by and large, I still think it is a sounder policy to prevent the witnesses from reciting specific circumstances indicating particular conduct. This is because it will be quite difficult for a witness to detail and describe fully all the instances in which he has heard the reputation discussed.
And even if he were able to recall and relate them, there would be a tendency for the trial to become bogged down in minutiae. Furthermore, it would be extremely difficult for a jury to appraise and evaluate the issues before them.

After raising issues about the majority judgement it is pertinent to consider the justification for restricting the proof of character to reputation testimony. The first thing that readily comes to mind is the fact that evidence of reputation as the aggregate judgement of a community is considered generally more reliable than the personal opinion of a witness whose testimony might reflect his own feelings and biases. The assumption is that the cumulative opinion of many people affords a degree of trustworthiness which could not be obtained by an individual opinion of a single witness regardless of how well acquainted he is with the party's character. Furthermore, it is feared that opinion evidence might be used as a subterfuge to prove character by means of specific conduct where such proof is prohibited. And since the opinion must be as to the general reputation prevailing among the community as a whole in the neighbourhood where the person whose character is in question resides, the witness's knowledge of reputation should therefore be based on his residence in the place or in its neighbourhood and not on mere inquiry by a visit to the place where the person whose reputation is in question resides. In Mawson v Heartsink, 1, Kenyon said, "That cannot be evidence.... If this was allowed, when it was known that a witness was likely to be called, it would be possible for the oppo-

1) 4 Esp. 102
site party to send round to persons who had prejudices against him and from thence to form an opinion which was afterwards to be told in court to destroy his credit”.

Despite the above justification, the majority decision in R V. Rowton has been the subject of continuous criticism by many scholars and judges. It will be pertinent to first discuss the minority judgement itself, which if I may so say, will in my opinion if adopted, not only be an improvement but will also simplify matters, and I will be forwarding arguments now and later to back this view up. It is common knowledge that a man with a very good reputation may have a very bad disposition, and both go to make up real character. On the other hand, a man may have a good disposition without any general character in the sense of reputation. If a man's reputation or the general credit he has among the public or a community is only taken account of, his real character, i.e., the particular traits in his disposition which are permanent and settled, is withheld and it is these traits which are of help in forming an estimate of his true character. The inclusion of "disposition" in the definition is therefore based on the reasons given by Erle C.J. and Willes, J. in their dissenting judgements in R V. Rowton. Erle C.J., in the course of his judgement said:- "What is the principle on which evidence of character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of any party accused, and basing thereon a presumption that he did not commit the
crime imputed to him. Disposition cannot be ascertained directly, it is only ascertained by the opinion formed concerning the man, which must be founded either on personal experience or on the expression of opinion by others; whose opinion again, ought to be founded on their personal experiences. The question between us is whether the court is at liberty to receive a statement of the disposition of a prisoner, founded on the personal experience of the witness who attempts to give evidence and state that estimate which long personal knowledge of an acquaintance with the prisoner has enabled him to form. I think that each source of evidence is admissible. You may give in evidence the general rumour prevalent in the prisoner's neighbourhood, and according to my experience, you may have also the personal judgement of those who are capable of forming a more real substantial guiding opinion than that which is to be gathered from general rumour. I have never seen a witness examined to character without an inquiry being made into his personal means of knowledge of the character.... Supposing a witness to character were to say - 'This man has been in my employ for twenty years, I have had experience of his conduct; but I have never heard a human being express an opinion on him in my life. For my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world'. The principle Cockburn C.J., has laid down, would exclude his evidence; and that is the point, where I differ from him. To my mind personal experience gives cogency to the evidence;
whereas such a statement as - 'I have heard somebody speak well of him' or 'I have heard general report in favour of the prisoner', has a very slight effect in comparison". 1

In the same case Willes J. said: "I apprehend that the man's disposition is the principle matter to be enquired into, and that his reputation is merely accessory, and admissible only as evidence of disposition..... The judgement of the particular witness, is superior in quality to mere rumour. Numerous cases may be put in which a man may have no general character - in the sense of any reputation or rumour about him - at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition and known only to a few; or again he may be a person of the vilest character and disposition, any yet only his intimates may be able to testify that this is the case. One man may deserve that character (reputation) without having acquired it, while another may have acquired without deserving it. In such a case the value of the judgement of a man's intimates upon his character becomes manifest.

In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family; so the character of a child is known only to his parents and teachers, and the character of a man of business to those with whom he deals..... According to the experience of mankind, one would ordinarily rely rather on the information and judgement of a man's intimates than on general report, and why not in a court of

1) (1865) Le & Ca. 520
I commend these two passages from the minority judgements as to the way and manner in which they raise and answer, by simple analogies where necessary, many important questions; the arguments are marshalled in a coherent and well thought out fashion. The comprehensive judgements of the minority give one the courage to concur with the view expressed by Taylor that the minority ruling in Rowton's case rests more upon authority than reason. Taylor also observed that though according to R V. Rowton, character is confined to 'reputation' only and not 'disposition', the rule probably would have been rejected long ago by the courts, had it not been for two causes. First, the rule, in practice, is seldom strictly enforced; and next, it has to a certain extent been modified by judges. I will not dispute either claim.

In India, the position is remarkably different from that of the majority decision in R V. Rowton, but significantly in accord with the minority view in the same case. According to the explanation to section 55 of the Indian Evidence Act, the term 'character' in sections 52, 53, 54 and 55 includes both reputation and disposition. The provision of the India Evidence Act did not come as a surprise since its author - Sir James Stephen had persistently criticised the decision in R V. Rowton. And the Indian example has been enthusiastically followed by the East African countries, as well as Sudan; India had always provided strong influence on the legal system of these countries. Obviously Sir James Stephen, in including both

1) (1865) Le & Ca. 520
2) Taylor On Evidence, 12th ed. at § 350
3) Indian Evidence Act, 1872
4) See, s. 58, Kenya Evidence Act; s. 57 Tanganyika Evidence Act; s. 53 Uganda Evidence Act; - See also Evidence in East Africa by H.F. Morris at p.97 See foot note 1
5) See Izmirhan V. Helena Tzanklo (1951) A.C. APP 5, 51, VI SLR (Gu) 625
'reputation' and 'disposition' within the definition of character in the relevant sections of the statute, made a bold and deliberate departure from the law of England. And there is no doubt that the inclusion of 'disposition' within the meaning of 'character' is in consonance with practice and reason as the distinction between 'reputation' and 'disposition' is seldom if ever adhered to. So, if the argument that the majority definition in Rowton's case is impossible to follow in practice is accepted, why retain it then?

There is however, a criticism of the extention of the mode of evidencing character to include the witness's personal knowledge of the character of the accused person. The matter was dealt with by William Bartlett, J., in People v Van Gaasbeck1 in the following observation: "If a witness is to be permitted to testify to the character of an accused person, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant and the particular actions of the defendant which have led him to his favourable conclusion. In most instances it would be utterly impossible for the prosecution to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusion were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect; its admission would lead to the introduction into the case of innume-

1) 189 N.Y. 408, 82 N.E. 718, 721 (1907)
rable collateral issues which could not be tried out without intro-
ducing the utmost complication and confusion into the trial, tending
to distract the minds of the jurymen and befog the chief issue in
litigation". The issue raised in the above passage though familiar,
cannot be ignored. However, if it is accepted that the rule in
Rowton, in practice is seldom strictly enforced, it will be hard to
believe that a mere pronouncement of the extension of character to
include disposition will exacerbate the situation in the way William
Bartlett J., suggested above. So it is my view that the criticism is
not all that tenable.

Having reviewed the different considerations of the meaning of
caracter, and signifying my preference for the minority judgement of
Erle C.J. and Willes J. in R V Rowton, and in turn Sir James
Stephen's definition and the provision of the Indian Evidence Act, I
note some further arguments that make me see it as the creditable and
convincing viewpoint. One of the criticisms of R V. Rowton is that
it made the scope of character evidence very narrow and generally
unhelpful, and I agree with that criticism. We know that a man's
general reputation by R V. Rowton is the reputation which he bears in
the place in which he lives amongst all townsmen. In other words, if
it is proved that a man who lives in a particular place is looked
upon by his fellow townsmen, whether they happen to know him or not,
as a man of good repute, that is strong evidence that he is a man of
good character. On the other hand, if the state of things is that
the body of his fellow townsmen, who know him, look upon him as a
dangerous man, and a man of bad habits, that is strong evidence that he is a man of bad character.¹

Furthermore in my view to say that personal knowledge is irrelevant is tantamount to saying that a witness should sometimes perjure, because the general perception of the accused's character by the society may be different from what the witness knows from personal observation or special relationship.

Sir James Stephen remarked as follows on R v. Rowton: "One consequence of the view taken is that a witness may with perfect truth swear that a man who to his knowledge has been a receiver of stolen goods for years has an excellent character for honesty, if he has the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with bad disposition. The case is seldom, if ever, acted on in practice. The question always put to the witness to character is: 'What is the prisoner's character for honesty, morality or humanity?' as the case may be, nor is the witness ever warned that he is to confine the evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction".² I would emphasise a point briefly touched by the statement of Stephen above; since it is common knowledge that a man may hypocritically impose upon his neighbours a good reputation, this should serve to reinforce the argument for the inclusion of personal knowledge in evidencing a person's character. Also, a personal knowledge that the

¹) See Rai Isri v. R 23 C. 621
²) Stephen Dig. note XXV p.179
accused is one kind of person may well tend to show that he is not the kind of person who would commit the crime charged, - and hence tend to show that he did not in fact commit the crime. And as such one would expect such evidence to be admitted. Another argument for the proposition that evidence of personal knowledge should be permitted in evidencing character, is the important question of what happens when character witness testifies that he has never heard the character discussed; is the witness thereby disqualified from going further and testifying? There is a general concurrence in the answer to this. Cockburn C.J.¹ observed that: ".... negative evidence, such as 'I never heard anything against the character of the man' " is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is some fault to be found with it. It is the best evidence of his character that he is not talked about at all; and in that sense such evidence is admissible. Similarly, Erle C.J.² stated: "The best character is that which is least talked about". And Professor Wigmore³ also agreed, saying that "the absence of utterance unfavourable to a person is a sufficient basis for predicating that the general opinion of him is unfavourable". It is obvious that the above concurrence is based on the assumption that the more unsullied and exalted the character is, the less likely is it ever to be called into question. But to my mind, this does not necessarily follow. For instance, a shy and retiring boss may be well known only to his household help; just as an invalid would be known to his maid, and this may mean that

¹ (1865) Le & Ca. 520 at 536
² See Ibid
³ Wigmore On Evidence, 3rd ed. at § 1614
he has no reputation amongst the community, and as such nothing might have been heard ever of him. But he could have been committing some terrible crimes known only to such help or maid. And yet such help or maid might never have heard his character discussed in the neighbourhood, but does this mean he has no fault or that his character is unsullied? This I believe, is a good and strong argument for the case that a character witness who has never heard the defendant's reputation discussed should be allowed to express himself as to whether the defendant's reputation is good or bad. The character witness can easily so state to the jury. However, I do realise that it can be argued that here, the jury is in a position to evaluate the fact of non-discussion without the need of the witness's opinion. But it can be argued too on the other hand, that the character witness should be allowed to testify as to whether the accused's reputation is good or bad especially where the witness is familiar with the special circumstances of the particular case; in such a case his testimony may be much more significant than the favourable inference that flows from the abstract circumstance of non-discussion. I will like to suggest that whatever approach is preferred, the jury should be instructed as to the favourable inference that can be drawn from non-discussion, though no witness should be allowed to draw such an inference himself.

It is interesting to note that the view that personal knowledge should be admissible in evidencing character is now shared by members
of the Criminal Law Revision Committee,¹ and also generally in the United States. It would be permitted under Model Code of Evidence Rule 306 (2)(a), under Uniform Rules of Evidence, Rule 46 and Rule 47 (1953), and under Federal Rules of Evidence (R.D. 1971) 404, 405. It was the Advisory Committee to the drafters of the American Federal Rules of Evidence who rejecting the traditional arguments, elected to allow proof of character by means of personal opinion. It recognised that "the persistence of reputation evidence is due to its largely being opinion in disguise".² It was argued that the danger of opinion evidence can almost always be avoided by efficient cross-examination which may expose personal hostility on the part of the witness or reveal that the opinion is based on a single isolated instance.³ It was also argued that allowance of personal opinion as a mode of proof of character is predicated on its higher degree of reliability in comparison with reputation testimony. A number of reasons, not purely legal also influenced the drafters. In an urban society a person may have no general reputation in the community while it is usually possible to find individuals with sufficient association with a person to have formed an opinion about him. The drafters also realised that in contemporary society an individual may not remain in one place long enough to establish a reputation. Hence, a witness having had sufficient contacts with the person whose character he is describing should be allowed to express his opinion as to the person's character. However, the drafters agreed that proof of character by reputation should still be retained since it may be

¹) See Bill attached to the 11th Report of the Criminal Law Revision Committee - See § 134 of the report
²) Federal Rules of Evidence re. 405, Advisory Committee Note.
³) See Ladd, Techniques and Theory of Character Testimony, 24 Iowa L. Rev. at 511
the only method of proof if no witness have sufficient personal contact with the person whose character is at issue to give a personal opinion. And it is no surprise that the drafters have chosen the above line of thought because many of American's respected commentators have argued for it. According to McCormick, evidence of reputation is the weakest available evidence of character "in order of pungency and persuasiveness". Wigmore observed that prior to Rowton's case, it was the "original and unquestioned" practice for a character witness to testify from personal knowledge and opinion, though particular facts were excluded. With respect, I beg to disagree. I consider it as an overstatement to say that R V. Rowton was decided against a background of long record of precedents which decided contrary to what Rowton says; in fact I would say that the contrary is true, as most of the cases I cited earlier, predating Rowton seems to confine character to reputation. There were few cases however, that allowed witnesses to testify from personal knowledge and opinion but most favoured reputation testimony alone. So Wigmore's statement that Rowton's decision "Surpris(ed) the profession and ignor(ed) the long record of precedents" is not entirely correct. However, in a more acceptable criticism of Rowton's case, Wigmore said: "The law itself clearly demonstrates this, because there is in fact more than one way of evidencing actual character. Reputation is not the sole way. Individual estimate was formerly always available, and still is in some jurisdictions.

1) C. McCormick on Evidence at n. 323
3) See ante, R V. Jones 31 St Tr. 310; Kimmel v. Kimmel (1817) 3 S. & R. 338; Powers V. Leach (1854) 26 vt. 278
Specific acts of conduct are also available for some purposes, especially to show a witness character. If reputation were the essential and relevant fact, these other modes of providing character would be impossible; for the thing they are used to prove would be unrecognised in the law of evidence. The truth is that reputation is merely one of the three possible modes of proving actual character.  

It is also an important part of the argument that character may be proved by reputation and disposition, that most statutes that have to interprete the meaning of the word 'character' seem to have taken that approach. For example, in section 15 of the Prevention of Crimes Act 1871 and section 1(2) of the Official Secrets Act 1911, the accused's 'known character' may be proved by reputation, specific acts and opinion as to disposition. And this view is further strengthened by the interpretation given to the word in the context of its usage in section 1(f) of the 1898 Criminal Evidence Act - (which has been re-enacted in many common-wealth countries). It is now generally agreed that the word as used in the statute means disposition and reputation. In Stirland V. Director of Public Prosecutions, Viscount Simon L.C., was "disposed to think that in paragraph (f) where the word 'character' occurs four times both conceptions are combined"; and some support on principle is derived from the fact that the accused may give evidence of his character by means of his own testimony under that Act. But no one can make worthwhile observations on the subject of his own reputation which is nothing more than "that which people say about him when he is not

1) Wigmore On Evidence, § 52
2) See Post; see also s. 7 of The New Zealand Official Secret Act
3) (1944) A.C. 315 at 324
there". When a party speaks to his character, it must be to his disposition as proved, in the majority of cases by overt acts to which he refers.¹

Lord Denning has indicated that there is another sense in which the term 'character' can be used, when it overlaps the word 'reputation'. In this sense 'character' bears a meaning that is mid-way between a person's disposition, that is what the man infact is, and his reputation, that is what other people think he is. Used in this sense, 'character' means the esteem in which a man is held by others who know him and are in a position to judge his worth even though he is little known to the outside world that he has no reputation in the ordinary sense of that word. This might indeed be called a man's private as opposed to his public reputation. Though I find this an interesting development, I am not sure it is anything desirable for the construction of a word to differ in several contexts, which are closely linked in practice. It is my considered opinion that the construction given in Stirland's case should be firmly adopted for all purposes especially now when most important questions of the admissibility of character evidence now turn on the provisions of section 1(f) of the Criminal Evidence Act, 1898.

It is worth mentioning though, that there were some isolated instances of resistance to the extension of the meaning of character in the context of the 1898 Criminal Evidence Act. For example, in R V. Dunkley,² character under section 1(f) of the Criminal Evidence

¹) See Per Lord Denning in Plato Films Ltd V. Speidel (1961) A.C. 1090 at 1143
²) (1925) 19 Cr. App. R. 78
Act, 1898, was held to have the same meaning as in R v. Rowton. Also in R v. Butterwasser, Lord Goddard, said: "Evidence of character nowadays, I think, is very loosely given and very loosely received, and it will be as well if all courts paid attention to a well known case in the court of Crown Cases Reserved, Rowton, in which a court laid down the principles which govern the giving of evidence of character and of evidence of bad character in rebuttal. It was pointed out that the evidence must be of general reputation and not dependent upon particular acts or actions".

And in a relatively recent decision, Lord Devlin in Jones v Director of Public Prosecutions reiterated his previously expressed view, that character in the law of evidence means 'reputation' and considered that the expression bore that meaning in the Criminal Evidence Act, 1898. However, as earlier pointed out, it is now settled that 'character' as used in the 1898 Act means both reputation and disposition.

Since the position under the statute is considered settled, the debate of how character may be evidenced is only a problem at Common Law. One thing though is clear generally, and that is that, strictly speaking character means actual disposition, that is, the inherent qualities of a person, or the sum of his traits - this determines his propensity to behave in a certain way in a given situation. The controversy has been all about how that 'actual disposition' is to be evidenced; while on the one hand it is argued that only reputation testimony is admissible, a view resting on Rowton's case, on the

1) (1865) Le & Ca. 520
2) (1947) 32 Cr. App. R. 81 at 85
3) (1962) A.C. 635
4) Dingle v. Associated Newspapers Ltd (1961) 2 Q.B. 162 Per Lord Denning at 195 and 198
other hand, it is argued that reputation and opinion as to disposition is admissible - a view strongly backed by the critics of Rowton's case like the dissenting judges in Rowton itself, Sir James Stephen, Wigmore, McCormick etc. To my mind though, the Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development, they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have admitted the second hand, irresponsible product of multiplied guesses and gossip which we term 'reputation'. It is encouraging to note the improvement the position in the United States have undergone and it is hoped that English courts will follow the recommendation of the Criminal Law Revision Committee which seeks to bring it in line with reality.

(ii) DEFINITION OF REPUTATION: PROBLEMS

Though the meaning of 'reputation' has been discussed, and some criticisms considered, it was not possible to engage in a detailed analysis and criticism of the definition since the previous preoccupation was ostensibly to examine the meaning of 'character'. The present discussion is to enable us complete the unfinished task by way of further analysis and criticism or examination of the problems arising from the definition of reputation.

As already pointed out 'reputation' signifies what is thought of by

1) See ante
2) See ante
others of the person concerned and such aggregate opinion is represented by the public estimation of the person's character. It is often said that reputation must be 'general', that is, the community as a whole must be agreed in their opinion — by the word community, it is meant the neighbourhood and not a whole town or city. In Pickens v. State,¹ Campbell C.J., said: "General reputation consists in what is generally thought of one by those among whom he resides and with whom he is chiefly conversant. 'Common opinion'; 'that in which there is general concurrence'; 'the prevailing opinion in that circle where one's character is best known'; 'what is generally said by those among whom he associates and by whom he is known'; 'common report among those who have the best opportunity of judging of his habits and integrity'; 'common reputation among his neighbours and acquaintances', — are so many forms of expression by which an effort has been made to define wherein consists general reputation". A further problem is highlighted by Wigmore²: "The reputation must involve the general opinion not a partial or fragmentary one. Nevertheless, that opinion may exist as a general one, entertained by the community as a whole, although no utterance by that general mass of its members, or even by a majority of them, has been made. In other words, a general reputation may by inference be believed to exist, although the utterances actually heard by the witness and used as the basis of his inference may be and usually are those of a representative minority only". And anyway, people often talk about the silent majority, and the minority usually as the most

¹ 61 Miss. 566 cited in Wigmore, Evidence (3rd ed.) § 1612
² Wigmore on Evidence, 3rd ed. at § 1613
vociferous. So it can be argued that reputation is merely a view of
the minority and this appears to be backed by Campbell C.J. in his
judgement in earlier cited case of Pickens v. State, when he said:
"He may have heard a sufficient number express themselves to be
willing to say he knows the general concurrence in one view of a
number great enough to be regarded as a fair index to the community.
One may know the general reputation of Sargent S. Prentiss as a
matchless orator, although he has heard a small proportion of those
who felt the thrill of his unrivalled eloquence say what they thought
of him".1

Another problem for examination with regard to the definition of
reputation is, what happens if the estimates vary, and public opinion
has not reached the stage of definite harmony, certainly then, the
opinion cannot yet be treated as sufficiently trustworthy. And on
the other hand, it must be impossible to exact unanimity; for there
are always dissenters. To define precisely that quality of public
opinion thus commonly described as 'general' is therefore a difficult
task. Wigmore, in driving home this point said: "There is on this
subject often an attempt at nicety of phrase which amounts in effect
to mere quibbling, because the witness ordinarily will not appreciate
the discriminations; such requirements of definition should be
avoided as unprofitable".2

A related problem here, is how long does a person have to live in a
place before he could be said to have established a reputation there,

1) 61 Miss. 566 at 567
2) Wigmore on Evidence 3rd ed. § 1612
in other words when the public opinion of him became definitive. And we should remind ourselves that a man's general reputation in the community in which he lives is determined by his do's and don'ts, the respect which he enjoys and the esteem in which he is held, the social and commercial circles in which he is or is not associated, as well as the gossips and rumours - good or bad - about him. So with these in mind it is nothing easy to tell how long it will take a person to form a reputation for himself or for the society to give him one. Would it be 3 months, 6 months, 1 year or 10 years, it is hard to say. A slight allusion was made to the problem in State V. Johnson, where several of the defendants witnesses had testified to his 'good character' in Evangeline Parish. The Supreme Court found that there was no error in the lower court's admission of rebuttal testimony to the effect that defendant had a bad reputation in and around Beaumont, Texas, where the defendant had lived 'for a time'. Unfortunately, in the above case how long the defendant stayed in Beaumont was not specifically stated; they merely said 'for a time' which I reckon might have been a couple of months to a couple of years, but I would think probably not more than three years. In my personal thought, four years and over cannot be said to be 'for a time' but rather a good number of years. I also think that a person's personality will play a considerable role in determining how long it will take for somebody to have a reputation in his neighbourhood because while some people are introverts some are extroverts etc. And the nature of one's job in the community may play some part

1] (1952) 220 La. 10, 75, 58 So. 2d 389
in how long it will take for the community to form their estimation of him, for example, the local nurse, or teacher, or barmaid, or shopkeeper will be more quickly assessed because they meet the people fairly often than will the local bank manager or insurance broker.

A point relating to time which should be mentioned is that since it is character at the time of the alleged crime that bears most nearly on the inference of innocence or guilt, the reputation evidence must be confined to reputation at that time or a reasonable time before. The matter in respect of the remoteness of earlier reputation should be left to the judge's discretion.

Another problem with the traditional definition of reputation is that it is said to be limited to that which obtains in the community where the accused lives, but it is now generally accepted that this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. And given the changed living patterns of today, there should be no question that the word 'neighbourhood' or 'community' should be given an expanded and more liberal interpretation. It does happen now that proof is allowed of a person's character not only in the community where he lives, but also in any substantial community of people among whom he is well known, such as the group with whom he works, does business or goes to school. And it appears that the only requirement is that such a relationship should be over

1) See People V. Willy, 301 Ill. 307, 133 N.E. 859, 864, (1932), Comm V. White, 271 Pa. 584, 115 Atl. 870 (1922)
2) See Hamilton V. State, 129 Fla. 219, 176, So. 89, 112 A.L.R. 1013 (1937) – admitting reputation in locality where accused worked as hotel employee; State V. Jackson, 373 S.W. 2d (Mo. 1963)
a prolonged or reasonable period of time, as Brace J., pointed out in *Waddington v. Hullett* when he said: "(The witness) must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant, - not by those among or with whom he may have sojourned for a brief period, and who have had neither time nor opportunity to rest his conduct, acts or declarations, or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his life and not by a mere episode in it". Brace J., was in my view, emphatic about the time factor especially where he made reference to the period of sojourn required, and at the same time he did show his desire to recognise the views of those "with whom he is chiefly conversant", which in my opinion means that a character witness, although apparently unable to testify to the person's community-wide reputation, could nonetheless properly testify to his reputation among long standing co-workers at his place of employment, or at his school etc. And it is hoped that this liberal approach would be encouraged especially in jurisdictions where character evidence is evidenced by reputation testimony only. As a matter of fact, some commentators and writers have alluded to this particular problem while making general comments on character evidence. For example Kenny in a general observation on the issue of character said: "But as Lord Ellenborough long ago said: 'No branch of evidence is so little attended to', - and this strict rule of law is still constantly and humanely disregarded in practice. For the present

1) 92 Mo. 533
2) Kenny's Outlines of Criminal Law (18th ed.) § 610
3) R V. Jones (1809) 31 St. Tr. at p.310
conditions of busy life in crowded cities often render it impossible for a man's conduct to have been under the continuous observation of many persons for so long a time as would enable any 'general opinion' about it to grow up. Even neighbours and customers of his know nothing about him beyond their personal experience. Yet a departure from the strict rule opens an inconveniently wide field of inquiry. For a witness's individual opinion of his neighbour's disposition may have to be supported or tested by protracted consideration of the innumerable facts which led him to form it. But evidence of a man's general reputation affords terse and summary proof of his disposition. On the other hand, this briefer and more technically correct mode of proof has the disadvantage of excluding all evidence (such as perhaps might have been obtained from the very same witness who proves the good reputation) of a deep-rooted evil disposition that rendered the man unworthy of the good reputation which he enjoyed". Kenny later concluded by saying that, "Evidence of good character is thus peculiar in its nature as being a case in which the witness speaks as to other people's knowledge instead of his own". ¹ The interesting thing about the above statements by Kenny is how he has managed to link by one line of argument some important points. The vital points are first the need to give an extended meaning to the definition of 'community or neighbourhood' because of the state of today's cities; the difficulty of knowing precisely what the 'general opinion' is and lastly the need to allow as a result of the first two

¹ Kenny's Outlines of Criminal Law § 611
enumerated problems, evidence of a witness's personal knowledge of the accused.

There are however questions that need to be considered regarding giving an expanded or liberal interpretation to the word 'neighbourhood' or 'community'. If one accepts the statement by Brace J. in Waddington V. Hullet, 1 where he indicated that it is enough if the witness could state what is generally said of the person by those "with whom he is chiefly conversant", the problem then is how about a situation that those with whom he is chiefly conversant either through place of work, business or school number only a few and they only meet seldomly. Lets take for example, where an effort is being made to show that someone bore a good or bad reputation among hotel owners of a neighbourhood; and suppose there are just about five to ten hotel owners and they don't meet often, lets say they meet only twice a year, but they have been having such meetings for ten years or even twenty. To mind the admissibility of such a reputation testimony among a few number of people like this, could only amount to a dubious utility of the proposed liberal approach. The reputation of someone in that small, limited segment of the community, I think is of insufficient value to warrant its admissibility. And it cannot by any measure of imagination be said to be a general consensus of the community or a fair representation of it. I do hope however, that this sort of extreme instance will not be regarded as a rejection of the suggested liberal approach but instead it should be viewed as a rejection of the questionable

1) 92 Mo. 533
Another problem with the definition of 'reputation' is the question of the admissibility of a survey carried out scientifically. Very often reputation is defined as the 'public opinion' about a person, place or thing. In contemporary society, public opinion may be sought about a person and just about any other thing through what is generally called a 'public opinion poll'. Such a scientific survey of the public opinion is done be controlled questioning and may cover from a little neighbourhood to a whole country. The pertinent question for consideration is that if it is true that a person's reputation is the public opinion about him, can a public opinion poll about his person in the neighbourhood he lives or works be admissible in the court? There is no specific case of that sort to my knowledge but I see no reason why such should not be admissible and it will be perhaps helpful to note that the Supreme Court of New Zealand though not in exactly the circumstances envisaged above decided in the case of Customglass Boats Ltd and Another V. Salthouse Brothers Ltd and Another,¹ that public opinion may be proved by evidence of a survey carried out scientifically.

(iii) EVIDENCE OF REPUTATION ADMISSIBLE BY VIRTUE OF SECTION 9 OF THE CIVIL EVIDENCE ACT, 1968

Reputation is sometimes receivable for other purposes than to prove the existence of the facts reputed. In civil cases, in England, the admissibility of reputation is governed by the Civil Evidence Act, 1968, section 9. The section is designed to admit hearsay evidence

¹) (Supreme Court of New Zealand) (1976) R.P.C. 589
which was formerly admissible at common law and which was either not at all or not necessarily covered by statutory provisions such as the Evidence Act 1938. The type of evidence which is made admissible by section 9 may be divided into two parts: (a) that which is admissible by reason of section 9 (1) and (2) and (b) that which is admissible by reason of section 9 (3) and (4). For present purposes, we shall only concern ourselves with the latter set of provisions. The provisions are as follows: "Section 9 (3) - In any civil proceedings a statement which tends to establish reputation or family tradition with respect to any matter and which, if this Act had not been passed, would have been admissible in evidence by virtue of any rule or law mentioned in sub-section (4) below - (a) shall be admissible in evidence by virtue of this paragraph in so far as it is not capable of being rendered admissible under section 2 or 4 of this Act; and (b) if given in evidence under this part of this Act (whether by virtue of paragraph (a) above or otherwise) shall by virtue of this paragraph be admissible as evidence of the matter reputed or handed down; and without prejudice to paragraph (b) above, reputation shall for the purposes of this part of this Act be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed.

"Section 9 (4) - The rules of law referred to in sub-section (3) above are the following, that is to say any rule of law - (a) whereby in any civil proceedings evidence of a person's reputation is admissible for the purpose of establishing his good or bad character;
(b) whereby in any civil proceedings involving a question of pedigree, or in which the existence of a marriage is in issue, evidence of reputation or family tradition is admissible for the purpose of proving or disproving pedigree or the existence of the marriage as the case may be; (c) whereby in any civil proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing".

It seems reasonable to say that general reputation is admissible to prove the existence of the facts mentioned above, partly by reason of the difficulty of obtaining better evidence in such cases, and partly because as Taylor\(^1\) observed, "the concurrence of many voices" among those most favourably situated for knowing, raises a reasonable presumption that the facts concurred in are true.

It may be contended that if the statement is not admissible by reason of sections 2 or 4 of the Civil Evidence Act, 1968, the statement is admissible without any reference to the provisions of the Act. In this sense section 9 is in substance only declaratory. This seems to be borne out by section 9 (6) which provides as follows: "The words in which any rule of law mentioned in sub-section (2) or (4) above is there described are intended to identify the rule in question and shall not be construed as altering that rule in any way". Yet when admitted under the Act the statement is admissible as evidence of the matter reputed or handed down, as provided for in

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1) Taylor - Law of Evidence - 12th ed. p.367
section 9 (3)(b); that section moreover provides that reputation shall be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed. It is to be noted that evidence falling under this category is evidence of character in the sense of reputation. Such evidence is admissible at common law and may consist of what has been termed second-hand hearsay evidence. The general policy of the Act is to exclude second-hand hearsay evidence but such evidence which falls into this category is specifically rendered admissible and there is no change of the common law in this respect. Evidence relating to reputation of pedigree to which the provisions of the Evidence Act, 1938, do not apply has now been rendered admissible together with other evidence of reputation which is admissible at common law.

It is important to distinguish as Taylor does,¹ between the establishment of reputation and the use made of it when established. Reputation is established by a witness's evidence concerning the sayings and doings of a plurality of people. Accordingly it has been said that a witness may not narrate a single person's statement of either the fact reputed or reputation unless it is the pedigree declaration of a member of the family with regard to a genealogical issue.² There is therefore, no question of an infringement of the rule against hearsay so far as the establishment of reputation is concerned, but that rule is infringed whenever reputation is tendered as evidence of the facts reputed. If a witness deposes to a tradition concerning the existence of a public right prevailing in the

¹ Law of Evidence (12th ed.) 367
² Sheddan V. Att-Gen. (1860) 30 L.J.P.M. & A. 217
community, or the neighbourhood's treatment of a couple as man and wife, he is recounting the express or implied assertions of a number of other people in order to establish the truth of that which was asserted.

It seems that the above distinction is taken in section 9 (3)(b) of the Civil Evidence Act, 1968. The sub-section provides that a statement which tends to establish reputation or family tradition under the rules mentioned in section 9 (4) shall be admissible as evidence of the matters reputed or handed down, whether tendered under section 2 or section 4, or by virtue of section 9 (3)(a); but, if the sub-section had stopped there, it would have been difficult to tender reputation as evidence of the matters reputed under section 2 or section 4. As reputation is a multiplicity of statements, how could the notice procedure be applied? How could it be made clear whether the statements were first or second-hand hearsay? To meet such difficulties section 9 (3)(b) provides that, for the purposes of Part 1 of the Act, reputation shall be treated as a fact and not as a statement, or multiplicity of statements dealing with the matter reputed.

And while on the one hand evidence by a witness of what he was told by another (deceased) person will be first-hand hearsay and admissible under section 2 or section 4 by virtue of section 9 (3)(a) - (This is because of the provision of section 9 (3)(b)), on the other hand, however, where the statement by the deceased person
concerns statements by others made to him concerning the matter reputed, the limitation of the earlier sections to first-hand hearsay means that the matters in question are admissible only by virtue of section 9 (3)(a), and no notice need be given to the other side.\(^1\) This appears to have the curious result that multiple hearsay is more readily admissible than first-hand hearsay relating to exactly the same fact. Moreover, when the case does fall within section 2 (1) or section 4 (1), the notice procedure will apply even though the source of the information may be a multitude of people, not identifiable by the witness.

At common law, reputation, when tendered to prove the facts reputed rather than for the purpose of proving the reputation itself, consisted of hearsay statements by those from whom the witness as to reputation derived his information.\(^2\) By virtue of section 9 (3)(b), reputation, whether tendered under section 2, 4, or 9 is admissible as evidence of the matters reputed. As a result of the combination of this provision with the provision that evidence of reputation is to be treated as evidence of a fact, great scope is given for the operation of sections 2 and 4 in practice, and the exceptions enumerated in section 9 (4) are of limited practical significance. However, reference must be made to the matters of pedigree and public or general rights mentioned in section 9 (4) because, at common law, they are the subject of technical requirements some of which will very probably be held to have survived the Act.

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1) s. 9 (5)
2) cf Taylor, Law of Evidence (12th ed.), p.367, where another view is taken
(a) PEDIGREE

There is an exception at common law to the hearsay rule under which the oral or written declarations of deceased persons, or declarations to be inferred from family conduct, are, subject to the conditions of admissibility mentioned below, admissible as evidence of pedigree. However, in civil proceedings1 the common law exceptions to the hearsay rule have either been superseded or rendered statutory by the Civil Evidence Act, 1968.2 Accordingly, questions relating to the admissibility of declarations as to pedigree must be considered in the light of the relevant provisions3 in the Act. At any rate in the present discussions reference will be made to the common law principles governing the admissibility of declarations as to pedigree as an exception to the hearsay rule.

Generally, declarations by deceased relations, made ante litem motam, are admissible to prove matters of family pedigree. The requirement that the declarations must have been made ante litem motam - ie, before the commencement of any controversy, and not merely before the commencement of any suit, involving the same subject matter, is in order to prevent bias.4 Declarations made after the commencement of the situation from which the controversy springs, are admissible, if made before any dispute has in fact arisen5; while those made after a dispute has arisen are inadmissible, although the dispute was unknown to the declarant, for that is a collateral issue which it might be impossible to prove,6 or was fraudulently commenced with a view to excluding the

1) As defined in s. 18 (1) of the 1968 Civil Evidence Act. 2) s. 20 (2) of the 1968 Act repeals the hearsay provisions in the Evidence Act 1938. 3) Primarily ss. 1, 2, 4 and 9 of the 1968 Act. 4) The Berkley Peerage (1811) 4 Camp. 401, 417; Butler V. Mountgarret, 7 H.L.C. 633, 639. 5) Shedden V. Att-Gen. 30 L.J.P. & M. 217. 6) The Berkley Peerage Case see infra.
declarations,¹ or involved different parties or related to different property or claims. The grounds of reception are mainly three. The first is death; and the second is necessity - such inquiries generally involving remote facts of family history known to but a few, and incapable of direct proof. And the last is the peculiar means of knowledge and absence of interest to misrepresent of the declarants - members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying, information on such subjects. As Lord Blackburn observed in Sturla V. Freccia²: "I suppose the ground is that they were matters relating to long time past, and that it was necessary to relax the strict rules of evidence for the purpose of doing justice".

And in Whitelock V. Baker,³ Lord Eldon stated that: "The principle is that the declaration are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth". Lord Eldon however, pointed out that the tradition must prevail among persons having such a connection with the person to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and could not be mistaken;⁴ but this is a matter of weight rather than admissibility, although it is clear that, in order to be admissible, the tradition must be family tradition, and not, for example, that prevailing among the neighbours.

¹ Sheddon V. Att-Gen. See infra
² 5 App. Cas. 623, 641
³ (1807) 13 Ves. 514, Re Jenion, Jenion V. Wynne (1952) Ch. 454
⁴ Whitelock V. Baker (1807) 13 Ves. 510 at p.514
It is interesting to point out that in tracing pedigrees, family tradition appears to have been resorted to long before the establishment of the hearsay rule. Indeed, before jury trial itself was developed, such matters were 'tried' by witnesses who stated circumstantially the sources of their knowledge, which included family hearsay and reputation.\(^1\) And later on, when the rule against hearsay was established, such evidence continued to be received by way of exception to that rule— one of the earliest cases of the kind being *Herbett v. Tuckell*.\(^2\) Originally, however, the use of such evidence was characterised by a much greater latitude than at present, both as to the issues involved,\(^3\) and the persons from whom the hearsay proceeded.\(^4\) Its restriction to purely genealogical questions appears to date from *R v. Erith*;\(^5\) its limitation to declarants who were members of the same family, and not merely friends or neighbours from *Johnson v. Lawson*\(^6\) and the requirement of ante litem motam from *The Berkeley Peerage*.\(^7\)

The common law conditions of admissibility of pedigree statements or to employ the more usual word 'declarations' are as follows: that the declarant should be dead; that the declarations should relate to a question of pedigree ie, have a genealogical purpose,\(^8\) that the declarant should have been a blood relation, or the spouse of a blood relation, of the person whose pedigree is in issue;\(^9\) and that the declaration should have been made before the dispute in which it is tendered had arisen.\(^10\) It must be said though, that all these conditions are now irrelevant so far as declarations of fact, as distinct

from reputation are concerned, provided they can be rendered admissible under section 2. One can therefore, say that it is only in a restricted sense that section 9 can be said to have preserved this common law exception to the hearsay rule. A statement tending to establish family reputation or tradition which would, but for the Act, have been admissible for the purpose of proving pedigree is only admissible by virtue of section 9 if the common law conditions of admissibility are satisfied. Accordingly, if A's deceased father told him that his deceased father had often said that, according to family tradition, his grandfather only had one child, A may prove these statements under section 9, although they would be inadmissible as hearsay upon hearsay under section 2; but if A's father had made these statements to B, a stranger, B could not prove that under section 9, and they would still be inadmissible under section 2. On the other hand, if C could prove that D, a deceased retainer of the X family, had told him that, according to the family tradition X's grandfather was illegitimate, it seems that, although the statement would be inadmissible by virtue of section 9, because inadmissible at common law as it was not the statement of a blood relation, the statement may be proved under section 2, since section 9 (3)(b) permits reputation to be treated as a question of fact if given in evidence under Part 1.

In the case of marriage, the repute and conduct need not be confined to the family, reputation among, and treatment by friends
and neighbours being receivable.¹ A witness deposing to the existence of such a general reputation must not, however, state what some particular individual has said on the subject; and if it appears that his testimony is based merely on the declarations of such persons, the evidence ceases to be admissible as general reputation, and can only be received if the declarant was a deceased member of the family.²

(b) PUBLIC OR GENERAL RIGHTS

As earlier pointed out, the common law exceptions to the hearsay rule have either been superseded or rendered statutory by the Civil Evidence Act, 1968, in civil proceedings.³ Accordingly questions relating to the admissibility of declarations as to public or general rights must be considered in the light of the relevant provisions⁴ in the Act. It should be pointed out that except where admissibility under The Civil Evidence Act is being considered, what is said under this head could apply in criminal proceedings.

At common law an oral or written declaration by a deceased person concerning the reputed existence of a public or general right is admissible as evidence of the existence of such right provided the declaration was made before the dispute in which it is tendered had arisen, and, in the case of a statement concerning the reputed existence of a general right, provided the declarant had competent knowledge. Here the grounds of admission are: death; necessity, ancient facts being generally incapable of direct proof; and (3) the guarantee of truth afforded by the public nature of the rights, which

¹) Doe V. Fleming, 4 Bing. 266; Re Thompson, 91 L.T. 680
²) Shedden V. Att-Gen. 30 L.J.P. & M. 217
³) As defined in s. 18 (1) of the Act.
⁴) Note s. 9 of the Act.
tends to preclude individual bias and lessen the danger of mis-statements by exposing them to constant contradiction. The admission of statements under the present head long antedates any formal rule against hearsay. In old days when jurors informed themselves as to disputed facts by inquiry out of court, this was probably the most common example of the reception of hearsay evidence. Thus, in 1436, a jury based their finding of a prescription thereon. There are early examples, after the establishment of the hearsay rule by way of exception to it. Originally, however, such evidence was receivable whether the prescription was public or private; but by the end of the eighteenth century this had become doubtful, and finally, its admission was definitely confined to cases involving public or general rights merely.

A public right is one affecting the entire population, such as a claim to tolls on a public highway, a right of ferry, or the right to treat part of a river bank as a public landing place. Declarations by deceased persons tending to prove or disprove the existence of such rights are admissible at common law, and evidence of this nature is received on cognate questions such as the boundaries between counties and parishes, and the question whether a road is public or private.

A general right is one that affects a class of persons such as the inhabitants of a particular district, the tenants of a manor, or the

1) See Knight v. David (1971) 1 W.L.R. 1671 See Goulding J.
2) Y.B. 23 Hen. VI 36, 37. 3) See Mossam v. Ivy (1684) 10 How. St. Tr. 602, 610-613; Sterne v. Drotwich (1695) Skin. 623; Somerset v. France (1722) 1 Strange 654, 659. 4) Morewood v. Wood 14 East 328n.
owners of certain plots of land. Examples are rights of common,¹ the rights of corporations,² and a custom of mining in a particular district.³ The distinction from public rights is not precise and only important, if important at all, because it has been said that no evidence of competent knowledge of the subject—matter of the reputed right on the part of the declarant is necessary when the right is public because: "in a matter in which all are concerned, reputation from anyone appears to be receivable, but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge as by living in the neighbourhood, or frequently using the road in dispute". If, however, the alleged right is a general one, such as mining right under a certain land "hearsay from any person wholly unconnected with the place in which the mines are found, would not only be of no value, but probably altogether inadmissible".⁴

A far more crucial distinction is that between public or general rights on the one hand and private rights on the other hand; for the latter cannot be proved by evidence of reputation.⁵ Declarations by deceased persons as to private rights are inadmissible, since these are not likely to be so commonly or correctly known, and are more likely to be misrepresented.⁶ Where, however, the question is whether a right is public or private;⁷ or the private is identical with a public one, ie, where the private and public right coincide, such declarations are receivable as, when boundaries between two estates are coterminous with those between two hamlets.⁸

¹) Evans V. Merthyr Tydfil U.D.C. (1899) 1 Ch. 241. 2) Davies V. Morgan (1831) 1 Cr. & J. 587. 3) Crease V. Barrett (1835) 1 Cr. M. & R. 919. 4) Crease V. Barrett (1835) 1 Cr. M. & R. 919; see also Rogers V. Wood (1831) 2 B. & Ad. 245.5) R V. Antrobus (1835) 2 Ad. & El. 788; Talbot V. Lewis (1834) 1 Cr. M. & R. 495. 6) Duraven V. Llewellyn, 15 Q.B. 791 7) R V. Bliss, 7 A. & E. 550; R V. Berger (1894) 1 Q.B. 823, 827. 8) Thomas V. Jenkins (1837 6 Ad. & El. 525.
The common law conditions of admissibility of hearsay statements concerning reputed or general rights are: the death of the declarants; that the declaration should have been made before the dispute in which it is tendered;¹ and that the declaration should concern the reputed existence of the right as opposed to a particular fact from which the existence of the right may be inferred.²

This last requirement marks a great distinction between the admissibility of pedigree declarations and the admissibility of declarations concerning public or general rights. In the case of each the declarant must be dead, and the statement must have been made before the dispute arose; but, whereas proof of reputation is only one way of establishing pedigree by hearsay at common law, it is the only way of doing so in the case of public or general rights.

One difficult question that arises relates to the effect of the Act on the third common law condition of admissibility, that the declaration should concern the reputed existence of the right as opposed to a particular fact from which it might be inferred. It is known that this has produced some decisions of breathtaking absurdity in the past as in the case of Mercer v. Denne.³ In that case, the issue was whether the fisherman of Walmer had a customary right of immemorial antiquity to dry their nets on part of the foreshore. In support of the contention that the custom could not have existed throughout the relevant period, a survey, depositions and old maps were produced. They showed that the sea had run over the portion of

1) Berkeley Peerage Case (1811) 4 Camp. 401
3) (1905) 2 Ch. 538; see also R v. Bliss (1837) 7 Ad. & El. 550; R v. Berger (1894) 1 Q.B. 823; and Att-Gen v. Horner (No.2) (1913) 2 Ch. 140.
foreshore in respect of which the customary right was claimed, but they were rejected because they amounted to statement of particular facts and had nothing to do with the reputed existence of the custom. Is the condition of admissibility under consideration simply a common law restriction on the reception of hearsay under an exception to the general rule excluding such evidence, or is it an independent rule, which can equally well be described as one of evidence or substantive law, which has survived the partial abolition of the hearsay rule in civil cases? Perhaps it would be rash to predict the courts' answer to this question, but it is to be hoped that Mercer v. Denne and the congeries of similar decisions have not survived the Civil Evidence Act 1968. The survey, depositions and old maps appear to have been documents in which statements were made by persons who could, if living, have given direct oral evidence with regard to the condition of the foreshore. However, whatever view may ultimately be taken by the courts on the matters mentioned above, some of the absurd results of past decisions will be avoided for the future, so far as rights of way are concerned, on account of the provisions of the Highways Act, 1959, section 35. The section provides that any map, plan or history of a locality is admissible to show whether a way has or has not been dedicated as a highway, or the date when such dedication took place. Such weight is to be given to the above documents as the court considers justified by the circumstances, including the antiquity of the document, the status of the person by whom it was made, its purpose, and the custody in which it was kept or from which it

1 Re-enacting The Rights of Way Act, 1932. See also National Parks and Access to the Countryside Act, 1949
was produced.

In America, general reputation is admissible in proof of public rights, and for similar reasons family reputation is admissible in proof of matters of pedigree. For example, when the location of land is at issue, reputation is admitted to prove that location. While in England the use of the evidence is limited to public boundaries or other publice rights, in America (except in a few states) it extends also to private boundaries. Traditionally, the reputation had not only to antedate the beginning of the present controversy but also be 'ancient', that is go back to a past generation. However, recent cases seem to suggest that the only essential requirement today is that the monuments or markers of the original survey must have disappeared. For example, in *Johnstone V. Mause* where monuments of a survey have disappeared, evidence of common reputation was admitted as to location of boundaries and corners. As a matter of fact, the Uniform Rules of America and the Proposed Rules of Evidence for the Federal Courts of America, would like to dispense completely with the requirement that the reputation be ancient, or that the passage of time have rendered other evidence of the boundaries unavailable. The reason for such propositions I don't know, and to my mind they appear to have over-looked the rationate behind the admissibility of such evidence.

Furthermore in America, reputation is admissible to prove a variety of facts which can best be described as matters of general

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history. In *Morris v. Harmer's Heirs' Lessee*, the court said: "Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy".

In the view of Wigmore, the matter must be an ancient one "or one as to which it would be unlikely that living witnesses could be obtained". Neither The Uniform Rules, nor The Proposed Rules of Evidence for the Federal Courts requires this, although by use of the term 'history' some requirement of age is no doubt imposed. It should be noted that in addition, the matter must be one of general interest, so that it can accurately be said that there is a high probability that the matter underwent general scrutiny as the community reputation was formed. Thus in *Montana Power Corp. v. F.P.C.* where the navigable nature of a certain river was at issue, newspaper accounts and histories describing the use made of it during the 19th century were held admissible to prove its general reputation for navigability at that time; and in *United States v. Louisiana*, newspaper accounts of proceedings of state constitutional committee on suffrage and elections were held to be admissible to prove legislative history of constitution.

In some of the states of America, in addition to these well developed exceptions, reputation evidence is sometimes admitted under statute or local law to prove a variety of other miscellaneous matters; such as ownership of property, financial standing, and maintenance of a house as an establishment for liquor selling or prostitution. And in the latter situation, common usage has

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absorbed the rule of evidence into the terms "house of ill fame" and "house of ill-repute". General reputation is also sometimes admitted on questions of identification; thus it has been admitted to prove the identity of a legatee,¹ or the subject matter of a devise.²

(iv) THE DISTINCTION BETWEEN DISPOSITION AND REPUTATION

Ordinarily one may wonder why a distinction between disposition and reputation has to be discussed as both words seem clearly distinguishable from the other. The purpose can be said to be two-fold. The first is to allay any possible confusion of the words since some commentators have chosen to use them in a somewhat interchangeable manner while attempting to explain the meaning of character. The other reason is purely academic - thereby stating the obvious observations of distinction.

Since a lot has been said about 'reputation', it will be needless going over its definition again. With regard to 'disposition', it is usually employed to denote a tendency to act, think or feel in a particular way.³ Strictly speaking it is generally agreed that character means actual disposition, that is to say the character which might be attributed to a person on a nice and close assessment of all his actions, if not his thoughts and desires.⁴ And in a more complex definition, such actual disposition is said to comprise of the springs and motives of actions and it is permanent and settled, and respects the whole frame and texture of the mind. It is thought that the possible occasional confusion of disposition and reputation is because while on the one hand it is generally accepted that

1) Re Gregory (1865) 34 Beav. 600
2) Anstee V. Nelms (1856) I H & N. 225.
3) Cross at p.354
4) Plato Films V. Speidel (1961) A.C. 1091 at 1128 Per Lord Radcliffe
character actually means disposition, some other people hold the view that character means reputation, while some others say that it means both reputation and disposition. To understand the problem being discussed here it will be helpful to draw attention to the view expressed by Wigmore ¹ when he said that character only properly refers to disposition with reputation being only a mode of proving disposition. Furthermore, Wigmore denied that there is any real legal ambiguity inherent in the term 'character', but admitted that there is a semantic ambiguity. He stated that character for the purposes of relevancy as evidence, is to be considered as the actual moral or psychical disposition or sum of traits, and must be distinguished from reputation or any other source of evidencing character. It is also essential to emphasise here, the distinction between the majority and minority judgements in R V. Rowton. While both sides agree on what character means, they differed on the way in which it is to be evidenced. Following the above references, one would hope that future confusions will now be avoided. In brief, while it is wrong to say that 'character' means 'reputation' it is correct to say that it means actual disposition and such disposition can be evidence of reputation and disposition. When it is said that such 'actual disposition' can be evidence by reputation and disposition, what is meant is that it can be evidence by reputation testimony (which meaning has been extensively considered) and opinion as to disposition.

¹) Wigmore On Evidence § 52
A possible example of how confusion sometimes arise is to be found in the definition of Bowen - Rowlands when he said that 'character' is general reputation, whereas disposition is its popular sense. I find this statement incomprehensible.

A possible way to illustrate the distinction between the terms 'reputation' and 'disposition' is for example, in a hypothetical case in which a person's integrity for honesty is in issue, say in a case of fraud. There are two different questions which can be asked, viz; what was the general reputation of the accused for honesty?; and was the accused generally of an honest disposition? It is thought that while he will answer the first from what was generally known about the accused in the neighbourhood where he lived, he would answer the second from his own special knowledge of the accused. Though in either case evidence may only be given of general reputation and general disposition, and not of specific acts, in the case of 'disposition' the opinion of a witness founded on a personal experience as well as the expression of opinion by others is receivable.

It is significant to point out that there are four obvious methods by which disposition might be proved in a court of law. In the first place, evidence of conduct on as great a variety of occasions as possible might be adduced, for it is to be assumed that someone who frequently acts in a given manner has a disposition to do so. Secondly, previous convictions tend to establish disposition, provided they can be received as evidence of the facts upon which

1) Bowen - Rowlands - "Examination and Cross-Examination as to Character" (1895) 11 L.Q.R. 20 at 23.
they were founded. Thirdly, a witness could be asked for his estimation of the disposition of one of the parties. Finally, evidence might be given of that party's reputation - the general opinion of his disposition prevailing among those who know him best.

(v) **REPUTATION TO BE DISTINGUISHED FROM RUMOUR**

The need for a distinction to be made between 'reputation' and 'rumour' cannot be overemphasised. Both Erle C.J. and Willes J., did make significant reference to the word 'rumour' while discussing the evidencing of character in *R v. Rowton.* Erle C.J. remarked that: "....You may give in evidence the general rumour prevalent in the prisoner's neighbourhood, and according to my experience, you may have also the personal judgement of those who are capable of forming a more real, substantial guiding opinion than that which is to be gathered from general rumour". And Willes J., said: "... The judgement of the particular witness is superior in quality and value to mere rumour. Numerous cases may be put in which a man have no general character - in the sense of any reputation or rumour about him - at all, and yet may have a good disposition". It is clear from the two statements above that reputation is somehow regarded as rumour and the purpose of this distinction is to repudiate any such notion by showing that the two words mean completely different things.

Wigmore, properly and correctly explained the distinction between the two words when he observed as follows: "Reputation, being the

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2) Wigmore On Evidence (3rd ed.) § 1611.
community's opinion is distinguished from mere rumour in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community; while rumour implies merely a report that is not yet finally credited. On the other hand, a rumour is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character; a man's reputation, for example, may declare him honest and yet today a rumour may have circulated that this reputed honest man has defaulted yesterday in his accounts.

Also, the statement by Cave J., in *Scott v. Sampson*,¹ is quite helpful in understanding that there is distinction between 'reputation' and 'rumour'. In that case, his Lordship said: "It would seem that such evidence (of rumour and suspicion) is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have infact affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. To admit evidence of rumours and suspicions, is to give anyone who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading, through the means of the publicity attending judicial proceedings, what he may have picked from the most disreputable sources, and what no man of sense who knows the plaintiff's character would for a moment believe in".

And Lord Denning expressed similar sentiments in *Plato Films Ltd v.*

Speidel; he said: "... In so far as the estimate spreads outwards from those who know him and circulates among people generally in an increasing range, it becomes his 'reputation', which is entitled to the protection of the law just as much as his character. But here I speak only of a reputation which is built upon the estimate of those who know him. No other reputation is of any worth. The law can take no notice of a reputation which has no foundation except the gossip and rumour of busybodies who do not know the man".

In India, it has been held in the case of Pirangi v. R., relied on in Baso Rai v. R., that if the evidence is of those persons who are living in the locality where the reputation is prevailing and people talk of their beliefs about him, it is admissible, but if the evidence is of a man who does not know of the reputation himself but heard it from others, it will be hearsay and inadmissible.

It is thus clear from the above explanations that there is an unambiguous distinction between reputation and rumour and regardless of the occasional description of reputation as public rumour, there is a world of difference technically between the two words.

(4) DISPOSITION AND CHARACTER EVIDENCE: SPECIAL REFERENCE TO NON-JURY TRIALS

Generally in the common law countries, most trials take place before a Judge or a Magistrate without a jury and it is only in trials before a High Court Judge that a jury is empanelled - never in trials in magistrates' courts. For the present purpose, I shall be

1) (1961) A.C. 1091 at 1138
2) A. 1933, P. 189: 143 I C 687
3) A. 1948 P.84.
4) Note also Sheriff Courts in Scotland; See The Jury Act Cap.98 (Nigeria).
discussing the position in the non-jury trials within the context of the Nigerian experience, since it is with this that I am more conversant, but I have no doubts that the arguments and issues to be raised are applicable to all other non-jury trial countries operating the common law adversarial system.

Presently in Nigeria, jury trial is in virtual if not complete extinction, and even when it appeared it was in use, it never really took any foot hold as it was only in a very small percentage of trials before the High Court that the jury was empanelled. Generally the laws establishing the various High courts provide that "Civil and criminal causes shall be tried by a judge alone except where express provision to the contrary is made" by any law. However, there is nothing in the Nigeria Evidence Act to indicate the English Common Law traditional division of functions between the judge and the jury where the judge sits with a jury, but it is clear from a reading of the whole Act, that this division is taken for granted by it. For example, section 57 (2) of the Nigeria Evidence Act provides that: "Any question as to the effect of the evidence given with respect to foreign law shall, instead of being submitted to the jury, in the case of trial with a jury, be decided by the judge alone". And it is also clear from the judgement of the courts that the division is applicable in Nigeria. Furthermore, special reference must be made to section 363 of the Criminal Procedure Act (Nigeria) which says that the procedure and practice for the time being in force in the High Court of Justice in England in criminal

1) See e.g. s. 65 of The High Court of Lagos Act Cap. 80; s.335 of The Criminal Procedure Act Cap. 43.
cases shall apply to trials in the High Court in so far as the Act has not specifically made provision therefor. Generally in criminal trials in the High Court of Justice in England, matters of law are determinable by the Judge whilst matters of fact are determinable by the jury. Thus, the credibility of evidence of any kind is a question for the jury and not for the judge unless he sits without a jury.\(^1\) Also, sections 278, 280 and 284 of the Nigeria Criminal code state that certain matters are questions of law whilst others are said to be questions of fact.

It is significant to note that there is a modern trend to abandon the traditional justification of the exclusionary rules as based on the jury trial system and to relate it to the adversary system of litigation prevailing in Anglo-American courts.\(^2\) It is however, difficult to apply this view to the rule under discussion; nor is one aware of any suggestion to do so. On the contrary, the danger of accepting evidence of disposition and character seems greater in the inquisitorial system. In the adversary system it may be assumed that the opponent will do his best to ward off the attack and frustrate the effect of such evidence. In the inquisitorial system, where proceedings are conducted almost exclusively by the judge who naturally is not interested as the party involved and has no direct knowledge of the details, the effect of such evidence might be much more damaging. On the other hand, the duality of judge and jury no doubt fits the rule: while there is serious danger in bringing preju-

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\(^1\) See Edet Obosi V. The State (1965) N.M.L. 119 at 123.
\(^2\) See Morgan's Foreword to the Model Code, P.8; Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956); McCormick Evidence, p.327; Stowe "Evidence of Similar Facts" (1922) 38 L.Q.R. 63.
dicial evidence to the notice of a layman jury, combined with the fear of confusing it by raising collateral issues, the judge is in a controlling position to subject all proposed evidence to proper scrutiny before it reaches the jury. Indeed, many of the judgements and most of the literature dealing with this rule emphasise the existence of the jury as a justification for excluding evidence of disposition and character. The remark by L. Orfield that: "In some cases, proof of other offences may be a harmless error where the trial is by the court without a jury but not if before a jury." is quite pertinent. It may seem of significance that R. 45 (b) of the Uniform Rules has replaced the word 'Judge' in R. 303 (b) of the Model Code - ("danger of misleading the judge") by the word 'jury'. There are of course other justifications for the rule which apparently do seem to relate to the jury system.

It is however, doubtful whether the English formulations of the rules are comprehensible, even to an intelligent 20th century juror.

The Nigerian law on disposition and character evidence, generally coincides with English Common Law. No serious attempt has been made in local case law to depart from the English rules and reliance on English precedents is accepted as a matter of course. This automatic absorption of a set of hard and fast technical rules is regrettable in view of the fact that the jury system has gone into oblivion in Nigeria. And if one follows the generally held belief that the law relating to disposition and character evidence is heavily influenced by the exigencies of the jury system of trials, it

can be argued that the present rule of exclusion is not suited to the Nigerian legal climate and such other countries that operate a non-jury trial system.

The rules' close relationship to the jury system and the desire to withhold doubtful evidence from the jurors do not obtain in a non-jury trial, where a professional judge alone sits in trial. The judge is neither inept nor careless to such a degree that he needs protection; and if he is either, such a protection will hardly be of any help.

There is also the sobering thought that the enormous majority of criminal trials take place before Magistrates and no one knows to what extend they are liable to be affected properly or improperly by being made aware of the accused's convictions before they have decided that he is guilty.
CHAPTER 2
SIMILAR FACT EVIDENCE

(1) GENERAL

That area of evidence law concerning the admission of evidence of other facts not directly related to the commission of the offence charged depicting criminal or other socially perjorative behaviour or state of disposition of the accused at other times, has come to be known as "similar fact evidence". The phrase "similar facts" is obviously a contraction, for the adjective implies a comparison. Also, one could say that the phrase "similar facts" is a misnomer, in so far as it cannot be said that the facts must in all cases be similar. The use of the phrase in the law of evidence is mainly confined to a comparison of other facts with the facts in issue in a particular litigation. Hence a similar fact is usually a fact which is similar to a fact in issue. But similarity is a vague conception, upon which different courts may take different views. It must apparently involve some characteristics common to the fact in issue and the other fact described as similar. As Lawrence, J., said in R v. Bond: "In proximity of time, in method or in circumstances there must be a nexus between the two sets of facts". Nokes explained further: if the fact in issue is whether beer sold by the defendant to the plaintiff was bad, a similar fact may be the sale by the defendant of bad beer to someone else. Here the undisputed common characteristics of the two facts are the nature of the transactions (sale), one party thereto (the defendant) and the nature of the

(1) The prior acts or facts need not be criminal at all: e.g. R v. Ball (1911)A.C.47 (H.L.)
(2) (1906) 2K.B.389 at 424
(3) Nokes, An Introduction to Evidence, 4th ed. (1967) at P.109
commodity (beer), from which the disputed quality (badness) is sought to be inferred. At the first glance the two sales might be thought to be similar facts, but if one sale took place yesterday and the other was ten years ago, or if one sale was in England and the other was in Australia even at the same time, the two transactions have only a superficial similarity. Yet if they occurred within a reasonable proximity of time and place and had some other common characteristic or connection, such as the origin of the beer, there would be a real similarity. Unfortunately in speaking of similar facts lawyers usually include both superficial and real similarity; but to decide on admissibility it is often necessary to distinguish between them. And this much of a distinction can be made; the expression of 'similar fact evidence' is used broadly to refer to all evidence which shows that on some other occasion the accused acted in a way more or less similar to the way in which the prosecution alleges he acted on the occasion which is the subject of the present charge. Such evidence is, clearly, frequently of great probative value. Equally, such evidence constitutes the example par excellence of evidence possessing a potential for prejudice. And 'similarity', not always being of particular importance or merely being relative to whatever common characteristic is significant at the time in order to determine relevance within a particular context and to a specific issue or proposition. It is thus clear that the reason why the admission/exclusion of similar fact evidence has perplexed the legal profession and academics is because, such evidence while often being

(1) Stone "The Rule of Exclusion of Similar Fact Evidence: England" (1932-33) 46 Harv.L.R. 954 at 955
unduly prejudicial has, paradoxically, often also been highly proba-
tive to an issue or issues in a trial. Thus, two fundamental
principles of the law - one of exclusion, the other of admission -
have come into conflict. However, rather than recognising the con-
FLICT as consisting of competing principles or values, and thus
attempting to resolve the conflict by balancing these values in each
particular case, the courts have instead sought a resolution by means
of absolute rules necessitating a particular conclusion, irrespective
of the factual particularities of a case. Specific rulings, wise in
the context of a case, but not of universal application, were solidi-
ified into binding propositions of law. On the other hand, some cases
dealt with a prior enunciation of principle as if it were only a
narrow precedent, failing to recognise its true character. Rules
were developed, exceptions made, and exceptions to the exceptions
followed. Soon controlling principles were lost in the shuffle and
in the attention being directed to the twisting of the facts in a
case in order that it fall within a recognised exception, or outside
a particular perceived forbidden line of reasoning. As Harry
'Glasbeck of Osgoode Hall Law School, York University, Toronto, analo-
gised the state of the law in this area:

Q: How do you shoot a purple elephant?
A: With a purple elephant gun

Q: How do you shoot a grey elephant?
A: 'Twist its nose until it turns purple, and then shoot it!
In accord with Thayer's comments on the general law of evidence with respect to similar fact evidence, a "bastard sort of technicality has thus sprung up, and a crop of fanciful reasons for anomalies desti-tute of reason, which baffle and disgust a healthy mind" - all of which is "to the perplexity and confusion of those who sought for a strong grasp of the subject". As one writer has synopsised the state of the law in this area: "Wigmore once called it a 'vast morass of authority'. It is hopeless to attempt to reconcile the prece-dents' was his judgement in 1940. In 1972 England's Criminal Law Revision Committee said 'it proved far the most difficult of all the evidence topics' they had to consider. Perhaps seen as an amalgam of two rules, the bewildering variety and apparent inconsistency of the cases dealing with similar fact evidence can be understood.

Also, in this connection it is worthwhile remembering the observa-tions of Butt, J., in R v. Flannagan and Higgins: "When considering the admissibility of previous acts, I have heard nothing of the authorities, but first of all and before any authority, I desire to say this: that I think where the authorities are at all in conflict, the safest rule to be guided by is one of common sense".

It should be borne in mind that similar fact evidence is merely an item of circumstantial evidence which, when combined with several pieces of other relevant and admissible evidence, enables one to arrive at a conclusion that the accused is guilty beyond any reasona-ble doubt. One item of evidence may place the accused in a class of persons who had a motive to kill the deceased. Another item of

(1) Thayer, A Preliminary Treatise on Evidence at the Common Law (Boston, 1898) at P.273
(2) Sklar, "Similar Fact Evidence - Catchwords and Cartwheels" (1977) 23 McGill L.J. 60
(3) Stone "The Rule of Exclusion of Similar Fact Evidence: England" (1932-33) 46 Harv. L.R. 954
(4) 15 Cox C.C. 403, 408
evidence may place the accused in a class of persons who had the opportunity. Another piece of evidence may place the accused in a class of persons who had the necessary mental state, etc. As Eggleston ¹ observed: "What ultimately leads to the conclusion of guilt is the improbability of an innocent person's belonging to so many independent classes". If, however, the classes are not strictly independent, then the improbability of an innocent person's belonging to so many classes is lessened. For example, on an issue of identity, the class of bearded persons is not strictly independent from the class of mustachioed persons. If the similar fact evidence, as an item of evidence in itself, or when considered with other items of evidence, inter alia, can increase or decrease the probability of the existence of the fact or proposition in issue sought to be proved or refuted, respectively, it has probative value. The degree to which its presence in the case can affect those probabilities determines its degree of probative force. If sufficiently probative to outweigh any prejudice inherent in the nature of the similar fact evidence, it is justifiably admissible in the case as an item of circumstantial evidence tending to prove or refute the issue or proposition to which it is directed (e.g. motive, intent, opportunity, commission of actus, etc.), the existence or absence of which, once established, is a piece of circumstantial evidence pointing towards the ultimate issue of guilt.

(1) Evidence, Proof and Probability (1978) at P.66
STATEMENT OF THE RULE

It has been said to be an axiom "that you cannot prove the commission of one crime by proving the commission of another". The rule is aptly stated by Cross⁴ thus: "Evidence of the misconduct of the accused on other occasions (including his possession of incriminating material) must not be given unless it goes beyond showing a general disposition towards wrongdoing, or the commission of a particular kind of crime, and has specific probative value in relation to the charge before the court, due regard being paid to the other evidence in the case, and to defences which may reasonably be supposed to call for rebuttal". In other words, evidence of similar acts is considered collateral, and therefore irrelevant, unless some special nexus between the fact in issue and the evidence tendered is shown, which creates a relationship beyond mere similarity; general similarity is not sufficient. It is interesting to note that evidence of actual propensity was held inadmissible certainly as early as 1810⁴. But it has been contended that at this time the general rule was to admit other evidence of similar facts if it was relevant, and that it was only about a hundred years ago when a general rule of exclusion was first recognised⁵. By the end of the last century, the rule in relation to criminal causes was settled beyond doubt and with great lucidity by Lord Herschell L.C. in Makin v. Attorney-General for New South Wales⁶. In that case the accused, a husband and wife, were charged with the murder of a baby M. Its body was found (together with the remains of three other babies) buried in their garden.

(1) Cross on Evidence, 5th ed. (1979) at 355; (2) 15 Halsbury (3rd ed.) p.291; (3) Brown and Wife v. The Eastern Midland Ry.Co. (1899) 22 Q.B. D391 at 393; Blake v. The Albion Life Ass. Society (1878) 4 C.P.D. 94 at 102; (4) R. v. Cole (1810-unreported); the judge's note is now printed in (1946) K.8 at 544; (5) Stone "The Rule of Exclusion of Similar Fact Evidence..." (1933) 46 Harv. L. R. 954, at 966, 967; (6) A.C. 57 at 65
(they, the accused) and they were proved to have agreed to adopt it in return for payment of a small sum by its parents. 'The reason given for this apparently generous conduct was that Mrs Makin had lost one of her children. 'The defence of the accused was that the child had died through natural causes, and that their sole crime was to have buried it irregularly. 'The prosecution's case was that the child had been killed by the Makins pursuant to a scheme by which they took charge of infants in return for payments to be used for the infant's care, then killed the infants and retained the sums paid. In support of this case the prosecution led evidence that the bodies of twelve other infants had been discovered in the grounds of premises occupied at various times by the Makins, and that several of these infants had been placed in the care of the Makins in return for the payment of a small sum. 'There was further indubitably admissible evidence against the accused, or one of them, in the shape of admissions, prevarication and concern about excavations in the back yard of one of the houses they had occupied. 'They were convicted, but a case was reserved on several points, two of which came before the Privy Council. 'These concerned the admissibility of testimony with regard to (a) the discovery of the remains of other bodies buried in the back yards of houses occupied by the accused; and (b) the fact that, in addition to the mother of M., four women had given their children into the care of the Makins in consideration of a low premium and had heard no more of them. 'The Privy Council held that the evidence had been properly admitted to establish that the baby's
death was the result not of natural causes but of the conduct of the Makins - that M was deliberately killed by the Makins. And perhaps it should be mentioned that, although entitled to do so, they did not give evidence; and they had told the police that they had earlier taken one baby into their charge and it had been returned to its parents after payment of a reasonable weekly premium. Delivering the judgement of their Lordships, Lord Herschell L.C. gave what was destined to become the locus classicus on the matter; he stated it by laying down two principles: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offences for which he is being tried. 'On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused". Simply put, the principle on which evidence of similar acts is admissible is, not to show that because the defendant has committed one crime, he would therefore be likely to commit another, but to establish the 'animus' of the act, and rebut by anticipation, the defences of accident, mistake, ignorance or other innocent states of mind. 2.

(1) (1894) A.C. 57 at 65
The above statement by Lord Herschell L.C. received general acclamation and has since been repeated in most of the subsequent cases on the subject with approval, and its authority is not doubted. It is, however, noteworthy that the above laid down principle, was once challenged. Commenting on the position of the law since after Makin's case, Nokes stated: "The law so stated remained unchallenged for fifty years. But in 1946 a judgement of the court of Criminal Appeal - (R v. Sims) - contained dicta which in effect reverted to the older law, reversing the settled approach to this subject, by laying down that evidence of similar facts was relevant and admissible unless there was some ground for exclusion". However, Professor Montrose disagreed with this interpretation of the dicta. Commenting on Nokes' interpretation of R v. Sims he said: "This is erroneous. Sims does not lay down the principle that all similar fact evidence is relevant: this is the entire misconception of Lord Du Parcq". But his next sentence attributed to the text a meaning which it could not bear, he said: "It (that is R v. Sims) expressly affirms the 100 years-old rule that evidence to show disposition is inadmissible. It is made clear that similar fact evidence must be relevant before it can be received. The principle on which Sims proceeds is that there is no rule of exclusion of Similar Fact Evidence which is relevant otherwise than through disposition; there is 'no novelty' no new approach". Having read the judgement of R v. Sims myself, I must respectfully disagree with Professor Montrose's interpretation of the decision, and agree with Nokes'. And as a

(1) Per Lord Herschell; Makin v. Attorney-General of New South Wales (1894) A.C.57
(2) (1894) A.C.57
(3) Nokes, An Introduction to Evidence (4th ed.) at 110-111
(4) (1946) K.B.531; see Hammelman "Evidence of Evil Propensity" (1949) 12 M.L.R.1
(5) Prof. Montrose, "Basic Concepts of the Law of Evidence" (1954) 70 L.Q.R. 527 at 546
matter of fact a number of commentators and jurists share the interpretation given by Nokes, while others criticise the decision too. For instance H.A.R. Snelling¹ said of the decision in R v. Sims: "That court had stated a view that all evidence that is logically probative is admissible unless excluded"; an interpretation which can't be far from Nokes¹. And Professor Montrose himself referred to the view of "another writer (who) implied that the judgement in Sims was nonsensical"². I reckon perhaps the writer disagrees with the decision's seeming reversal of the generally approved rule in Makin's case. Be that as it may, in 1949 these dicta in R v. Sims³ were disapproved by their Lordships in quashing a conviction in the British'Guiana case of Noor Mohammed v. R⁴, where on the trial of a man for murdering his paramour by poison, evidence was admitted that two years before the alleged murder the accused's wife had died of similar poison. Noor Mohammed was a decision of the Privy Council which decision is technically only of pursuasive authority in English law, but in 1957 the Court of Criminal Appeal accepted the view of the Judicial Committee⁵. It is the considered opinion of Nokes⁶, which I happen to share, that indeed, Makin's Case⁷ was probably binding on the Court of Criminal Appeal in 1946 in R v. Sims⁸ for it had been approved in the House of Lords much earlier⁹. In any case, today, one can see the status and popularity enjoyed by the propositions of Lord Herschell L.C. from the description given by Cross, he said⁹: "These propositions have come to be regarded as almost canon-
cal and, although they have been subjected to trenchant criticism, they can, with a certain amount of exegesis, still form the basis of an exposition of the present law". For instance in R v. Bond Kennedy J. said: "When a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge ..." And in Director of Public Prosecutions v. Boardman, a decision of the House of Lords, Lord Morris stated that Lord Herschell's words "have always been accepted as expressing cardinal principles", and Lord Hailsham said "I do not know that the matter can be better stated than it was by Lord Herschell". Lord Salmon expressed himself even more strongly, stating: "The principles upon which such evidence should be admitted or excluded are stated with crystal clarity in the celebrated passage from the judgement delivered by Lord Herschell L.C. in Makin v. Attorney-General for New South Wales. I doubt whether the learned analysis and explanations of that passage to which it has been subjected so often in the last eighty years add very much to it". Also in an earlier case, Lord Sankey, with the concurrence of his colleagues, characterised the first principle in Makin's case as "one of the most deeply rooted and jealously guarded principles of our criminal law and fundamental in the law of evidence

(1) By Hoffman in 91 L.Q.R. at 193
(2) (1906) 2 K.B. 389 at 397 followed in R v. Barbour (1938) 71C.C.C.1
(3) (1975) A.C. 421; (1974) 3 All E.R. 887
(4) (1974) 3 All E.R. at 892
(5) Ibid at 905
(6) Ibid at 912
as conceived in this country". All this goes to show the degree of acceptability the decision in Makin enjoys.

It should be noted that in Scotland as in the Commonwealth countries, when the question in issue is whether a person did a particular thing at a particular time, it is in general irrelevant to show that he did a similar thing on some other occasion. Lord President Dunedin observed in *Oswald v. Fairs* as follows: "The question being whether A said a certain thing to B, I do not think that it is relevant evidence upon that question - where there is a controversy between A and B - to show that A said something of the same sort upon another occasion to C. The question is what did A say to B, not what did he say to C, and the fact that he said the same sort of thing to C does not seem to me to prove that he said it to B". And in the Canadian case of *Koufis v. The King*, Taschereau J. said: "When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, 'and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment'. Otherwise, 'the real issue may be distracted from the minds of the jury', and an atmosphere of guilt may be created which would indeed prejudice the accused".

The common law rule has been enacted into statute in some of the Commonwealth countries. In India for instance, the rule relating to evidence of similar facts is contained in Sections 14 and 15 of the

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(2) (1911) S.C. 257 at 265; see also Coventry v. Douglas (1944)
J.C.B.L.J.G. Normand at P.19
(3) (1941) 76 C.C.C.161 (S.C.C.) at 176; see also R v. Miller (1940)
74 C.C.C. 270 (B.C.C.A.); R v. Wied (1949)95 C.C.C.108 (B.C.C.A.);
4 C.C.C.206 (B.C.C.A.)
Indian Evidence Act. Section 14 deals with the relevancy of facts showing intention, knowledge, good faith, negligence, rashness, ill-will or good will, when the existence of any state of mind or bodily feeling is in issue. Under Section 15, when there is a question whether an act was accidental or intentional (or done with a particular knowledge or intention), the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned is relevant. The two sections should be read together for a grasp of the true principle; when studying Section 14, it is well to consider the provision in Section 15 which is an application of the rule in Section 14. Indian courts have consistently held that the India Evidence Act does not go beyond the English law in regard to the admissibility of similar facts to prove states of mind. The subject was exhaustively dealt with and the law in Sections 14 and 15 was stated with clearness and precision in Amritalal v. R, thus: "Facts similar to, but not part of, the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence aliunde on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent with respect thereto. In general, whenever

(1) Indian Evidence Act 1872
(2) See Post
(3) R v. Parbhudas, 11 Bom H.C. 90; R v. Vyapoory, 6 C. 655, 659
(4) 42 C. 957 pp. 997, 998; 19 CWN 676, 692
it is necessary to rebut, even by anticipation the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. 'To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question'. And in *R v. Panchu Das*¹, the English and India cases on which the above statement of law was based were re-examined and it was declared that the law stated above was accurate.

And the rule relating to similar fact in Nigeria is contained in Section 17 of the *Nigeria Evidence Act*² which provides that, when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant. 'Thus under the section, evidence of other acts of the accused similar to the act complained of may be relevant to rebut defences of accident³, lack of intention, for example to defraud⁴, and lack of knowledge⁵.

In Nigeria, one of the most important reported cases so far on the admission of evidence of similar facts under Section 17 of the Evidence Act since the Act came into operation in 1945 is the case of *The Queen v. Olubunmi Thomas*⁶. In this case, the appellant was tried

(1) 24 CN 501, 47C. 671 FB  
(2) Nigerian Evidence Act, 1945  
(3) See *R v. Bond* (1906) 2 k.B. 389 at 413; *R v. Heesom*, 14 Cox C.C. 40  
(4) See *R v. Wyatt* (1904) 1 k.B. 188; *Barnes v. Merritt* (1899) 15 T.L.R. 419; *R v. Rhodes* (1899) 1 Q.B. 77  
(5) See *R v Mason* (1914) 10 Cr. App. R. 169  
(6) (1958) 3 F.S.C. P.8
in the Ibadan High Court for, and convicted of, forgery in that he forged a letter dated February 4, 1956, purporting to be a letter of application for endorsement of an import licence from one E.E. Alade of Oshogbo. At the trial of the appellant, evidence was given by one Mrs Bola Ademiluyi, whose evidence the Federal Supreme Court found was designed to show that the appellant had been carrying on a systematic trafficking in import licences. The conviction was quashed and the case remitted to the High Court for retrial by another judge. At the retrial the same witness was called again and she gave the same substance of evidence against the appellant, and the appellant was again convicted. In quashing the conviction, Nageon De Lestang A.C.J. (as he then was), delivering the judgement of the Federal Supreme Court said: "We have considered with care whether the evidence in question can be considered to be relevant to any issue in this case, the charge in which was forgery of a specific application for an endorsement of an import licence. Evidence given by witnesses directed specifically to the circumstances surrounding the application which was the subject of the charge would clearly be relevant and admissible, but we are unable to agree that evidence touching a series of other transactions was relevant to the issue whether or not the appellant wrote the signature on the application form we are concerned with here because that was the question the court below had to determine. We are, however, satisfied that counsel was justified in describing the evidence as highly prejudicial. As Lord Simon said in Harris v. D.P.P.: 'Evidence of other occurrences which merely

(1) (1958) 3 F.S.C. 8 at 9
(2) (1952) A.C. 708
deeper suspicion does not go to prove guilt', and that was the grounds upon which the Judicial Committee of the Privy Council allowed the Appeal in the case of Noor Mohammed v. "The King". In the United States of America as in the common law countries, generally evidence of other crimes of the accused is excluded and the prosecutor is required to prove the case other than by showing the accused as a 'bad man'. The Uniform Rule 55 provides that "... evidence that a person committed a crime or did wrong on a specified occasion is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, ... such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity". To similar effect is Federal Rules of Evidence (R.D. 1971) 404 (b). And in People v. Molineux, it was observed as follows: "The general rule of evidence applicable to criminal trial is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proof, that he is guilty of the crime charged. ... The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the com-

(1) (1949) A.C. 182
(2) (1901) 168 N.Y. 264, 61 N.E. 286, 293, 294
mission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial".

'The statement of the rule as stated in Uniform Rules r.55 above, is based on rule 311 of the American Law Institutes code of evidence, and subject to the verbal modifications to be gathered from a comparison with the text, it is submitted that this rule represents English Law. 'The only modification of any importance relates to the inclusion of misconduct which is neither a crime nor a civil wrong. For example in R v. Ball the previous conduct alleged was an incestuous relationship between the brother and sister at a time when incest was not a criminal offence.

'It should be emphasised that the exclusionary rule is confined to misconduct on other occasions. 'Thus if a court has acquitted an accused of an offence arising out of certain alleged conduct then this conduct cannot be adduced as a prior similar act. Also, evidence tending to show good conduct of a party on other occasions is frequently excluded because it is insufficiently relevant having regard to the collateral issues it might raise, and evidence of conduct which is neither good nor bad may be rejected for similar reasons, but it is not rendered inadmissible with the ease by which an argument from conduct on other occasions to deposition and thence to conduct on the occasion under investigation might be accepted.

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(1) (1911) A.C. 447
(2) (1967) 2 All. E.R. 271; Kempe v. R (1951) A.C. 447
(3) (1810) 2 Camp. 391; Hollingham v. Head (1858) 4 C.B.N.S. 399
(i) **ILLUSTRATIONS OF THE RULE**

'There are hypothetical as well as case authorities to illustrate properly the principle enunciated by Lord Herschell L.C. in *Makin v. Attorney-General for New South Wales*. However, as illustrations of the exclusion of the accused's misconduct on other occasions are scattered throughout the reports, I would only make a few significant case illustrations at this initial stage of the discussion.

Starting with the hypothetical situations, I find the explanation given by *Cross*² quite apt to begin with: "If someone is accused of theft on the 31st of January, evidence that he obtained money by deception on the 31st of December must not be adduced if it is solely relevant as supporting an argument that the accused was the kind of person who might commit theft, and this would also be the case with regard to evidence that the accused committed theft on the 31st of December, but if the argument can be rendered more specific, and made to support a suggestion that the accused is disposed towards a particular method, as opposed to a particular kind of wrongdoing, evidence of his misconduct on other occasions may become admissible. Proof of deception in December might well be allowed on a charge of a similar kind of deception in January."³ *Cross* moved on to emphasise that the rule is confined to misconduct on other occasions. One can think of numerous illustrations to the rule, and it will be worthwhile to consider a few. 'Take for instance A, who is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the

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(1) (1894) A.C. 57 at 65; see *R v. Smith* (1915) 11 Cr. App. R. 299; *Sudan Government v. Mohamed Abdulla Imam* (1972) SLJR 222
(2) *Cross on Evidence* 5th ed. at 355
same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen. And where A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured; the fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant, but the fact that B was habitually negligent about the carriages which he lets to hire, is irrelevant. We can also consider a situation where A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. However, the fact that A was in the habit of shooting at people with intent to murder them would be irrelevant. And where A is accused of burning down his house in order to obtain money for which it is insured, the fact that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, is relevant, as tending to show that the fires were not accidental.

Equally so, there are case authorities to adequately illustrate the rule, and one of the most famous cases on the subject can be examined in this respect. 'The case is Noor Mohammed v. R', where the accused was charged with having murdered, by potassium cyanide poisoning, a woman who was living with him as his wife. 'This woman, Ayesha, had left her husband and come to live with the accused shortly after the

(1) (1949) A.C. 182
death of his first wife. 'The first wife also had died of potassium cyanide poisoning. 'The accused, a goldsmith, used a solution of potassium cyanide in the ordinary course of his business. 'The evidence of events preceding the death of Ayesha indicated that the relationship was not a happy one. 'There were frequent quarrels due to the fact that the accused suspected her of infidelity. 'In addition to assaults upon her, he once threatened that she must 'go away', if not alive, then dead, because people were gossiping over the circumstances of the death of the first wife, 'Gooriah, as a result of Ayesha's coming to live with him so shortly after the death of 'Gooriah. 'On the day of Ayesha's death, the accused took her to a chemist and later to a hospital complaining that she was seriously ill and that he had detected the odour of 'gold solution' in her vomit. 'The chemist was not able to smell such on the stain shown him. 'Gooriah, who had died 28 months earlier also had been beaten and charged with infidelity by the accused. 'On the day of her death, the accused was alleged to have told her to drink a solution for her toothache. A short time later, she died from cyanide poisoning. 'The accused brought an empty cup to the doctor saying that it smelled of cyanide. 'The doctor, however, claimed that there was no odour. 'The accused was never charged with respect to this death.

'The similarities between the two deaths are striking, to say the least. 'The Privy Council, however, held that the evidence as to the death of 'Gooriah had been improperly admitted at the trial. Lord du Parcq said of this evidence in its application to the facts of the
case before him: "There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in Makin's case, 'that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried', and if it is otherwise of no real substance, then it was certainly wrongly admitted'.

It is submitted that the Privy Council was correct in this decision, and that the similar fact evidence was not of sufficient weight to justify its admission. There are a number of likely explanations as to the deaths of the two women. Either they had taken potassium cyanide by mistake or as a means of suicide, or the accused had murdered them. Another possible hypothesis could have been that the accused killed one woman but not the other. In this instance, however, the coincidence required for the first hypothesis to be true was not of a sufficiently high order to render the evidence admissible. Only two incidents were involved, and the circumstances of death were not of great peculiarity.

Lord Simon, when speaking of Noor Mohammed's case in Harris v. D.P.P., said: "The Board there took the view that the evidence as to

(1) (1949) A.C. 182 at 192-193
(2) Note remarks of Viscount Simon in Harris v. D.P.P. (1952) A.C. 694 at 708 and of Owen J. in R v. Fletcher (1953) S.R. (N.S.W.) 70 at 79
(3) (1952) A.C. 694 at 708 and 711
the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman and if it was not relevant it was at the same time highly prejudicial". There is, therefore, some reason for treating Noor Mohammed v. R as an illustration not so much of the general principle of relevancy, as of the more specific rule under consideration - the evidence was relevant but only because it suggested that the accused was likely to have poisoned A because he had already shown a disposition to use poison by his dealings with 'Gooriah. This explains why Noor Mohammed was the principal authority relied on by Hutchison J. in R v. Spring, where the learned judge rejected evidence which raised a strong suspicion that the accused, who was charged with theft, had committed earlier thefts.

Some of the strongest illustrations of the working of similar fact rule are provided by appeals from convictions for obtaining money by false pretences. For instance in R v. Fisher, where at the trial of a prisoner on an indictment charging him with obtaining a pony and cart by false pretences on June 4, 1909, evidence was admitted that on May 14, 1909 and on July 3, 1909, the prisoner had obtained a provender from other persons by false pretences different from those alleged in the indictment; the prisoner was convicted. The Court of Criminal Appeal held that the evidence was wrongly admitted, as it did not show a systematic course of fraud, but merely that the prisoner was of a general fraudulent disposition, and therefore it did not tend to prove the falsity of the representations alleged in the

(1) (1949) NZLR 736; see also Owen J in R v. Fletcher (1953) S.R. N.S.W. 70, 79
(2) (1910) 1 k.B. 149; see also R v. Holt (1860) Bell C.C. 280; R v. Baird (1915) 11 Cr. App. R. 186; R v. Boothby (1933) 24 Cr. App. R.112; R v. Hamilton (1939) 1 All. E.R. 469
indictment that although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to the other cases might have influenced the jury, and the conviction must therefore be set aside. Channel J. stated the law in the following terms: "The principle is that the prosecution are not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged it is admissible because it is relevant to the issue, and it is admissible not because but notwithstanding that it proves that the prisoner has committed another offence." 1. And in William Inglis v. National Bank of Scotland 2, which was an action against a bank to recover a sum of money which the pursuer averred he had been induced to pay on a bill in the erroneous belief that it was still outstanding, induced there-to by the acts or omissions of the defenders or their bank-agent, the pursuer averred that the bank-agent had been guilty of similar mis-representations to customers in other cases, one of which he specified in detail. The court held that these averments as to similar misrepresentations was irrelevant and proof thereof refused. Lord McLaren said 3: "... it is not evidence against a party of having

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1 (1949) 1 K.B. 149 at 152
2 (1909) S.C. 1038; A v. B (1895) 22 R. 402 followed
3 (1909) S.C. 1038 at 1040
committed a delict to show that he has committed delicts of the like
description against other persons on other occasions".

Evidence admissible because of its specific connection with the
facts alleged might consist of pretences similar to those charged,
such as the repetition of an advertisement designed to obtain prop-erty'. Another illustration of the rule is R v. Coombes²; Coombes was
convicted at quarter sessions of indecent assault on a married woman.
According to the evidence of the complainant, Coombes was pushing a
handcart in the street, he left it and followed her for some
distance; he caught up with her, asked her the time, touched her
lightly on the back and said: "Are you going to give me a bit?"
Coombe's defence was that he touched the woman by accident and said
to her: "I'm sorry, I didn't mean it a bit". During the trial the
court ruled that Coombes could be cross-examined about a previous
conviction of indecent assault on a girl of twelve; and when cross-
examined, Coombes admitted that he had pleaded guilty to that
offence. 'On appeal to the Court of Criminal Appeal, the court,
allowing the appeal, held that it was perfectly clear that evidence
of a previous offence was admissible to rebut a defence of accident
and also to rebut a defence of innocent intent. 'The previous offence
must have been of a similar character, although there was no clear
authority on the question of the degree of similarity. 'There had to
be some nexus both in time and in the nature of the offence. How-
ever, it was unnecessary in this case to decide whether the previous
offence was sufficiently similar to the offence charged so as to make

(1) R v. Rhodes (1899) 1 Q.B. 77
(2) (1960) 45 Cr. App. Rep. 36
it admissible; it was unnecessary because the evidence was so highly prejudicial as far to exceed its probative value. Whether such evidence should be admitted was, of course, a matter of discretion for the trial judge. But in the present case the chairman had ruled upon the matter without having heard evidence from the investigating officer as to the details of the previous offence. The court noted that it would not lightly interfere with the discretion of the trial judge but it was, in the circumstances of this case, possible to interfere and to hold that the evidence ought not to have been admitted. The ensuing conviction was quashed by the Court of Criminal Appeal.

'The exclusionary effect of the rule on a charge of criminal negligence is illustrated by R v. Akerele'. In that case, the appellant, a duly qualified medical practitioner, had inoculated thirty-six children suffering from 'yaws' with sobita, consisting of sodium bismuth tartrate, a trade preparation supplied in the form of a powder; five of the children died from stomatitis induced by bismuth poisoning. At his trial for manslaughter of one of the children, it was held that evidence that other children died as a result of the injections given to them by the appellant at the same time and from the same mixture was admissible in proof that the death of the deceased, the subject of the charge, was not an isolated case which might conceivably be due to idiosyncrasy in relation to bismuth.

(1) (1943) A.C.255; (1943)1 All. E.R.367; 168 L.T.102, P.C.
(ii) THE BASIS OF THE RULE OF EXCLUSION

Several theories have been proposed as a doctrinal basis of the rule of similar facts evidence. Indeed, when accepting or rejecting evidence of similar facts, the courts often are not content to apply the rule to the facts, but endeavour to justify the rule itself and its various exceptions. On the contrary, when dealing with the two other major exclusionary rules, i.e., those relating to hearsay and to opinion evidence, the courts do not take such pains; and this very difference probably demonstrates the weakness of the present rule. Attempts at justification can be considered under a number of heads or paragraphs.

At one time, there was authority for the view, propounded by Stephen, that the exclusion of similar fact evidence was merely an application of the maxim res inter alios acta alteri nocere no debet (no one should be prejudiced by a transaction between strangers). Stephen regarded the maxim as one of the four great 'exclusive' rules of evidence, and it was in use in England as early as the thirteenth century. The application of this maxim has usually been confined to litigation between strangers, though even such litigation may result in a judgement binding all the world. Stephen pointed out that it fails as a statement of general principle: 'because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them'. The maxim does not cover actions between

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(1) e.g. Holcombe v. Hewson (1810) 2 Camp. 391, per Ellenborough C.J.
(2) Stephen, Digest, XIV, pp. 188-190
(3) Ibid
(4) (1292) 1 Y.B. 20 & 21 Edw. 1 (R.S.) 24; for later citations see Boswell's case (1606) 16 Co. Rep. 486 at 516; Eccleston v. Petty (1695) 72 Carth. 79 at 80
the parties themselves (inter partes), nor other acts of one party which are sought to be used against him. Nokes' criticism of the theory seems irrefutable. He said: "The maxim is thus inapplicable to evidence of previous crimes committed by an accused person, for the accused is not a stranger to them, nor are they acts done by strangers; yet the general rule excluding similar facts makes inadmissible evidence of such crimes. Thus it is clear that the maxim is an insufficient basis for the rule". If this criticism is correct, then the maxim cannot serve as a reason for the hesitance to admit evidence of similar acts, it is an insufficient basis for the rule.

In a similar vein, justification has been advanced on the basis of relevancy, that is, evidence of similar facts is not admitted because evidence of such is irrelevant. In fact it is the considered opinion of Nokes that the main reason for excluding similar facts evidence is because they are often irrelevant to the facts in issue.

In some cases this may be true, for instance if the fact in issue is whether a dog or a horse had a propensity to bite human beings, evidence that the animal had a propensity to bite other animals is irrelevant; and on a charge of obtaining goods or money by false pretences, other pretences may be so dissimilar as to be excluded.

In _R v Ellis_, cheques were obtained by the false pretence that the cost of articles of virtue was greater than the real cost, which the prosecutor had agreed to pay to the accused plus ten percent, while the other false pretences sought to be adduced were that some china

(1) Nokes, An Introduction to Evidence, 4th ed. at P.113
(2) Ibid
(3) _Osborne v. Chocquell_ (1896) 2 Q.B.109
(4) _Glanville v. Sutton & Co_ (1928) 1 K.B. 571
(5) (1910) 2 K.B. 746 at 761
was genuine 'Old Dresden, and evidence of these pretences was therefore inadmissible. Also on a charge of rape, where the issue is consent to sexual intercourse on the part of the complainant, evidence that the accused had propositioned other women, all of whom refused to have sexual intercourse with him, is not probative as to whether the present complainant consented when she had intercourse with the accused. Full or partial support for this theory can be found even in the opinion of writers who emphasise other theories. However, the main fault lies in Stephen, himself the author of the res inter alios acta rationale, since he confused relevancy and admissibility; but it is also possible to discern vestiges of this theory in other works. Nokes, a modern exponent of the theory of irrelevancy as the basis of the rule, based it on the difference between 'superficial and real similarity'. Such a difference cannot be gainsaid. But when we speak of relevancy, we do not mean 'artificial' relevancy such as might relate all human faults to Eve and the Serpent in the 'Garden of Eden, but to substantial relevancy as having a logical content. And yet similar facts accepted by this very test, are excluded in evidence. 'This approach confuses relevancy with admissibility. It may be a result of pushing the 'legal relevancy' theory to its far extreme. Fox, in criticising Thayer's Treatise, said: "(L)ogic furnishes no test of relevancy and unless we permit the law to decide that question for us, it is not going to be decided at all". Nokes realising the internal contradiction in his theory agrees that "If the principal ground for excluding similar facts is

(1) R v. Malouf (1975) 31 C.R.N.S.194 (Ont.Co.Ct.)
(2) Stephen, A Digest of the Law of Evidence pp.188-190
(3) Nokes, An Introduction to Evidence, P100; see also McCormick, Evidence, P.332
(4) Nokes, pp.110-111
(5) J. Fox, "Law and Logic" (1900)14 Harv. L.R.39, 40 (In his reply, Thayer in "Law and Logic", P.141, accused Fox of failing to observe the distinction between "relevancy" and "admissibility")
their irrelevancy to the facts in issue, it follows that similar facts which are relevant should be admitted"¹; and yet, when dealing with the 'exceptions' to the rule, he admits that the contradiction cannot be reconciled: the contradiction exists, as McCormick points out², since the policy of protecting a defendant from undue prejudice conflicts with the rule of logical relevancy. As a matter of fact, a moment's reflection should suffice to show that irrelevancy (or lack of probative value or connection) as a reason for exclusion is in truth, meaningless, not to mention redundant because any item of evidence must be relevant to be admissible.

Another proposed basis for exclusion is that the admission of similar fact evidence raises endless issues which would be too distracting and arduous to investigate. In other words the rule is of importance with reference to saving the time of the court, and preventing the minds of the jury from being drawn away from the real point which they had to decide³. However, in many instances, similar fact evidence has been adduced even where that evidence itself has been in dispute and had to be investigated⁴. However, courts have used this ground to exclude evidence of facts collateral to the similar facts⁵. At any rate, this cannot be said to be the exclusive ground for the rule of exclusion of similar facts. A similar reason for exclusion is that the adducement of such evidence at the trial unfairly surprises the accused and compels him, on the sudden, to account for his entire life⁶. And if such evidence was received it

¹ Nokes, An Introduction to Evidence, P.113
² McCormick, Evidence, P.332
³ Hollingham v. Head (1858) 4 C.B. (N.S.) 388 at 391
⁴ e.g. in Makin v. Att. Gen. of New South Wales (1894) A.C. 57, the similar facts or at least, their character were disputed, but the evidence was admitted
⁵ Re Phillips (1829) 1 Lewin 105
⁶ Re Phillips - Ibid; R v. Whiley (1804) 2 Leach C.C.983; R v. Gray (180614 F. & F. 1102
would only encourage attacks without notice. This objection is not applicable to Scotland because there, it is a legal requirement of the court that notice has to be given as to what line of attack the accused is to be subjected. However, the case reports are full of instances where, notwithstanding the objection, similar fact evidence has been admitted.

Another reason that has been suggested is that the ability to adduce similar fact evidence provides police with an inducement to rig a criminal trial against the man with the most lengthy and damning criminal record. This reason has some merit, but neither this, nor the others are reasons in themselves for exclusion; each one of them however counts.

It appears that the strongest ground for exclusion advanced is that, as a result of admission, prejudice may be wrought against the accused in the eyes of the jury. While all of the above reasons can be said to prejudice the fair defence of an accused, 'prejudice' in the present context is more restrictively defined to mean that the evidence has an undue influence upon the jury - a prejudicial influence. And the sense in which the term 'prejudice' is here used is quite similar to that adopted by Wigmore, that is "(1) the over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) the tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences; both of these represent the principle of Undue Prejudice". Such prejudice as

(1) R v. Oddy 2 Den. CC. 269; Att-Gen. v. Nottingham Corpn. (1904) 1 Ch. 673
(2) Turcott, "Similar Fact Evidence : The Boardman Legacy" (1978) 21 Cr. L.Q. 43 at 45
(3) Wigmore On Evidence (3rd ed.) at 650
the one intended here may be the consequence of a number of factors. It may be due to the nature of the offences comprising the similar fact evidence and that of the offence charged. When "the crime alleged is one of a revolting character ... and the hearer is a person who has not been trained to think judicially, the prejudice must sometimes be almost insurmountable". Prejudice may be the result of this societal 'prejudice' being used to prove elements of the charge, rather than using the logical force of that evidence as derived from a logical probative nexus. Hewart C.J. in _R v Bailey_ once remarked: "The risk, the danger, the logical fallacy is indeed quite manifest ... It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients, no one of which is sufficient, a totality which will appear to contain what is missing".

Prejudice can also occur where the jury fails to give proper allowance to the possibility that the accused has mended his ways since the commission of other acts. As Cowen and Carter state, "The more revolting the suggestion, the more a jury may be likely to lose sight of the fact that it may not be true". One writer has summarised these prejudices as follows: "The common law rejects such evidence not because it is irrelevant (for logically it is relevant), but because an undue weight is allowed to it and it is misleading. Give a dog a bad name and hang him. Place a man's bad record before

(1) _R v. Bond_ (1906) 2 K.B. 389 at 398 per Kennedy J., and see Bray J. at 417
(2) _R v. Bailey_ (1924) 2 K.B. 300 at 305
(3) Cowen and Carter, Essays on the Law of Evidence (1956) at P. 146
the jury, and it is almost impossible for them to take an impartial view of a case brought against him. Slight evidence becomes magnified. Every defence is liable to appear suspicious. Instead of approaching the case with the presumption of innocence, the jury starts with the presumption of guilt, which the accused man has to displace; and he is lucky if his efforts to do so are not regarded as more or less ingenious attempts to wriggle out of a manifestly well-founded charge".

Clearly any evidence which indicates guilt can be said to prejudice the claim of innocence by an accused. The fact that an accused has committed similar crimes or acts, or is of bad character, may naturally, make it more probable that he committed the resent offence. It is however, the possibility that the jury may attribute more probative value to the evidence than it really possesses which is the real basis for the concern over prejudice. Logical probative force may be replaced by purely prejudicial probative force. As Lord Simon stated in Kilbourne v Director of Public Prosecutions: "It is not that the law regards such evidence as inherently irrelevant, but because it is believed that if it were generally admitted jurors would in many cases think it to be more relevant than it truly was". Therefore, upon the totality of the case, the jury might regard the total probability of guilt derived from all the evidence to be higher than it really is. In addition, because the accused may have already been convicted of a serious offence, and has therefore less reputation to lose than a citizen with an unblemished record, the

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(1) Stow "Evidence of Similar Facts" (1922) 38 L.Q.R. at 63
(2) (1973) A.C. 729 at 756
jury may well be satisfied with a lower degree of probability than it would otherwise require"¹. Clearly then, the basis of 'prejudice' is that the prejudicial effect of the evidence may be disproportionate to its actual probative value. From all the above discussion I would think that it is demonstrably clear that the true rationale behind the principle of exclusion embodied in the first sentence of Lord Herschell's formulation² is the risk of prejudice inherent in evidence of this sort.

(iii) AN EXAMINATION OF LORD HERSCHELL'S FORMULATION

In the now familiar classic criteria for the admission or exclusion of similar fact evidence, Lord Herschell stated in Makin v. Attorney-General for New South Wales³: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused".

Though the statement of general principles does not seem to present

¹ Eggleston, Evidence, Proof and Probability (1978) at P.83
² In Makin v. Attorney-General for New South Wales (1894) A.C. 57 at 65
³ (1894) A.C. 57 at 65 (P.C.)
much difficulty, their application is not easy. The intent of the present discussion is to examine what is the substance of this classic quote, and that we shall do by examining the sentences making it up. If Lord Herschell's formulation is examined it will be seen to contain an internal logical contradiction which would appear to render it unworkable. The two sentences of Lord Herschell's formulation constitute an example of what Professor Julius Stone has termed 'Legal Categories of Competing Reference'. The first sentence states a rule of exclusion; the second sentence states a rule of inclusion, but a rule of such width as to render the rule of exclusion of no effect. Basically, it is not possible to say that evidence of a particular class is inadmissible and then to say that such evidence is admissible 'if it be relevant to an issue before the jury'. The sentence in essence means nothing, because to be admissible any item of evidence must be relevant to an issue before the jury. The truth is that, if evidence relevant to an issue before the jury is to be admissible, notwithstanding the exclusionary rule, then the exclusionary rule is of no effect. Broadly, three approaches have been adopted to the problem of giving a workable meaning to Lord Herschell's formulation, and we can now consider each of these.

(a) The Catchword or Category - Purpose Approach: -

This first approach is operated by stating that there is a general rule requiring the exclusion of similar fact evidence - which is stated in the first sentence of Lord Herschell's formulation. To this rule of exclusion however, there are a number of exceptions,

(1) Legal System and Lawyers' Reasoning (Sydney: Maitland Publications Pty. Ltd., 1964) at 248-52
which are referred to in the second sentence of Lord Herschell's formulation. Therefore, if evidence of the class mentioned in the first sentence is relevant to one of these particular issues listed in the second half of the second sentence, the evidence is then admissible. If it is not relevant to one of these listed issues or purposes, it will not be allowed - it becomes inadmissible. The exclusionary rule in the first sentence then has some applicability. This approach is generally known as the rule of exclusion with exceptions of inclusion, or the category approach. It has been adopted by some courts and it is the approach taken in many of the text books on evidence. And this was in substance the approach taken by the Canadian Law Reform Commission in drafting the proposed Federal Evidence Code. Section 17(1) provides: "In Criminal proceedings, evidence tendered by the prosecution of a trait of character of the accused that is relevant solely to the disposition of the accused to act or fail to act in a particular manner is inadmissible." Section 18 provides: "Nothing in Section 17 prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his disposition to commit such act, such as evidence to prove absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity." It should be pointed out that the two exceptions mentioned (cases where the evidence bears upon the question whether the acts alleged to constitute the crime charged in the

(1) e.g. R v. Bond (1906) 2 k.B. 389 at 393, 414; Harris v. D.P.P. (1952) A.C. 694 (H.L.); R v. Horwood (1969) 3 All. E.R. 1156 at 1158
(2) e.g. Phipson, Evidence, 12th ed. at Chap. 11; McCormick, Evidence, 2nd ed. (1972) at pp. 447-54; McWilliams, Canadian Criminal Evidence (1974) Chap. 11
indictment were designed or accidental, and cases where the evidence rebuts a defence which would otherwise be open to the accused) were not intended to be exhaustive of the classes of case where relevant similar fact evidence may be admitted. It is now recognised that there are other classes of case where such evidence may be admissible, and further classes may be developed. In McDonald et al v. Canada Kelp Co Ltd et al, Bull J.A. said: "The test is essentially one of relevancy, and although it cannot be validly said that the principles he outlined have been later modified or extended, it is plain that Lord Herschell L.C. was giving examples of purposes for which the evidence might be relevant and admissible and was not endeavouring to formulate an exhaustive list. In Harris v. Director of Public Prosecutions Viscount Simon (with whom all the other Law Lords, save one, agreed) in his speech said with reference to the Makin case: 'It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates: such a list only provides instances of the general application to the particular circumstances of the charge that is being tried'. The most commonly listed classes of exceptions are: to prove identity; to prove knowledge and intent; to rebut a defence of mistake or involuntary conduct; to establish system; and to rebut a defence of innocent association. This categorisation can still be expanded, perhaps to any fact in issue before the jury. It then follows that any issue would be permissible. But if the evidence is admissible if it be relevant to any issue, and not simply to one or more of a


(2) (1952) A.C. 694 at 705, (1952)1 All. E.R. 1044, 36 Cr. App. R. 39 see also Shavovitch v. Att-Gen. (1965) (III)21 P.D. 421, at P.446 (Israel)
limited number, then there is again no meaningful exclusionary rule.

'Of greater import were the unfortunate by-products of the use of the category approach by the courts. 'The use of the category approach fostered a tendency in courts to think of these issues or purposes as keystones or touchstones to automatic admissibility if the facts and issues of the case could be fitted within one of these recognised categories. Sight was lost of the basic reason for the inadmissibility of the evidence - prejudice disproportionate to probative value. This approach has received much criticism. Sklar said of it!: "The search in each case was for the acceptable issue, e.g. 'absence of mistake or accident', 'motive', 'opportunity', 'underlying unity', 'hallmark' and so on. 'The catchwords were born. Whether the evidence was really relevant to the issue by whatever the rationale and whether, if it was, it was relevant enough to justify its reception despite its nearly uncontrollable tendency to damn the accused in the minds of the jury, was lost in the shuffle". 'The shuffle was the result of a shifting of attention from a concentration on the degree of probative and prejudicial value to a concern with whether the case could be fitted into one of the categories. 'This in turn spawned confusion over the appropriate definition of the categories, resulting in hair-splitting distinctions among and within the categories. Hoffman, in his critique of the category approach, said 2: "The use of the categories was extremely confusing. 'In the first place, whatever Viscount Simon may have said, judges were understand-

(1) Sklar, "Similar Fact Evidence - Catchwords or Cartwheels" (1977) 23 McGill L.J. 60 at 62
(2) Hoffmann, "Similar Facts After Boardman" (1975), 91 L.Q.R.193 at 200
dubiously reluctant to admit similar fact evidence, however compelling it might be, which did not seem to be covered by precedent. 'Then the categories produced hideously metaphysical problems of definition. How many acts made a 'system'? When could the accused be said to have raised the defence of 'innocent association'? Must the accused have pleaded an alibi before there can be an 'issue of identity'? Much time and ingenuity was spent in debating these questions. Finally, the category approach suggested that once a case had been given the appropriate label, admissibility followed as of course". 'The greatest danger was that the reliance upon categories as the basis of admission was likely to result in some admissible evidence being ruled inadmissible, because a category had been overlooked, or inadmissible evidence ruled admissible by reliance upon an inappropriate category'. Simply put, the difficulty with this approach is that it tends to encourage an overtly simplistic view of the question of the admissibility of similar fact evidence; when faced with a particular case its adherents often simply ask whether the case fits neatly within one of the established categories. 'If it does the evidence will usually be admitted; if it does not the evidence will usually be rejected. 'It is submitted that if such a procedure is adopted, the true factors which ought to determine whether an item of similar fact evidence is to be admitted or rejected are being largely ignored. The use of the category approach was finally rejected by high judicial authority in Boardman v Director of Public Prosecutions'. The court of Criminal Appeal referred a question to the House of Lords

(1) See Stone, "The Rule of Exclusion of Similar Fact Evidence: America" (1937-38) 51 Harv. L.R. 988 at 1022; see also D.P.P. v. Boardman (1975) A.C. 421 at 443 per Lord Wilberforce

(2) (1975) A.C. 421; (1974) 3 All. E.R. 887
in the following form: "Where on a charge involving an allegation of homosexual conduct there is evidence that the accused is a man whose homosexual proclivities take a particular form, whether that evidence is thereby (sic) admissible although it tends to show that the accused has been guilty of criminal acts other than those charged". The House of Lords unanimously held that they could not give a simple 'yes' or 'no' to the questions as framed. 'The question of admissibility of evidence could not be determined by thrusting the facts of a case into broad categories labelled by the issue sought to be proved, the type of crime charged, or the nature of the defence raised. 'There was no automatic admissibility'.

(b) Relevancy via Propensity and Relevancy other than via Propensity Approach:

A second interpretation of the dicta of Lord Herschell in Makin's case was to consider the passage as prohibiting a particular type of logical reasoning. 'That reasoning has commonly become known as 'propensity reasoning'. Probative value or relevance is determined via propensity. 'That is, the fact that the accused has performed other acts similar to that of the offence charged indicates that he has a propensity or disposition to commit offences of that type. This tends to show (because a man who has such a propensity is ceteris paribus more likely to have done it on the instant occasion than one who has not) that he did in fact do it on the instant occasion". 'This second approach treats as crucial the distinction

(1) (1974)3 All. E.R. 887 at 899
(2) See Cross, Evidence, 5th ed. (1979) at P. 362
(3) Cowen and Carter, Essays on the Law of Evidence (1956) at P.133
between evidence which is relevant only as establishing a propensity or disposition on the part of the accused to commit acts similar in nature to those acts constituting the subject matter of the crime charged, and evidence which possesses a relevance other than by establishing such a propensity or disposition. 'The words 'propensity' and 'disposition' are here treated as equivalents. If the evidence is relevant only via propensity it is excluded by the first sentence of Lord Herschell's formulation. If the evidence possesses a relevance other than via propensity it is admissible as falling within the second sentence of Lord Herschell's formulation. Hoffman describes this approach as follows: "The first branch of the Makin rule says that similar fact evidence may not be used 'for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried'. In other words, one cannot introduce such evidence merely to support the reasoning that he is the sort of person likely to have done it. 'The second branch permits the use of similar fact evidence when it is 'relevant to an issue before the jury' - presumably in some way different from the kind of relevance excluded by the first branch. 'The two branches are mutually exclusive: the second branch is residuary and admits only such evidence as is not excluded by the terms of the first'. Therefore, admissibility was determined upon the type of probative reasoning process utilised to determine relevance or probative value. If the evidence possesses a relevance other than via propensity it is admissible notwithstan-

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(1) This distinction forms the basis of many academic accounts of the similar fact rule. See e.g. Julius Stone, The Rule of Exclusion of Similar Fact Evidence: England (1933) 46 Harv. L.R. 954
(2) Hoffmann, "Similar Facts After Boardman" (1975) 91 L.Q.R. 193 at 197
ding the fact that it also possesses a relevance via propensity. Indeed, by definition similar fact evidence will always possess some relevance via propensity. In this context what Wigmore termed the doctrine of 'multiple admissibility' is applicable. He wrote: "... When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity". Therefore, only if the evidence possesses substantial probative value other than via propensity is it admissible and it is only if the evidence possesses no substantial relevance other than via propensity that it is inadmissible as falling within the first limb of Lord Herschell's formulation. Lord Hailsham in Boardman v Director of Public Prosecutions was of the opinion that this was the meaning of the dicta of Lord Herschell in Makin v Attorney-General for New South Wales. His Lordship stated: "It is perhaps helpful to remind oneself that what is not to be admitted is a chain of reasoning and not necessarily a state of facts. If the inadmissible chain of reasoning be the only purpose for which the evidence is adduced as a matter of law, the evidence itself is not admissible. If there is some other relevant, probative, purpose than the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reaso-

(1) Wigmore on Evidence (1940) Vol. 1 at 300
(2) See Cowen and Carter - Essays on the Law of Evidence (1956) at 133
(3) (1974)3 All. E.R. 887 at 905
Before discussing the shortcomings of this approach, the expressions 'relevance via propensity' and 'relevance other than via propensity' require explanation. Assume that the accused is charged with burglary; evidence that the accused on some previous occasion broke into another house is, without more, inadmissible. It is inadmissible because it shows no more than that the accused has a propensity for dishonesty, or, at most, a propensity for burglary. Assume, however, that at the scene of the second burglary an article left by the burglar is found. Assume further that it is established that this article was taken from the first house which was burgled. When the facts are changed in this way, evidence that the accused committed the first burglary becomes relevant in a quite different way to show he committed the second burglary. The evidence now possesses a relevance other than via propensity. The evidence is relevant in the same sort of way as evidence that a wallet honestly acquired and belonging to the accused was discovered at the scene of the second burglary. The evidence does, of course, still possess a relevancy via propensity; it tends to show that the accused has a propensity for burglary. This latter relevance may constitute a reason for its exclusion by the trial judge in the exercise of his discretion. Because of the risk that prejudicial evidence may be admissible as possessing some slight relevance other than via propensity, proponents of this interpretation of Lord Herschell's formulation place considerable emphasis on the discretion which, in
English Law at least, the trial judge has to reject legally admissible evidence.

The major shortcoming with an approach based upon the distinction between relevance via propensity and other relevance is that in many cases undoubtedly admissible similar fact evidence derives its only relevance from an argument via propensity. It simply is not true that similar fact evidence cannot, or has not been admitted "for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried". Lord Cross obviously recognised this in Boardman v Director of Public Prosecutions. He said: "My lords, on hearing of a criminal charge the prosecution is not as a general rule allowed to adduce evidence that the accused has done acts other than those with which he is charged in order to show that he is the sort of person who would be likely to have committed the offence in question. As my noble and learned friend, Lord Simon of Glaisdale, pointed out in the recent case of Director of Public Prosecutions v Kilbourne, the reason for this general rule is not that the law regards such evidence as inherently irrelevant, but because it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was - so that, as it is put, its prejudicial effect would outweigh its probative value. Circumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront.

(1) (1974) 3 All. E.R. 887 at 908-909
(2) (1973) 1 All. E.R. 440 at 461; (1973) A.C. 729 at 756
to common sense. 'Take, for example, R v Straffen'. There a young girl was found strangled. It was a most unusual murder for there had been no attempt to assault her sexually or to conceal her body, though this might easily have been done. The accused, who had just escaped from Broadmoor and was in the neighbourhood at the time of the crime, had previously committed two murders of young girls, each of which had the same peculiar features. It would indeed have been a most extraordinary coincidence if this third murder had been committed by someone else and though an ultra cautious jury might still have acquitted him it would have been absurd for the law to have prevented the evidence of the other murders being put before them, although it was simply evidence to show that Straffen was a man likely to commit a murder of that particular kind\[.4\. And so, R v Straffen is in no way highly unusual in this regard. In many cases the only relevance of undoubtedly admissible similar fact evidence is by virtue of an argument via propensity\[.3\. A modified form of the present approach recognises that there are many cases where evidence relevant solely via propensity is admissible, but nonetheless insists on the importance of the distinction. Those adopting this approach maintain that evidence relevant solely via propensity is prima facie inadmissible, but may be admissible if it is of exceptional probative value. This argument was elaborated by Cowen and Carter\[.2\. 

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(1) (1952)2 All. E.R.657, (1952)2 Q.B.911
(2) See e.g. Hoffmann, "Similar Facts After Boardman" (1975)91 L.Q.R. 193; Cowen and Carter - Essays on the Law of Evidence (1956); Cross, Evidence, 5th ed. (1979) at 363–364
(4) Essays on the Law of Evidence at 106
(c) An Approach based upon a Comparison of Probative Value and Risk of Prejudice

The third approach treats the balance between probative value and the risk of prejudice as the key of determining the admissibility of similar fact evidence. It is submitted that this approach presents the most workable formula for reconciling the logical contradiction in Lord Herschell's dicta. This approach involves treating Lord Herschell's formulation not as conflicting rules, one of exclusion and one of inclusion, but rather as referring to two competing principles. The first sentence refers to the principle that evidence which shows the accused to be of bad character or disposition is not admissible to establish his guilt of the crime charged. The second sentence refers to the principle that relevant evidence which does not fall within a recognised rule of exclusion ought to be admitted. The problem, however, arises as to when the evidence should and should not be admitted. What Lord Herschell's formulation requires is that these two competing factors, the probative value of the evidence and the risk of prejudice be weighed one against the other. If the risk of prejudice is great, and the probative value small by comparison, the evidence should be rejected. If the probative value is great, and the risk of prejudice slight by comparison, the evidence should be admitted. This is exactly what is done in those instances where a trial judge has a discretion to exclude otherwise admissible evidence because its probative value is outweiged by its prejudicial value.

(1) This is the view taken by P. Brett - Abnormal Propensity or Plain Bad Character? (1954) 6 Res. Judicate 471
'The problem of estimating the probative value of evidence is one which has received surprisingly little attention'. Relevance and weight are generally treated as matters of common sense or experience both by judges and by academic commentators. In this way, the difficulties associated with what is in fact the key concept in the law of evidence are largely glossed over. It is, of course, impossible to ever estimate the probative value of evidence with any degree of exactitude. The degree of relevance possessed by an item of evidence is obviously dependent on a number of variables. In the present context the key variables appear to be the nature of the similar fact evidence itself, issues in contest in the case, and the other evidence presented in the case.

Equally it is extremely difficult to assess, even in a very approximate fashion, the extent of the risk of an item of evidence being misused by a jury so as to result in prejudice to the accused. However, the risk of prejudice is quite clearly the rationale for the exclusionary aspect of the similar fact rule. This being so, the difficulty in estimating potential for prejudice in no way removes the necessity for attempting some such estimate when determining whether a given item of similar fact evidence ought to be admitted. This approach could be better referred to as the fairness approach. For example, it would be fair as Cowen and Carter suggest, and many writers also do, to admit propensity evidence sometimes especially in very exceptional situations, just as it would be fair to exclude it.
where it would be unduly prejudicial. I would not be surprised if
Scottish courts prefer this view, since they are noted for their
readiness to exercise their discretion on fairness grounds from time
to time. 'One arguable handicap of this approach though is that it is
fairly uncertain as it is susceptible to changing with the judges'
whims and caprices, but that has always been the usual problem in any
case of judicial discretion and yet it has been used by the courts
from time to time.

Why I prefer this last approach is that it does not involve a
complete rejection of the process of categorisation which is the
essence of the first approach discussed. 'The traditional categories
in fact group together types of situation in which similar fact
evidence is likely to possess a high degree of probative value. 'They
do so, however, in an imprecise and haphazard way, and they have been
accorded far greater significance than they ought to possess. 'I do
not think that it is over-simplification to suggest that in practice
all the three approaches are concurrently brought into play but
ultimately it is the last that prevails, because the admissibility of
any evidence depends on which way the judge decides to go - that is
for or against. 'The importance of judicial discretion is quite
significant in this area of the law of evidence.
(3) THE ADMISSIBILITY OF SIMILAR FACT EVIDENCE

The need for a thorough discussion of the admissibility of similar fact evidence cannot be overemphasised, especially as it entails the consideration of some important and fundamental issues. Though some of the issues to be raised here have been mentioned in earlier discussions, it will be worthwhile to consider some of them in further detail. Properly considered, the admissibility of a piece of similar fact evidence depends upon its probative strength, i.e. the degree to which it tends to prove the proposition for which it is being offered. It should be emphasised that the evidence of similar facts is admissible "not because, but notwithstanding that it proves that the prisoner has committed another offence". What is particularly required and which is very important is "a special connection (or nexus) between similar facts in issue". As Viscount Sumner said in Thompson v. D.P.P., for a similar fact evidence to be admissible: "There must be something to connect the circumstances tendered in evidence, not only with the accused, but with his participation in the crime". And as Lawrence, J said in R v. Bond: "In proximity of time, in method or in circumstances there must be a nexus between the two sets of facts". Thus evidence of similar facts may be rejected because it is too remote in time; similar facts evidence may also be rejected because of the old and established rule that no irrelevant evidence should be admitted. And where there is no nexus between the nature of the offence charged and the conduct of the similar act, the evidence may be rejected. Furthermore, it is important to note

(1) Per Channel J. in R v. Fisher (1910) 1 K.B. 149, 152
(2) Nokes, Introduction to Evidence at P. 113
(3) (1918) 13 Cr.App.R. 61 at 80
(4) (1906) 2 K.B. 389 at 424
(5) R v. Shellaker (1913) 9 Cr.App.R. 240
that there are also rules of judicial practice, first referred to by Lord Moulton in *R v. Christie*¹, by which the judges may indicate to the prosecution not to press the evidence because its probative effect would be out of proportion to its evidential value. Subsequently, this became an outright judicial discretion to exclude evidence of similar facts. It is thus clear from the numerous salient issues raised above that this entire area needs a fresh examination to rediscover the fundamental principles which form a common thread running through many of the cases.

(i) Requirement of Relevancy and Specific Probative Value:— It is a truism that to be admissible, evidence must be relevant to a fact in issue. It might therefore appear unnecessary to accord this requirement separate treatment in relation to similar fact evidence; however, we should remember that similar fact evidence is in a special category because of its inherent prejudicial nature, and the need for the discussion of 'Relevancy' is required by the fact that Lord Herschell made repeated reference to it. In the second branch of the Makin Formulation², of the similar fact evidence rule, Lord Herschell stated that similar fact evidence is admissible, notwithstanding that the evidence adduced tends to show the commission of other crimes, "if it be relevant to an issue before the jury". His Lordship then gave examples of when such evidence may be relevant.

Relevancy is not an "inherent characteristic of any item of evidence, but is a relationship between an item of evidence and a

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(1) (1914) A.C.545
(2) (1894) A.C.57; see also *Sudan Government v. Mohamed Abdulla Iman* (1972) SLJR 222
proposition sought to be proved". In the words of J. Stone, "a fact is similar to another when the common characteristic is the significant one for the purpose of the inquiry at hand. When facts having characteristics in common with the main fact are tendered in evidence, the court must ascertain which common characteristics are the significant ones in order to determine relevance". The chief merit of this definition is that it is in no way connected with the exclusionary rule. The test it embodies applies whenever the question of relevancy arises: only after the prepared evidence has passed this test is it necessary to decide whether it should be subjected to one or more of the exclusionary rules. Relevance is 'a variable standard'; it does not exist in a vacuum; it exists, and can only exist, in the circumstances of a particular case. Legally relevant evidence is evidence whose probative force is such as to outweigh any disadvantages that may exist in admitting it. The fact that an accused is a homosexual may have a relevance to the question of his guilt on a criminal charge; it will only be legally relevant and admissible if it, taken together with the other evidence in the case, would point so strongly to the accused's guilt (if it were believed) as to warrant its reception. The observation by Cross in his book is quite illustrative of my intended point; he said: "Although it is difficult to deny the relevance of misconduct on other occasions tendered for the sole purpose of showing that the accused is the sort of person who would commit the crime with which he is charged, it is important to bear in mind that the relevance is of a general statistical na-

(2) Stone, "Exclusion of Similar Facts Evidence: England" (1932) 46 Harv.L.R. 954, 955
(3) L.H. Hofman (1975) 91 L.Q.R. 193 at 204
(4) Cross on Evidence, 5th ed. at P. 364
ture. Some empirical research confirms the common belief that someone who has once committed a particular crime is more likely to do so again than someone who has not, and the likelihood gets higher and higher each time it is committed. If all that was proved against a man charged with burglary was that he had committed twenty other burglaries within the past six months, there would be relevant evidence against him, but it would of course lack any probative value in a court of law in the absence of evidence connecting him with the crime charged. It is thus clear from the last sentence in the above statement that after the issues involved in the case have been correctly identified, evidence of the previous bad conduct of the accused though it may be relevant, would be inadmissible if there is nothing to connect both. In other words, evidence of earlier offence is only admissible if it goes beyond merely showing a propensity to commit offences of a similar kind and is positively probative of one of the essential features of the offence charged, there being a nexus or link between the offence under consideration and earlier offences, which serve to rebut the defences which might otherwise be open to the accused.

Another important point to note from the above statement in Cross is that it is policy and not statistical probability which is the dominant consideration in the admissibility of similar fact evidence. Similar to the example given above, if A for example is charged with obtaining property by deception, the fact that he had done so in
divergent ways a hundred times during the past year may well render it statistically more probable that he did so on the occasion in question than would be the case if he had done so on two previous occasions with the aid of precisely the same false pretence, but the chances are that similar fact evidence would be rejected in the first and admitted in the second. This clearly shows that in order that evidence of similar facts may be admissible, there must be something in the nature of special features about the two or more crimes relied on as constituting the system which can properly be said to constitute a link between them. In another passage from Cross¹, he adeptly explained the matter as follows: "Let it be assumed that a witness swears to having seen the accused break into the house alleged to have been burgled carrying an empty sack and that it was full of goods when he came out, the relevancy of the other burglaries is still only of a general statistical nature. Whatever the probabilities of the accused's guilt may be, there is nothing to connect these burglaries with that with which the court is concerned. As evidence tending to confirm the testimony of the witness, the other burglaries suffer from that, for aught that appears to the contrary, the accused may have had a change of heart since he committed the last of them. On the other hand, if the witness had sworn that he saw the accused climb down the chimney of the house in question and emerge carrying a pepper pot in his hand, and one other burglary by the same means and with the same result were proved against him, there would be a significant nexus between the two crimes highly

¹ Cross on Evidence, 5th ed. at P.364
confirmatory of the witness's testimony, and suggesting that the accused had not mended his ways.

Lord Parker C.J. observed in *R v. Coombes*¹ that: "It is perfectly clear the degree of similarity which the other incidents must have to the act charged in order to be admissible evidence is obviously a matter on which no precise rules can be laid". His Lordship repeated this point when he said: "There is no clear authority as to how similar the offence must be to make it admissible..." However, the requirements of 'nexus' or 'underlying unity' as a condition of the admissibility of similar fact evidence has been stressed in several judgements. In fact, Lord Parker C. J. in the same case of *R v. Coombes* said "...there must be some nexus both in time and the nature of the offence". Whether it be called 'unity', 'sytem', 'striking similarity', 'hallmark' or 'signature', or the like, there must be something about all the incidents that makes rejection of the evidence "an affront to common sense"². Though it is doubtful whether such expressions do more than draw attention to the need for such evidence to be highly relevant to an issue in the case, what generally seems to be meant is one or more unusual features common to the misconduct on other occasions and that charged, supporting an inference that the same person was responsible for both. The problem with regard to this area of the law will be better appreciated by considering a few cases. In *R v. Wilson*³, the appellant was charged in the first count of an indictment with rape of a young woman A, in the second

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(1) (1960)45 Cr.App.R.36
(2) (1975)A.C.421 at 453-454 (H.L.)
(3) (1973)58 Cr.App.Rep.169
count with assault causing actual bodily harm to A, and in the third count with indecent assault on another young woman R. The three alleged offences presented similar features, but nothing of a peculiar nature. Counts for the three alleged offences were joined in one indictment, and the judge ruled that they should be tried together as affording evidence of system, and directed the jury that the evidence relating to the first two counts was relevant to the third count and vice versa. The jury convicted on the first two counts and acquitted on the third. The court, in its judgement, held that, assuming that the three counts could properly be joined in one indictment, they should not have been tried together or, at any rate, if they were to be tried together, the jury should have been directed that the evidence in relation to the first two counts ought not to be used by them when considering the third count and vice versa; the court of appeal quashed the conviction.

However, an extreme example of the requirement of similarity can be found in R v. Slender¹. In that case the appellant and another man were convicted of obtaining money by false pretences. They had obtained two sums of 30s. each from a lady in Cheltenham. They said that they had been involved in a lorry accident at Colesbourne, and that they required the money to spend the night in Cheltenham. On this occasion, the appellant said his name was Ted Williams. It was proved that the two men were brothers-in-law, each of them was on the dole, neither of them had anything to do with driving a lorry, being at the time engaged upon compulsory relief work for the local autho-

(1) (1938)2 All.E.R.387
rity. P., who lived just outside Cheltenham, gave evidence that two
days before the happening of the facts stated in the charge, the
same two men called upon him, said they wanted to go to Rissington,
where they had work, and required the money for the journey there.
On this occasion, the appellant gave the name of Smith. The evidence
was admitted, as proving the intent to defraud, but the Court of
Criminal Appeal held the evidence was inadmissible. I must say that
I am rather curious about this decision. The Editorial Note to the
case tried to give some explanations. It stated:\"Guilty knowledge
or design may be proved by evidence of acts similar to those which
form the basis of the charge. Such evidence may also be given to
prove that the act charged formed part of a system. The evidence
however, must be of transactions having such a nexus with the offence
charged that it forms part of the evidence by which that offence is
proved. The evidence sought to be adduced here is of two independent
acts of fraud, which can be shown to be fraudulent without reference
to similar acts and such evidence is not therefore admissible. It is
otherwise where the frauds are of a similar character and show a
systematic course of swindling\". Despite this explanation, the case
has not escaped criticism\(^2\), and I am still fairly sceptical myself
about the decision.

As we know, evidence of earlier offence is admissible if it goes
beyond merely showing a propensity to commit offences of a similar
kind and is positively probative of one of the essential features of

\(^{1}\) (1938) 2 All.E.R. 387 at 388
\(^{2}\) See 54 L.Q.R. 335
the offence charged, there being a nexus or link between the offence under consideration and earlier offences, which serve to rebut the defences which might otherwise be open to the accused. It is thus pertinent to consider cases in which no nexus or connection is thought to have existed between the offence charged and those earlier committed. R v. Brown, Smith, Woods and Planagan\(^1\), is an example of a case in which there was no adequate nexus. The accused were charged with, and convicted of, shop breaking. Smith had pleaded guilty to a previous offence of shop breaking, and evidence relating to that offence had been admitted. The convictions were quashed by the Court of Criminal Appeal because the evidence of his previous offence had been improperly received against Smith, and it was prejudicial to the other accused because they were proved to have been associated with Smith. It was argued that there was a sufficient nexus between Smith's previous shop breaking and that of which he had been convicted because it occurred only five days earlier and at a place only twenty miles distant, but the Court of Criminal Appeal held that these facts tended to negate rather than establish a nexus. It was also argued that the fact that each shop breaking was committed during the absence of the shopkeeper for his luncheon break and in both cases entry to the premises was effected by the use of a skeleton key, constituted a nexus, but these were held to be too common features of shop breaking to have that effect. Edmund Davis, said\(^2\): "Supposing that a person charged with house breaking was found with a piece of celluloid in his possession, and supposing it

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\(^{1}\) (1963)47 Cr.App.R.205; R v. McPherson & Resnick (1964)2 OR 101

\(^{2}\) (1963)47 Cr.App.R.205 at pp.210-211
was found that he had used celluloid as a means of gaining access to a hundred houses on previous occasions, could it possibly be said that that fact was any reason why the hundred other offences should be used to establish the identity of the accused as the perpetrator of the offence charged?...were the court to approve of what was done in this case, it would mean the annihilation of the fundamental rule, that criminal propensity as such can never be adduced in order to establish the guilt of a person of the offence charged.

The Australian case of R v. Blackledge¹, is another in which there was no adequate nexus. The accused was charged with robbery with violence arising out of a handbag snatching incident in April. The substantial issue was that of identity. The Crown led evidence of five similar incidents in which the accused with others was involved in the preceding month. The Full Court quoted, with aproval, the words of another Victorian Full Court in R v. Aiken²: "The mere similarity in the means adopted in the two cases, where those means might have been adopted in either case by anyone of an indefinite number of persons and where no other connection either in the mind of the accused or in fact is shown to have existed, cannot, we think, justify on the question of identity the combining of the evidence in the one case with that in the other. Any other conclusion would, we think, result in destroying the general rule that, on a charge in respect of a particular offence, evidence cannot be given of similar offences for the purpose of showing that the accused is the kind of

¹ (1965) V.R.397
² (1925) VLR 265 at 268
man who would be likely to commit the offence charged. Upon examination of the evidence the court held: "that such similarities as existed in this case did not go beyond the stage of mere similarity and the evidence did not indicate such a singular peculiarity of common features as to mark out the commission of the offence charged by the applicant as distinct from any one of an indefinite number of other persons".

The approach to admissibility is that of degree of logical probative value. Degree is, of course, a variable standard dependent upon the circumstances of each case. In addition, where the prejudicial nature of the evidence exceeds the probative value it is bound to be rejected. In *R v. Bain*\(^2\), the accused was charged with indecent assault upon a twelve year old girl. The assault was said to consist of improper fondling in the course of purporting to take photographs. The crown sought to lead evidence of a subsequent incident of picture taking. On this occasion also a young girl was involved, but there was no evidence of indecent fondling. The magistrate before whom the case was heard ruled evidence of this incident inadmissible, and the Crown appealed unsuccessfully to the Nova Scotia Supreme Court. Delivering the judgement of the court, Cooper J.A. said: "The offence charged is indecent assault. Any similar act to be admissible must, in my view, contain in itself the element of indecency to be material. I do not find such element in her evidence. The nearest approach to anything that could be said to be indecent was that the accused in the course of taking the (later

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(2) (1970)2 C.C.C.49 (N.S.C.A.)
pictures)... put (the girl's) hand on her stomach. Even if this action could be said to supply an element of indecency, it is 'tenuous to a degree' and its prejudicial value would far exceed its probative value"¹. And in the New Zealand case of R v. Horry², the accused was convicted of a common assault upon a girl by endeavouring to kiss her. She had replied to his advertisement concerning employment, and received a letter asking her to meet him at a particular place. The accused did not contest these facts, but denied that he was guilty of the assault. Two other women gave evidence that they had answered the same advertisement, and met the accused in the same place after being asked to do so by a similar letter. Each of them was deceived in the sense that she discovered that the advertisement was not genuine, but the accused did not make improper overtures to either of them. Their evidence could have been treated as inadmissible because it was irrelevant, but the Court of Appeal stressed its prejudicial character when ordering a new trial. In R v. Rodley³, on the other hand, evidence which the judge had considered to be of some relevance as showing lustful disposition at the time of the alleged crime was held to be irrelevant by the Court of Criminal Appeal and no particular emphasis was placed upon its prejudicial nature. In that case, a conviction for housebreaking with intent to commit rape was quashed on account of the wrongful reception of evidence that the accused came down the chimney of another house during the same night and had intercourse with one of its inmates with her consent.

² (1949) N.Z.L.R. 791
³ (1913) 3 K.B. 468 see R v. Rata Huihni (1947) NZLR 581 at 586
From the consideration of the formulation of the similar fact rule, the distinction between Lord Herschell's two propositions may be expressed by saying that the first prohibits reliance on nothing more than a general disposition to commit the crime charged while the second permits inter alia, reliance on a disposition to do so in a particular way, or, in the case of a sexual offence, with a particular person. The distinction turns mainly, but perhaps not entirely, on degrees of relevance\(^1\). The leading case to illustrate the point being made here is the decision of the House of Lords in *R v. Bally\(^2\).* Cross in describing the case said: "The importance of the decision lies in the doubt it casts on Lord Herschell's first proposition in Makin's case if construed au pied de la lettre"\(^3\). In the case, the two accused, who were brother and sister, were indicted under the Punishment of Incest Act 1908 (U.K.) for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, the accused were living together in the same house, that the house contained only one furnished bedroom, and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The prosecution then tendered evidence of prior sexual relations between the two accused. The evidence was to the effect that the male accused in November 1907 took a house to which he brought the female accused as his wife, that they lived there as husband and wife for about sixteen months, that at the end of March 1908 the female accused gave birth to a child, and that she regis-

\(^1\) Cross on Evidence 5th ed. at P.364
\(^2\) (1911) A.C.47
\(^3\) Cross on Evidence 5th ed. at P.363
tered the birth, describing herself as the mother and the male accused as the father. These events took place prior to the enactment of the Punishment of Incest Act 1908, at a time when incest between a brother and sister was not unlawful. The accused were convicted and appealed to the Court of Criminal Appeal where the convictions were quashed. When holding in the Court of Criminal Appeal, that the evidence ought not to have been admitted, Darling J. plainly thought that it was banned by Lord Herschell's first proposition; he stated: "If without the admission of the disputed evidence the fact of the two accused persons occupying the same bed on the date or dates charged was insufficient proof that intercourse took place between them on that date or those dates, then the fact that intercourse took place between them on former occasions could only be tendered to show that they were persons likely to have intercourse on the particular dates - a ground on which evidence is not receivable".

The prosecution appealed against the above decision to the House of Lords which reversed the order of the court. Lord Loreburn made the only speech at the House of Lords. He cited Lord Herschell's two propositions, but made no allusion to the passage in Darling J's judgement which has just been quoted. He contended himself with repudiating the assertion, also made by Darling J. that similar fact evidence was only admissible to prove mens rea. His words were as follows: "My Lords, the law on this subject is stated in the judge-

(1) (1911) A.C.47 at 57
ment of Lord Chancellor Herschell in Makin v. Attorney-General for New South Wales; it is well known and I need not repeat it - the question is only of applying it. In accordance with the law laid down in that case, and which is daily applied in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed - not to prove the mens rea, as Darling J. (delivering the judgement of the Court of Criminal Appeal) considered, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in bed of the fact when there they had guilty relations with each other.¹

The sole relevance of the evidence in Ball's case was, of course, via propensity. However the degree of relevance possessed by the evidence was sufficient to justify admissibility. If an accused is charged with incest with sister A, evidence that on some other occasion he committed incest with sister B would not be of sufficient probative value to be admissible². This is because in such event the similar fact evidence would establish no more than a propensity to commit incest. However, where the similar fact evidence establishes a propensity directed exclusively towards the individual the subject of the instant charge, the probative value of the evidence is increased to such an extent that admissibility may be justified. This is so notwithstanding that the evidence clearly involves a very

¹ (1911) A.C. 47 at P. 71
great risk of prejudice.

As a way of further appraising the case of R v. Ball we can consider some slight variations to its facts. The actual facts are as stated above, whereby the evidence of the police who called at their house was that one bedroom was in use and that it contained a double bed which appeared to have been occupied by the accused. The defence was a simple denial that sexual relations had taken place and the prosecution were allowed to adduce evidence that before incest had become unlawful, the Balls had lived as man and wife and that Miss Ball had given birth to a child. On the facts of the case, this evidence was highly relevant because it dispelled any doubt as to whether the Balls slept together for the purpose of having sexual relations. But what if the facts had been slightly different? If the police when they called at the Ball's house had found that two bedrooms were in use, would the evidence of their previous incest have been admissible? Almost certainly not. The court would have said that it was merely prejudicial; there was nothing to show that the Balls had not given up their incestuous relationship after it was made illegal. It would no longer be a question of using the similar fact evidence to dispel a mere doubt; the evidence would have to bear the whole weight of proving that an outwardly normal relationship was in fact incestuous, and for this purpose its probative value was too weak. It was the evidence of the bedroom, pointing so strongly to the Balls' relationship having remained the same, which made the
similar fact evidence sufficiently relevant to be admissible. Undoubtedly the weight of the similar fact evidence in *R v. Ball* was affected by the other evidence presented in the case; the fact that while living together they occupied the same bed, when taken together with the similar fact evidence, made the likelihood of sexual intercourse having taken place very high. The evidence of the existence of one bed in use tended to confirm or support the validity of making an assumption of continuity. Furthermore, the nature of the evidence, (i.e. a bed in use) also tends to support an inference that the propensity was not dormant, but was in fact, presently being exhibited. Of course, the existence of the propensity also tended to support the inference, derived from evidence of the discovery of the bed, that sexual relations occurred. As Lord Atkinson noted, "(it) would be wrong to assume in some cases that there must have been incestuous intercourse because persons of different sexes were in the same bed". Evidence of the existence of a present disposition would tend to give character to the nature of the bedding together. However, the evidence of present possession was only an inference from possession of a similar disposition at an earlier time. One must make an assumption of continuity of possession, which, as indicated, was justified by the evidence of the bed. But if, for example, no more had been shown than that they lived together in the same house, the similar fact evidence would have been of less probative force. This, when coupled with its extreme potential for prejudice, would probably have resulted in its exclusion.

(1) Hoffman "Similar Facts after Boardman" (1975) 91 L.Q.R. 191 at 202
(2) (1911) A.C. 47 at 66
As already made clear, generally, evidence which shows no more than that the accused possesses a general propensity towards a certain class of criminal activity is, of course, inadmissible. However, as it is evident in *R v. Ball*, if the propensity can be rendered more specific by virtue of the fact that the crime charged and the similar fact evidence each have as their object the same individual, the evidence may be admitted. As the decision in *R v. Ball* further shows, evidence of a propensity directed specifically towards another person, whether taking the form of sexual passion or violent antipathy, is often sufficiently probative to be admissible notwithstanding its extreme potential for prejudice. This decision of the House of Lords has been followed in other jurisdictions, and it has been applied not only to cases of incest\(^1\), but also to rape\(^2\), indecent assault\(^3\), and unlawful carnal knowledge\(^4\), as well as to cases involving the display of violent antipathy as in *R v. Drysdale*\(^5\). In this case, the accused was charged with the murder of the three year old daughter of the woman with whom he was residing. The child's mother and a brother gave evidence that clearly established that the accused had "beat the child into unconsciousness, inflicting injuries upon her from which within a very few minutes she died"\(^6\). Evidence was admitted that the accused had assaulted the girl on previous occasions. Evidence was also admitted of a number of vicious assaults by the accused upon other children of the family and upon the household pet. The accused was convicted and appealed successfully to the

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\(^{2}\) *R v. Stelmascauk* (1948) 93 C.C.C. 124; 8 C.R. 430 (N.S.S.C.)

\(^{3}\) *R v. Collerman* (1964) 3 C.C.C. 195; 46 W.W.R. 300 (B.C.C.A.)

\(^{4}\) *R v. Bristol* (1926) 4 D.L.R. 753; (1926) 46 C.C.C. 156

\(^{5}\) (1969) 2 C.C.C. 141; 66 W.W.R. 664; see also *Theal v. R* (1882) 7 S.C.R. 397

\(^{6}\) (1969) 2 C.C.C. 141 (Man.C.A.) at 142
Manitoba Court of Appeal. The Court held that while evidence of the earlier assaults upon the deceased little girl were admissible as showing a specific antipathy towards her, evidence of assaults upon the other children and upon the family pet were inadmissible. Delivering the judgement of the Court, Freedman J.A. said: "Dealing first with the evidence of earlier assaults upon Angela (the deceased child), I would admit that evidence on the ground of relevance, particularly on the issue of intent. That evidence could provide a nexus or link with the alleged murder and could show the existence of a continuing animus or malice on the part of the accused towards the child. ... Concerning the evidence of prior acts relating to others than Angela, I am decidedly of the view that these were irrelevant and inadmissible".

It is not, of course, the case that all similar fact evidence, for instance, of showing prior antipathy towards the victim, will necessarily be admissible; the key is always the degree of probative value possessed by the evidence. In R v. Robertson\(^2\), similar fact evidence showing prior antipathy was held inadmissible. In it, the accused, a sixteen year old youth, was charged with the murder of the nine year old sister of a friend. The girl was murdered at her home when she returned there from school during the lunch hour. The accused's connection with the crime was established largely by circumstantial evidence. His defence was a complete denial. The prosecution led evidence of two prior incidents involving the accused and the girl. The first, which took place some ten or fourteen days

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(2) (1975)21 C.C.C. (2d) 385; see also R v. Tsingopoulous (1964)V.R. 676
before the killing, involved a threat made by the accused to the deceased. The accused, with others, was at the victim's home, and the accused was being noisy. The victim came out of the bedroom and asked if the others would 'quiet (the accused) down'. The accused replied: "You get... back in the bedroom or I'll kill you in the..."
The second incident took place later the same evening. The accused was alleged to have made a remark that he was going to do something 'similar to shooting at a police officer' or do 'something better than (shooting at a police officer)'. The accused was convicted of murder and appealed to the Ontario Court of Appeal. The Court allowed the appeal and ordered a new trial. The Court held that evidence of the two prior incidents ought not to have been admitted.

With respect to the first incident, Martin J.A., with whom the other members of the Court agreed, stated that evidence that an accused entertained feelings of hatred or hostility towards the deceased was relevant to prove the accused killed the deceased. Further, that evidence of prior threats were admissible to prove the existence of feelings of such hostility. However, His Honour held that on the facts of the instant case the evidence was not of sufficient probative value to justify admissibility. His Honour stated: "The utterance of the accused in the circumstances cannot be regarded other than as an unseemly venting of feelings of temporary annoyance and on any reasonable view is not evidence of feelings of ill will or enmity constituting a motive for the murder of the
deceased. The evidence with respect to such utterance was accordingly inadmissible"\(^1\).

With respect to the second incident, His Honour stated: "A threat may be generic in character, and accordingly a threat to shoot at the police would be admissible on a charge of murdering a policeman although the threat was not directed towards the particular policeman who was killed. As a general rule, however, a threat by an accused to kill A would not be admissible on a charge of murdering B...(even if the statement made by the accused is capable of being construed as a threat referable to the deceased) its admissibility is so tenuous, having regard to the context in which the words were uttered, and of such slight probative value in relation to its prejudicial effect, that the trial judge, in the exercise of his discretion, would be justified in excluding it"\(^2\).

(ii) The Principle of Thompson v. R\(^3\)

I have chosen to discuss the case of Thompson v. R separately and not under the issue of evidence of identification with which it is always identified, because, equally importantly and perhaps more, this case with a chequered career, shows how specific probative value may be conferred upon a general disposition by a particular incident, and as such very important with respect to present discussion.

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(1) (1975)21 C.C.C. (2d) 385 at 411
(2) Ibid at 412
(3) (1918) A.C.221
In the case, the accused was charged with committing acts of gross indecency with two boys. The acts in respect of which the charges were brought were alleged to have occurred on March 16, and the person who committed them was alleged to have made a further appointment with the boys for March 19. The police were informed in the meantime, and they kept watch with the boys at the rendezvous - a public lavatory. At the appointed time the accused arrived at the rendezvous and was identified by the boys as the man who had committed the offences on the 16th. From the first moment, the only defence raised by the accused was that of mistaken identification: "You have got the wrong man" he kept saying. At his trial the prosecution tendered evidence that when arrested on the 19th the accused was carrying powder puffs, and that he had indecent photographs of boys in his room. The accused was convicted and appealed unsuccessfully first to the Court of Criminal Appeal and then to the House of Lords. The significance of the powder puffs and the indecent photographs was that they showed the accused to be a homosexual. The House of Lords held that, in the very special circumstances of the case, evidence showing the accused to be a homosexual was admissible to support the identification of him by the two boys. Lord Finlay L.C. stated: "The whole question is as to the identity of the person who came to the spot on the 19th with the person who committed the acts on the 16th. What was done on the 16th shows that the person who did it was a person with abnormal propensities of this kind. The possession of the articles tends to show that the person
who came on the 19th, the prisoner, had abnormal propensities of the same kind. The criminal of the 16th and the prisoner had this feature in common, and it appears to me that the evidence which is objected to afforded some evidence tending to show the probability of the truth of the boys' story as to identity"\(^1\). Lord Parker of Waddington, in a similar vein, stated: "If the abnormal propensity of the criminal of March 16, manifested by the nature of the crime and the appointment for its repetition can be regarded as one of the indicia by which his identity can be established, the evidence is admissible as showing that the accused had some abnormal propensity"\(^2\).

The other members of the House of Lords adopted similar reasoning to that in the dicta above, and the reasoning adopted by their Lordships was essentially as follows. The person who committed the offences and who made an appointment to be at point A at time B possessed a certain unusual propensity, he was a homosexual. The accused was present at point A at time B. The similar fact evidence established that the accused possessed the same propensity. Thus, barring a remarkable coincidence, the accused and the individual who committed the offences were indeed one and the same person. In this regard, Lord Sumner analogised the situation to one where burglary implements are found in the possession of an accused. The ability to adduce evidence of burglary implements not connected with the offence "is really only misleading, unless at the same time we

\(^1\) (1918) A.C.221 at pp.225-6
\(^2\) Ibid at 231
ask the question what exactly does this purported to prove and by what probative nexus does it seek to prove it?"¹. This type of reasoning process or probative nexus is crucial with respect to the admissibility of evidence so that the evidence will not merely be evidence of general bad character without any other probative connection to the case. The House of Lords finally decided that, having regard to all the circumstances of the case, in particular the identification of the accused by the two boys, the similar fact evidence thus possessed sufficient probative value to justify its admission.

The decision in this case has given rise to some important and controversial issues which need to be considered. It is submitted that the reasoning of their Lordships was based upon certain untested premises. First, it appears to have been an unstated assumption throughout the case that homosexuality is a very rare condition indeed. This was, of course, an understandable assumption in 1918. It is now estimated that at least 4% of adult males are exclusively homosexuals throughout their lives. This is the estimate in the Kinsey Report². The figure of 4% relates to males who are exclusively homosexual. The authors estimate that 37% of the total male population has at least some overt homosexual experience between adolescence and old age³. More recent studies would suggest that the actual percentages are, if anything, higher than those estimated by the authors of the Kinsey Report. It would seem then that the coincidence required for the accused to have been innocent was of considerably less magnitude than was believed to be the case by their

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¹ A.C. 221 at p.236
³ Kinsey Report, op. cited at 650
Lordships. Secondly, nothing appears from the report of the case as to the nature of the area in which the offences occurred and the accused was arrested. If the locality was one regularly frequented by homosexuals, then the fact that at the appointed time the accused who was a homosexual was in the vicinity was of quite limited probative value. However, it is of little significance that of all homosexuals around the accused was picked out, but it is of significance that he walked towards them and offered money.

(ii) Unwarranted Extensions of Thompson's Case

Thompson v. R has often been mis-interpreted and treated as authority for the proposition that cases involving sexual deviance, and in particular cases involving homosexuality, constitute a special category in relation to which similar fact evidence is always admissible. Largely responsible for this mis-interpretation of Thompson v. R is an obiter dictum in the judgement of Lord Sumner. The following remark by His Lordship is the principal reason why the case has had a chequered career: "The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognised as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner or a house-breaker is only a particular specimen of the genus rogue, and though no doubt

(1) (1918) A.C. 221
each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognisable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class as much as if they carry on their bodies some physical peculiarity”1.

In R v. Sims2, to be discussed shortly, this dicta was taken to mean that homosexual offences are in a special category with the result that there is a sufficient nexus between two homosexual acts to render evidence of one admissible on a charge relating to the other, but in Director of Public Prosecutions v. Boardman3, the House of Lords was unanimous in holding that homosexual offences are not in a special category in the context of the admissibility of similar fact evidence or evidence of disposition. The important question to be answered now is whether the decision in Thompson v. R is still the law, or has it been overruled in the sense that, were substantially similar facts to recur, would their decision be the same? It is difficult to answer the question with any degree of certainty as there are varying and disagreeing views. Cross4 is of the opinion “that Thompson v. R might well be decided today as it was in 1918”.

Cross on Evidence, 5th ed. at 367

(1) (1918) A.C. 221 at 235
(2) (1946)1 k.B. 531
(3) (1974) 3 All E.R. 887
(4) Cross on Evidence, 5th ed. at 367
conclusion might be reached, not because the law had changed, "but because public attitudes and public habits, particularly in regard to homosexuality, may themselves have changed meanwhile". In the words of Lord Cross of Chelsea in Director of Public Prosecutions v. Boardman: "The attitude of the ordinary man to homosexuality has changed very much since R v. Sims was decided and what was said on that subject in 1917 by Lord Sumner in Thompson v. R¹ - from which the view that homosexual offences form a class apart appears to stem - sound nowadays like a voice from another world". And to quote Lord Reid in Director of Public Prosecutions v. Kilborne², referring to the special classification of homosexual cases, he said: "If there ever was a time for that, that time is past, and on the view which I take of the law any such special rule is quite unnecessary". Thus clearly from the above recent dicta homosexuality is now recognised as sufficiently common to render the evidence of insufficient probative value to justify admissibility in view of its great potential for prejudice. However, to the above argument of present day change in attitude towards homosexuality and its consequent effect of what would be the effect on a similar case today, Cross³ replied: "This undeniable fact (i.e. the change in attitude) does not seem to have much to do with the high degree of relevance of the finding of the powder puffs and photographs to the confirmation of the identification of the 19th, although they did no more than manifest a general disposition". He continued to comment on the

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(1) (1918) A.C. 221 at 235, H.L.
(2) (1973) A.C. 729 at 751
(3) Cross on Evidence, 5th ed. at 367
possible effect of R v. Morris\textsuperscript{1}, he said: "It is possible that, in Morris's case, the court of Appeal had in mind Lord Sumner's words about homosexuals and their abnormalities, but it would clearly be unwise to dogmatise about the extent to which Thompson v. R has survived".

Apparently from the views expressed by Cross, he shares the opinion of some members of the House of Lords who tacitly took notice of the fact that powder puffs are used in the course of homosexual crimes and considered that the accused's possession of them was admissible to identify him as a man who came on the 19th equipped and intending to repeat the offences of the 16th. However, Cross pointed out that the facts would only need to be changed slightly to render the evidence of the articles discovered of no probative value. He said: "For example, if he (Thompson) had been handed over the police on emerging from the lavatory on the 16th, and his defence had been that the allegations against him were a tissue of lies, it is difficult to see what legitimate use could now be made of the discovery of the articles". Though I agree with the situation given by Cross, I disagree with his original reasoning and view which seem to arise from his view on the use of powder puffs. While no doubt unusual, I think it is in fact highly doubtful if the carrying of powder puffs does possess any real probative value in suggesting that a man is a homosexual. As such I would have thought that if Thompson v. R were to occur again on its precise facts, the similar fact evidence ought not to be admitted. Likewise, however, the facts would only need to

\textsuperscript{1} (1969) 54 Cr. App. Rep. 69
be changed slightly to render the evidence of much greater probative value and therefore to justify admissibility. If, for example, the person who committed the offences arranged to meet the victims again on a deserted hillside, or in a graveyard at midnight, evidence that the person who kept the appointment possessed the same propensity would be admissible; because ordinarily such are not places one meets homosexuals.

It is now proposed to focus herein upon some illustrative cases on the tendency to regard cases involving homosexuality as standing in a special category. Attention will therefore be turned now on \textit{R v. Sims}\(^1\) which is the most important in this respect. In that case, the accused was convicted on three counts of buggery with three different men. The evidence of each man was that the accused had invited him to his house, and had there committed the acts charged. On appeal to the Court of Criminal Appeal it was argued that in respect of each count evidence concerning the other two counts ought to have been held to be inadmissible. This argument was rejected by the court. Delivering the judgement of the Court, Lord Goddard C.J. stated: "The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence. The probative force of all the acts together is much greater than one alone; for, whereas the jury might think that one man might be telling an untruth, three

\(^{1}\) (1946) 1 k.B. 531
of four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy, their evidence would seem to be overwhelming"¹. The logic of the argument here being put is unexceptionable; if there had been some feature strikingly peculiar about the three incidents, then the similar fact evidence would have been admissible upon ordinary principles. The above words of Lord Goddard C.J. must now be treated as a statement of the sole surviving ratio decidendi in R v. Sims especially as the words were approved in the speeches in the House of Lords in Director of Public Prosecutions v. Boardman². As Cross put it: "Provided there is a sufficient degree of significant similarity in the incidents to which they refer, the direct testimony of Crown witnesses concerning other misconduct is admissible to confirm such testimony concerning the offence charged. Although the evidence of other offences goes to show a disposition to commit them, it is admissible on a ground wholly independent of that disposition"³.

It should be noted that the evidence of the witnesses to whom the Sims' ratio decidendi is applicable must be creditworthy, otherwise the question of confirmation does not arise. Also the stories of the witnesses must suggest that the other offences and the offence charged have significant common features to such an extent as to suggest that the same person was responsible for all of them. Other passages in Lord Goddard's judgement in R v. Sims make it plain that this is the interpretation to be placed on the phrase 'striking similarity',

(1) (1946) K.B. 531 at pp. 539-40
(2) (1975) A.C. 421; (1974) 3 All. E.R. 887
(3) Cross on Evidence, 5th ed. at P. 368
used in the dicta quoted above. Anyhow, I would like to note that there is nothing as far as I can see in the report of the case to suggest that anything other than acts of buggery of the ordinary kind occurred.

Immediately following the passage by Lord Goddard quoted above, His Lordship went on to place the Court's decision upon a wider basis - thereby making Lord Sumner's words about homosexuals the basis of a second ratio decidendi in Sims' case. His Lordship stated: "...we think (the admissibility of the evidence) should be put upon a broader basis. Sodomy is a crime in a special category because, as Lord Sumner said (His Lordship then quoted from the judgement of Lord Sumner in Thompson v. The King)...On this account, in regard to this crime, we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused". Certainly this part of the judgement no more represents the law, not since Boardman's case.

Meanwhile, however, Lord Goddard repeated the same views in R v. Hall. In that case the accused was charged on an indictment containing eight counts alleging gross indecency with three different young men. The accused's defence to the charges in the case of two of the young men (C and B) was that the acts complained of were done in the course of medical treatment. The accused and these young men had met at a medical institution at which the accused worked. In the

(1) (1946) 1 k.B. 531 at 540
(2) (1952) 1 k.B. 302
case of the third Man (R) the accused's defence was that he had never met him. At the trial application was made for each case to be tried separately. The trial judge refused the application, giving as his reason that all the evidence to be called on all the counts could have been called on any one of them. The accused was convicted on all counts, and appealed unsuccessfully to the Court of Criminal Appeal. The judgement of the Court was delivered by Lord Goddard C.J. In relation to C and B His Lordship correctly held that the similarities between the two sets of incidents were sufficient to justify the admissibility of the evidence to rebut the accused's defence of lack of criminal intent. In relation to R, however, His Lordship again returned to the view he had put forward in R v. Sims that homosexuality is itself a sufficiently unusual characteristic to justify the admission of similar fact evidence. In relation to R, His Lordship stated: "The only case which caused the court momentary difficulty was the case of R, because in that case the appellant's defence was that he had never seen R in his life before, and he did not say that he was giving R medical treatment. But the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of the evidence in Thompson v. R, namely, that it went to identity. The meaning of that expression is that the evidence goes to show that the witness for the prosecution is speaking the truth when he said that the appellant was the man who did the indecent things to him, because it shows that the appellant is a man addicted to unnatural practices. That was what
justified the evidence in this case with regard to R. It was for
the jury to say whether R was a liar or a witness of truth, and in
deciding that question they were entitled to take into account the
evidence given by C and B"\(^1\). Clearly the view adopted by Lord
Goddard C.J. in \( R \) v. \( Sims \) and \( R \) v. \( Hall \) is in principle wrong.
Where the accused is charged with a homosexual offence, evidence that
he is in fact a homosexual obviously has tremendous potential for
prejudice. On the other hand it is, without more, of quite limited
value. It shows no more than that the accused belongs to a class of
persons, a class comprising 4% or more of the population, members of
which class possess a propensity for acts of the kind charged.

And recently in Canada, \( Thompson \) v. \( R \) was followed in the case of \( R \)
v. \( Glynn \)^2. In that case the accused was charged with murder. Traces
of semen were found in the anus of the deceased. The trial judge
admitted in evidence proof that the accused had engaged in homosexual
acts on previous occasions. The accused was convicted and appealed.
The Ontario Court of Appeal, relying on \( Thompson \) v. \( R \), upheld the
decision of the trial judge. Gale C.J.O. stated: "...in a case where
it was proved death could have been caused only by a left-handed
person, evidence that the accused had the characteristic of being
left-handed would clearly be admissible on the question of identity,
so in this case where the death may well have been caused by a
homosexual with certain characteristics it was proper to show that
the accused was a homosexual with those characteristics"^3.

(1) (1952) 1 k.B. 302 at 308
(2) (1972) 5 C.C.C. (2d) 364. As to the application of Thompson's
ratio in Israel see \( Arisha \) v. \( A.G. \) (1951) 5 P.D. 1200, 1205
(3) Ibid at 365-66
It is, with great respect, suggested that this analogy is fallacious. The distinction between the two cases is that left-handedness does not, but homosexuality does, carry with it the risk of prejudice. It is this danger which necessitates the requirement of greater relevance before admissibility can be justified in the case of homosexuality. If the accused were charged with murder committed in the course of a rape, there can be no doubt that evidence that he had previously raped someone else would, without more, be inadmissible. There can be no justification for treating a propensity towards homosexuality differently. As such it is submitted that similar fact evidence of insufficient probative value was improperly admitted. The case was given a more exhaustive criticism by Ronald Sklar, he said: "The brief opinion of the Court of Appeal is unsatisfactory in that it fails to indicate (i) how long the semen had been in the deceased's anus (if deposited there some appreciable time before his death, it would not connect, even remotely, the person who performed such act with the killer) and (ii) if the other acts proved against the accused were similar to those committed on the deceased (i.e., whether they showed the accused to be the active party in acts of anal intercourse), which would certainly have greatly strengthened the probative force of the other acts. Assuming as we must that there was other evidence connecting the accused with the death of the deceased (motive, opportunity, and the like), the evidence disclosing the homosexual tendencies of the accused seems quite probative on the issue of who killed the deceased. Given the nature of the charge and

(1) Similar Fact Evidence - Catchwords and Cartwheels (1972) McGill Law Jour. P. 60 at 74 and for "a psychologist's point of view" of Glynn, see the note by Doob (1972) 15 Crim. L.Q. 119
the clear and specific purpose for which the evidence of other homosexual acts was admitted, the evidence also does not seem likely to confuse and distract the jury from the main issue. However, even if the result in Glynn may be correct, its reasoning is unsound. The court approved the trial judge's explanation to the jury that the evidence was admitted because it tended to show 'an abnormal propensity in a certain direction'. This is a throwback to the outmoded and now (since Boardman) unacceptable view of homosexuality as a special class of crime 'which stamps the individual as clearly as if marked by a physical deformity'. Then the court, to support further its conclusion the evidence was admissible, analogised to 'a case where it is proved death could have been caused only by a left-handed person, evidence that the accused had the characteristic of being left-handed would clearly be admissible on the question of identity'. This analogy serves correctly to underscore the limited purpose for which the evidence of the other acts of homosexuality was admitted in Glynn. However, it overlooks a fairly fundamental point: at least in this day and age, no one on a jury is likely to be hostile to an accused who is shown to practice homosexuality. This may be an overstatement however.

There are other examples from some other countries to show that the dilemma whether there was a special rule for cases involving an allegation of homosexual conduct after the decisions of Thompson v. R and R v. Sims was widespread until Boardman provided the

(1) R v. Sims (1946) 1 k.B. 531 at 538
(2) (1972) 5 C.C.C. (2d) 364 at 405
(3) (1918) A.C. 221
(4) (1946) k.B. 531; (1946) 1 All E.R. 697
(5) (1975) A.C. 421; (1974) 3 All E.R. 887
breakthrough. The issue came up for attention in Sudan. In Sudan
Government v. Osman Abdel Wadood El Kursawi\(^1\), the accused was charged
with homosexual conduct with a boy of twelve. In the judgement of M
I El Nur J: "The trying court was absolutely wrong in refusing to
hear the evidence adduced by the prosecution of the various pupils of
the accused on whom he made similar assaults". It seems that this
evidence was tendered by the prosecution in order to corroborate the
story of the complainant, because the learned judge said: "In the
present case the evidence adduced by the prosecution, as appearing in
the Magisterial Inquiry, tends to prove to show system and systematic
course of conduct and renders more probable the truth of the
statement of the complainant".

In another case - Sudan Government v. Abbas El Sheik El Fazari\(^2\),
where a school teacher was charged with committing sodomy with a boy,
Abu Rannat C.J. noted: "there is the evidence of the other pupils
which showed the tendency of the accused and propensity for sodomy".
This concurs with the broader view taken in Sims' case that the fact
that the accused has homosexual propensities is relevant and admiss-
able in order to prove the charge against him. The Learned Chief
Justice did not say whether there was any similarity or striking
similarity about what happened to each of the boys. The possibility
that the boys could have concocted a false accusation cannot be
overlooked in such cases. It may be significant to note that atti-
tude towards homosexuality is different: for instance, since 1974,
acts of homosexuality between consenting adults in private have

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\(^1\) (1956) AC CP 198 56, KNP PC Maj Ct 35 36 unrep.
\(^2\) (1964) A.C. CP 76 64, unrep.
become a criminal offence in the Sudan. It is completely obscure whether an accused person can be convicted of an offence of sodomy under Section 318, Sudan Penal Code, by mere proof that he has homosexual propensities.
Relevancy and Cogency: Probative Value as Weight

Relevancy being a correlation between the proffered evidence and either a fact in issue or a proposition which such evidence is sought to refute, it is necessary to establish the issue in a case, and to recognise when such issues arise. Determining relevancy, as earlier discussions have shown, is important but it is being mentioned again here because of its particular significance with respect to the issue of cogency, and this issue can certainly not be over-emphasised. First, it entails recognising the issue to which evidence is to be probative. If the fact or proposition is not an issue in the case, there will be no target point at which the evidential inference may be aimed. Any possible probative relationship between the proffered evidence and an issue or proposition is broken if that issue or proposition is absent or is removed from the case. In such a situation, without a target point, the proffered evidence is simply irrelevant to the proper determination of the merits of the case. The correct identification of issues is essential to the proper determination of the question of admissibility. Otherwise 'the real issue may be distracted from the minds of the jury' and they may become involved in side issues which complicate and prolong the order of a criminal trial. However, the correct identification of issues is merely the beginning and not the end of the requirements of admissibility of similar fact evidence; some other requirements like the degree of similarity have already been discussed. Further, since the admissibility of similar fact evidence depends upon its cogency it is
especially important that its weight be substantial. If it is of trifling weight and is gravely prejudicial then it will be excluded as a matter of judicial discretion. The admission of similar fact evidence is after all an exception to the general rule excluding other acts 'for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried', and it should be restricted not merely to situations in which an issue is raised which permits its admission but those in which the similar fact evidence is itself clear, unambiguous and substantial in its cogency and effect lest the salutory policy of the fundamental rule of exclusion stated by Lord Herschell be destroyed. At this junction it is pertinent to refer to the remarks of Professor Smith, who said: "Whether evidence of similar facts is admissible or not depends upon its cogency. Evidence that the accused has committed crimes of the same general type before has some probative value, but it will generally be inadmissible because its slight relevance is greatly outweighed by its prejudicial effect. The probative value of the evidence may, however, be greatly increased if it can be proved that there is a degree of similarity in circumstances and proximity in time and place, etc... It should be noted that judges commonly distinguish facts as going to weight rather than admissibility, but it is submitted that, as regards similar fact evidence, no sharp line can be drawn and that admissibility depends on weight". And Hoffman

(1) Noor Mohammed v. R (1949) A.C. 182
(2) Makin v. Attorney-General for New South Wales (1894) A.C. 57 at 65 Per. Lord Herschell
(3) (1962) Crim. L.R. 770 at P. 771
observed: "To say that evidence is relevant must always mean that it has attained the variable standard of cogency sufficient, in the absence of any special exclusionary rule, to justify its admissibility"\(^1\).

An important case to be discussed now is *Harris v. Director of Public Prosecutions*\(^2\). Of this case Cross said\(^3\): "Harris's case invites consideration of the degree of cogency required of the evidence of misconduct on other occasions. If it is inadequate to lead a reasonable jury to think that such misconduct took place, it is a fortiori inadequate with regard to the allegations with which the court is immediately concerned". In that case, Harris, a member of the City of Bradford police force, had been convicted of larceny from premises in the Bradford market on the eighth count of an indictment charging him with similar thefts of money from the same premises between May and July. So far as this count was concerned the evidence was that a burglar alarm had been placed on the premises without the knowledge of the appellant who was on duty in the market at the time. Immediately after it sounded detectives who had been lying in wait, went to the market and saw the accused standing near the premises. He did not approach them immediately, although they were persons with whom he was acquainted, but he did so after disappearing from sight for a short period during which he could have placed the money that had been left on the premises in the bin where it was found. The only evidence on the other seven counts was that in every case the theft occurred in a period during part of which the appel-

\(^1\) Hoffman in *91 L.Q.R. 191* at 206
\(^2\) (1952) *A.C. 694*; (1952) *1 All E.R. 1044*
\(^3\) Cross on Evidence, 5th ed. at P. 373
lant was on duty in uniform in the course of patrolling the ground of the market, and none of them occurred during the period of his leave. Also, in every case, the money stolen was only part of the amount that the thief, whoever he was, might have taken, and in every case the same means of access was used. On the first seven occasions, apart from the similarities in the respects above, there was no further evidence to associate the appellant specifically with the thefts. The jury acquitted on counts 1 to 7, and convicted on the eighth count. The accused appealed unsuccessfully to the Court of Appeal on the ground that the trial judge had incorrectly directed the jury that they could take account of the evidence relating to the first seven counts in considering the eighth count. He then appealed to the House of Lords, where, by a majority of four to one, the appeal was allowed and the accused's conviction quashed. The main judgement in the House of Lords was delivered by Viscount Simon, who stated: "The eighth count raised two issues: (i) Was the money stolen on 22 July? (ii) Is it proved that it was the appellant who stole it? Previous events could not confirm (i), which indeed was proved beyond dispute. As for (ii), the accused denied that he was the thief and the fact that someone perpetrated the earlier thefts when the accused may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion. The case against him on 22 July depended on the facts of that date"1. It is with respect, submitted that the evidence regarding the first seven

(1) (1952) A.C. 694 at 711
counts in fact possessed considerably more probative value in relation to the eighth count than the majority of their Lordships were prepared to accord it. The series of eight thefts were identical in locality and nature. It was highly probable, though not a necessary inference, that they were all committed by the same person. All eight thefts were carried out on evenings when the accused was on duty in the market. Two hypotheses could be adduced to explain this set of facts. Either on eight evenings during which the accused was on duty in the market a theft had been carried out by an unknown person who was seen by no one including the accused. Alternatively, the accused committed each of the thefts. When to this is added the fact that the other evidence against the accused in respect of the eighth count was quite strong, it would seem that the first hypothesis was a fairly improbable one. It would appear then that the evidence relating to the first seven counts was of considerable probative value in respect of the eighth count, and that the House of Lords may have been unduly favourable to the accused in holding that it was not admissible for this purpose. It was in R v. Robinson that Hallet J., after reviewing the facts of the case, said: "I would emphasise (the) words 'if you come to the conclusion that he was the man who carried out the first raid'. Now if there had been a similar direction to the jury in the case of Harris, we apprehend that their Lordships might very well have taken a different view, because in that case the jury acquitted the appellant on the first seven charges. If, therefore, they had been directed that it was if, and only

(1) (1953) 37 Crim. App. Rep. 95 at 106
if, they found him guilty on the first seven charges they could be assisted by that view in determining the eighth charge, the criticism their Lordships made would not have been the same and there might well have been a difference in the result. There is a Scottish case that is apt for discussion in this respect as its facts have close resemblance with Harris's case; the case is Coventry v. Douglas. Here, at the trial of an accused on charges of theft and attempted theft from a receptacle in a canteen, the alleged offences having been committed on Thursday mornings, evidence was led by the prosecutor that such shortages had been discovered on previous occasions - always on a Thursday morning - in consequence of which the police had set a watch on the premises. An objection to this evidence was repelled. Other evidence established that the accused had charge of a shift of voluntary workers which did duty in the canteen on Thursday mornings. The court held that the objection had been rightly repelled, in respect that evidence of the earlier cash shortages was competent for the purpose of explaining the action taken by the police. There were observations on the impropriety of leading evidence which tended to show that the accused was at the canteen on those occasions. Lord Justice General (Normand) said: "I agree with (the) comment on the impropriety of leading evidence to show that the appellant was in attendance at the canteen on days when cash was found to be missing before the dates of the two occasions libelled in the charge. If the objection taken at the trial by the solicitor for

(1) (1944) J.C. 13
the appellant to the admission of evidence had been directed to this point, the objection might and should have been sustained. But the only objection taken was on another ground and was, I think, a bad objection\(^1\).

There is no special rule with regard to the cogency required of evidence tendered to prove the accused's misconduct on other occasions. It does not have to be undisputed\(^2\) and, when it consists of evidence pointing to an intention to commit other crimes, there need not always be proof that they were committed. A good case for illustration is *R v. Seaman*\(^3\). In the case, the appellant went into a supermarket carrying a shopping bag in which were empty beer bottles. He then ordered a packet of bacon which the assistant wrapped up and which he placed in a wire basket. He then went to the wine and spirits counter where he exchanged some empty beer bottles for some full ones for which he paid and placed in a bag, slipping the bacon into the bag. He left the supermarket without paying for the bacon at the checkout and was stopped by the Stores Manager. At his trial for the theft of the bacon, to show that what the appellant had done was not by mistake, as he averred but was part of his modus operandi, evidence was admitted of two previous occasions the year before of which a store detective in the same supermarket had seen the appellant buying a bacon. On both occasions he was seen to place bacon in a wire basket. On the first occasion the basket was seen later to be empty, but as the store detective had lost sight of the appellant for a minute or so, no action was taken against him. On the second

\(^1\) (1944) J.C. 13 at P. 19; see also *R v. Salerno* (1973) VR 494
\(^2\) *R v. Herron and Rance* (1975) 62 Cr. App. R. 118 at 121
\(^3\) (1978) 67 Cr. App. R. 234
occasion the appellant, noticing that he was being watched, took the bacon out of the basket and returned it to its place on the provisions cabinet from whence he had got it. The appellant was convicted and appealed on the ground that the aforesaid evidence was wrongly admitted. The court held that, although it was a borderline case as to similar fact evidence, the evidence of the store detective was properly adduced in the court below, thus negating the defence of mistake; the appeal was dismissed accordingly.

The other issue to be discussed now is the question of 'weight'. In the earlier cited statement of Professor Smith he said: "It should be noted that judges commonly distinguish facts as going to weight rather than admissibility...; but it is submitted that, as regards similar fact evidence, no sharp line can be drawn and that admissibility depends on weight". Although technically, matters of weight and admissibility are separate, in the consideration of similar fact evidence, when so much depends upon the degree of probative value and the jury's probable reaction to it, matters of weight and admissibility are not entirely separate. The admissibility of evidence 'depends on how far its real probative value or true weight falls short of the probative value or weight with which a jury is likely to credit it'. As a result, 'it is not rational to persist in regarding problems of weight and problems of admissibility as being entirely separate'. In a 'case comment' the following pertinent statement was made: "Evidence that the accused has committed wrongful

(1) (1962) Crim. L.R. 770 at 771
(3) Ibid
acts on other occasions is admissible when it has a very high degree of cogency. The judges have often reminded us that the weight of the evidence and the admissibility of the evidence are two different things. So they are. The one is a question for the jury and the other a question for the judge. But in this sphere the two concepts interact. Admissibility depends on weight. The evidence is admitted because it is very cogent evidence of the accused's guilt. As Lord Cross put it in Boardman: '...The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in the face of it. In the end - although the admissibility of such evidence is a question of law, not of discretion - the question as I see it must be one of degree"1. The above statements show the interaction between admissibility and weight. While the truth of the facts2 and the degree of similarity alleged to constitute the prior misconduct3 is a determination which, itself, belongs to the jury, "the question whether the evidence is capable of being so regarded by a reasonable jury is a question of law"4. And when one is dealing with the likelihood of the jury's using an evidence in either a logically probative or prejudicially manner, the psychological probative force is an important factor.

Without doubt the psychological problem posed to the jury by the evidence of similar facts is one of the reasons why it is generally

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1 "Case Comment" (1976) Cr. L.R. 311 at 312
3 R v. Smith (1915) 11 Cr. App. R. 229 (C.C.A.)
4 Per Lord Hailsham, D.P.P. v. Boardman (1975) A.C. 421; (1974) 3 All E.R. 887 at 906 (H.L.); and see at 905, and Per Lord Salmon at 913
inadmissible. As Lord Hailsham in Director of Public Prosecutions v. Boardman\(^1\) said: "The first rule in Makin is designed to exclude a particular kind of inference being drawn which might upset the presumption of innocence by introducing more heat than light". And on that, Cross commented as follows: "There is less danger of the infusion of heat into their deliberations when a jury is considering whether there is sufficient resemblance between two crimes to warrant an inference that the accused was responsible for both than when they are pondering on the force of the argument that he is the kind of man who would do that kind of thing, even when it has strong statistical backing"\(^2\). It is thought that it is in keeping with the spirit of preventing the introduction of more heat than light, that there is the proposition that if the crown has a strong case without the similar fact evidence, there is no need for whatever probative value the similar fact evidence may have, and therefore the evidence should be excluded. This certainly appears to be the position in the United States - for example, Anderson, U.S. Cir. J. held in U.S. v. Byrd\(^3\):

"Another factor to be considered is whether the government was faced with a real necessity which required it to offer the evidence in its main case. The defence had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake... . Nor did the Government suffer from lack of evidence of intent... . There was, therefore, no pressing necessity

\(1\) (1975) A.C. at P. 454

\(2\) Cross on Evidence, 5th ed. at P. 365

\(3\) 352 F. 2d 570 (2d Gr., 1965) at 575
that evidence of that prior occasion be offered on the Government's main case". And Sobeloff, Sen. U.S. Cir. J., adopting a passage from McCormick, stated in U.S. v. Baldvid:\(^1\): "Accordingly, some of the wiser opinions (especially recent ones) recognise that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other crimes evidence in the light of the issues and the other evidence available to the prosecution ...and the strength or weakness of the other crimes evidence in supporting the issue, and on the other hand, the degree to which the jury will probably be roused by the evidence to overmastering hostility".

A decision of the Supreme Court of Canada may exemplify the proposition. In Alward and Mooney v. R\(^2\), the accused were charged with the murder of an old man which was alleged to have occurred during the course of robbing him in his hotel room. Both accused made several statements to the police which are classifiable into two. (i) One set of statements consisted of admissions as to the committing of subsequent incidents of assault and robbery upon other persons in their hotel rooms at other hotels. (ii) The other set of statements by each accused were admissions of the beating and taking of money from the deceased in regard to the offence charged. According to Limerick J.A. speaking for the New Brunswick Court of Appeal, the two incidents of the day following the incident charged, having several points of similar conduct, were offered by the Crown in chief "...to negate the defence of lack of intent by reason of intoxication to reduce the offence from murder to manslaughter. The jury draw an

\(^1\) 465 4. 2d 1277 (4th Gr., 1972) at 1283
\(^2\) (1977) 35 C.C.C. (2d) 392 (S.C.C.)
inference that since the two accused committed two other robberies two days later using some of the same procedures and under similar circumstances that the consistent course of conduct on the part of the accused was inconsistent with the connection of counsel for the accused that they were so drunk they did not know what they were doing and did not have the capacity to form a specific intent to rob Mr Willet or cause him bodily harm for the purpose of facilitating the robbery”. There was no dispute as to the fact that the accused were in the hotel room of the deceased or that they had assaulted him and taken his money. The issue was whether the accused possessed the requisite state of mind for theft so that the actions of the accused constituted a ‘robbery’ which in turn would trigger the ‘felony-murder’ provisions of the criminal case. The trial judge, when charging the jury as to the evidentiary value of statements above by the crown, however, stated that they were inadmissible for three reasons completely different from the reason upon which the crown had based their admission. However, the New Brunswick Court of Appeal subsequently held that the prejudicial effect of the evidence so greatly outweighed its evidentiary value that the evidence of the other robberies should not have been admitted on those grounds, particularly as there were written confessions by each accused implicating himself in the commission of the offence charged. The New Brunswick Court of Appeal, however, was of the opinion that it did not have to decide whether the evidence of the two subsequent robbe-

(1) (1976) 32 C.C.C. (2d) 416 at 430-31 (N.B.C.A.)
(3) (1976) 32 C.C.C. (2d) 416 at 431
ries was admissible on any other ground, because, in light of the admissions of the accused as to their complicity in the offence charged, the provisions of Section 613(1)(b)(iii) of the Criminal Code\(^1\) was applied. Spence J., speaking for the Supreme Court of Canada\(^2\), stated that if the evidence of similar facts was inadmissible, he was firmly opposed to the use of the above section to cure the introduction of such evidence as the New Brunswick Court of Appeal had done. However, Spence J. held that the similar fact evidence was admissible nonetheless; not on any of the grounds or issues that have been canvassed in the courts below, but upon an entirely new ground, that of identity.

However, there was no consideration of whether identity was a real issue in the trial. It is submitted that in light of the confessions by the accused they were the ones who had beaten and taken money from the old man, identity was not a real issue in the case. Since relevancy depends upon a correlation between the proferred evidence and the fact in issue (the latter being absent here), there was no probative value in the similar fact evidence with respect to the issue of identity. Even assuming that identity was still a 'real' issue, it is further submitted that in light of the admissions of the accused that they had in fact committed the taking of money and the physical assault, the similar fact evidence in actuality would have little probative force in determining that it was more likely true that the accused were the perpetrators of the alleged robbery which resulted in the death of the deceased. That they were the perpetra-

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\(^1\) **Crim. Code, R.S.C. 1970, C. C-34, SS. 213 op. cit.**

\(^2\) **(1977) 35 C.C.C. 392 (S.C.C.)**
tors was determined by the admission into evidence of the statements of each accused as to the beating of the deceased in regard to the offence charged. Any further evidence in proof of such an issue would have been superfluous. In fact, in such a situation the prejudicial effect of this superfluous evidence would have outweighed any 'of more than trifling probative force' which the evidence may have had with respect to the issue of identity. Eliminating the evidence of the confessions from one's mind, and working through the logical inferences deduced from the similarities in modus operandi between the subsequent robberies and the alleged robbery in regard to the offence charged, the similar fact evidence taken alone might have been highly probative as to the establishment of identity. However, considered in the light of the whole of the case, and especially compared with the other evidence of identity (i.e. the statements of the accused), this evidence was only of trifling probative force with respect to the establishment of identity. Due to the sufficiency in probative value on the other 'identity' evidence, the jury would be more apt to use the similar fact evidence in the 'forbidden way'. It is submitted that the sufficiency of the other evidence caused a relative decrease in the degree of actual probative value of the similar fact evidence to the point that it was not 'at least of more than trifling probative force'. One may argue however that on the one hand it is stated that the presence of other incriminating evidence increases the probative value of the similar fact evidence,
thereby making it sufficiently relevant, while on the other hand and in apparent contradiction, it is stated that the presence of other incriminating evidence may decrease the probative value of the similar fact evidence. The probative value of the similar fact evidence, with its greater opportunity for error within the inferential process is really of slight or trifling probative value when compared with 'other' direct evidence. Surely an account of an eyewitness, if believed, is of more probative value than a piece of circumstantial similar fact evidence which, in order to be probative, has to be linked to the particular fact in issue through a number of inferential links within a chain of reasoning.

(iv) Sufficiency of Single Act

Usually the issue of sufficiency of single act arises under two circumstances: first to prove system and second to rebut the defence of accident or mistake.

As a general rule, a single similar act or transaction is admissible to prove system. However, some contrary opinions have been expressed; for example Cairns L.J. remarked in R v. Wilson1: "What we think is perfectly clear is that, in order that system may be relied on, there has to be something in the nature of special features about the two or more crimes which are relied upon as constituting system which can properly be said to constitute a link between them. There is some doubt as to whether two cases can make a system". In Director of Public Prosecutions v. Kilbourne2 Lord Reid stated: "So when we are considering whether there can be mutual corroboration

(1) (1973) 58 Cr. App. R. 169 at 175
(2) (1973) A.C. 729 at 751
between witnesses each of whom require corroboration, the question must or at least ought to be whether it would be too dangerous to allow this. It might often be dangerous if there were only two children. But here we are dealing with cases where there is a 'system', and I do not think that only two instances would be enough to establish a 'system'. Where several children, between whom there can have been no collaboration as concocting a story, all tell similar stories it appears to me that the conclusion that each is telling the truth is likely to be inescapable and the corroboration is very strong. So I can see no ground at all for the law refusing to recognise the obvious. Once there are enough children to show a 'system' I can see no ground for refusing that they can corroborate each other.

But the above views were not shared by the members of the House of Lords in Boardman v. Director of Public Prosecutions. While Lord Cross said that he was not prepared to draw a line of that sort he commented that, "where you have so few as two witnesses you need to proceed with real caution". While Boardman's case will be regarded as the law today, it is also true that, a fortiori, a series of such acts will be more likely to show system or a systematic course of conduct.

It is interesting to note that in other common law jurisdictions, similar divergent opinions have been expressed. In Canada for instance, in R v. Pollard, it was held that a single act was insufficient

(1) (1974) 3 All E.R. 887 at 911
(2) (1909) 15 C.C.C. 74 (Ont. C.A.)
but in Brunet v. King\(^1\), where the defence to a charge of using instruments with intent to procure a miscarriage was that the act had been performed with an innocent purpose, Anglin, J. said: "With Jelf J. (in \(R\ v.\ Bond\)) I am of the opinion that whatever objection there may be to evidence of a single other similar offence goes to its weight only and not to its admissibility"\(^2\).

The case of \(R\ v.\ Bond\) is a particularly interesting one in the sense that the judgements provide us with 'negativing accident or mistake', 'negativing innocence of intent' and 'proof of system'. The effect of the use of this last expression is specially interesting because the majority was divided on the question whether the evidence of G.S.T. would have been admissible had she not sworn that Bond told her that he had put 'dozens of girls right'. The predominant view was that, without this admission, the evidence with regard to a single previous use of instruments to abort should have been rejected because it did not prove system. We have seen that doubts continue to be expressed on the question whether two acts can have this effect.\(^3\) Semantics favour the predominant view, but the relevance of G.S.T.'s evidence, even when shorn of the embellishment concerning the other girls to the facts of the particular case is indisputable, although its weight may have been another matter.

Thus it is conceded that a single act may be sufficient to rebut the defence of accident or mistake and despite the conflicting reports, with regard to proof of system the preponderance of authority appears to favour admissibility of a single act. Logically it would

\(^1\) (1918) 30 C.C.C. 16 (S.C.C.)  
\(^2\) Ibid at 39  
\(^3\) See Infra.
seem that nature of the similar act, that is the improbability or rarity of the occurrence, is a factor to be considered, and if sufficiently so a single act may well be sufficient. Conversely, if the similar act is commonplace a single instance, or even a number of instances, may be insufficient.

It is noteworthy that usually it is only the acts of the person whose intent is in question that are relevant. But in order to rebut accident, even anonymous acts may be proved, if they show system, without showing connection with the defendant. The rationale seems to be that the evidence is admissible to prove the corpus delicti, i.e. that the offence had been committed even though it did not go to proving that it had been committed by the accused. For example in *R v. Bailey*¹, under an indictment for arson, where the prisoner was charged with wilfully setting fire to her master's house, the court held that two previous and abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them. Sir F. Pollock C.B. in his judgment said: "I think this is clearly evidence and may be used at all events for the purpose of showing that the present fire, which was the third on the same premises within so short a time, could not have been the result of accident. Surely if a man finds certain mysterious circumstances to arise day after day in his establishment, he is at liberty to refer to them, if only for the purpose of showing that they could not have had their origin in

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(1) (1847) 2 Cox C.C. 311
accident, and that a repetition of them could only lead to the conclusion that they resulted from malice and design. This course of evidence is not without precedent and authority moreover, for the trial of Donallan for the murder of Sir Theodosius Boughton, by administering to him some poison, evidence was given that a certain tree, which hung over a deep and dangerous brook near a spot where Sir Theodosius was accustomed to fish, had been sawn almost in two by some unknown person. This was proved to show that someone entertained a design against the life of Sir Theodosius, for he was accustomed to stand on that tree while engaged in fishing, and the natural presumption was that, whoever cut the tree, did so with the design of precipitating the deceased into the water and endangering his life. Those facts were given in evidence on the trial of Donallan for murdering Sir Theodosius afterwards, and were received, though quite unconnected with the prisoner, in order to show that someone entertained a felonious design on his life, and that the probability was that he had not come to a natural death, though his life had been actually terminated in a very different way. That act was not in any way connected with Donallan, but it was received in his evidence at his trial, after objection taken to it.

The defence counsel suggested that, according to his recollection of that case, there was some evidence to connect the prisoner with the circumstances alluded to, to which Sir F. Pollock retorted: "Oh, no. I am confident there was no such attempt to do so. If the prisoner had been shown to cut the tree, there could have been no
doubt whatsoever of the reception of proof of that fact on his trial for poisoning the deceased. 'I have no doubt that this is legitimate evidence to prove corpus delicti, and to negative the presumption of accident'.

A similar decision was given in R v. Roden. Here the prisoner was indicted for the murder of her child Clara Roden. The prisoner was a woman, crippled and very helpless from rheumatism. The deceased, an infant of nine days' old, died of suffocation while in bed with her and on her arm, during the night. Counsel for the prosecution tendered evidence to prove that the prisoner had had four other children who had also died in infancy at early ages. He cited R v. Cotton where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison; evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible. The defence counsel objected. He argued that the evidence tendered, although of no real legal value, would if given, greatly prejudice the case in the minds of the jury. That admitted in R v. Cotton, he argued, pointed directly to prior acts of poisoning, but here it is not proposed to prove that the four children died from other than natural causes. Lush J., in his judgement, said: 'The value of the evidence cannot affect its admissibility. The principle of R v. Cotton applies. The Lord Chief-Justice and I were consulted upon the point in

(1) (1874) 12 Cox C.C. 630
(2) 12 Cox C.C. 400
(3) Ibid
that case by my brother, Archibald before the trial, and having considered it, we were clearly of opinion that the evidence was admissible. I think the evidence now tendered may likewise be received".

A witness then stated that the prisoner had five (5) children before, one five months and a quarter, one four months, and the other about three months old at death. They did not die in bed, but on the prisoner's lap, except one, and that was born dead.

However, it appeared from the testimony of the surgeon that the deceased might have been accidentally killed by the mother overlaying it, or by the clothes covering it, his Lordship directed on acquittal.

(v) Director of Public Prosecutions v. Boardman

Clearly the most important case in recent years on the subject of similar fact evidence is the decision of the House of Lords in Director of Public Prosecutions v. Boardman. The case has been described by some commentators in glowing superlatives: "an intellectual breakthrough"; "by far the most important on similar fact evidence since Makin..."; "Boardman contains a deeper and revolutionary (if not wholly surprising) message"; "a watershed case in the development of the similar fact evidence rule"; "a case of fourth time lucky" and a case whose speeches "ought not to lead to a similar disappointment" as has resulted from prior decisions of the House of Lords "on the vexed question of the admissibility of similar fact evidence as part of the prosecution's case".

(1) (1975) A.C. 421; (1974) 3 All E.R. 887 (H.L.)
(6) Ibid at 62
Director of Public Prosecutions v. Boardman is of particular significance for a number of reasons. Prior to this case there was a considerable body of authority in support of the view that cases involving homosexuality stood in a special category, and that in each case similar fact evidence was always admissible. Their Lordships squarely rejected such a view. The decision of the House of Lords in Boardman will shortly be discussed in detail: suffice to say for now that the House of Lords held that no special rules are applicable in cases involving homosexuality. Lord Hailsham stated: "There is not a separate category of homosexual cases. The rules of logic and common sense must be the same for all trials where 'similar fact' or other analogous evidence is sought to be introduced." Lord Cross described the words of Lord Sumner in Thompson v. R, as sounding "nowadays like a voice from another world." As this aspect of the case has been considered earlier while discussing "The unwarranted extension of Thompson v. R", and as other various aspects of the case have already been discussed or at least mentioned, the present discussion will confine itself strictly to the aspects of the case concerning logical probative value.

First, the facts: Boardman, the accused, was convicted on one count of buggery with S, aged 16, and one count of buggery with H, aged 17. Both boys were pupils at a language school at which the accused was headmaster. Each of the boys gave evidence that the accused came to his dormitory late at night, and asked him to come with him.

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(1) (1975) A.C. 421 at 441, 443, 455, 458, 461; (1974) 3 All E.R. 887 at 895, 896-7, 907, 909-10, 912
(2) Ibid at 455-6; (1974) 3 All E.R. at 907
(3) (1918) A.C. 221
(4) (1975) A.C. 421 at 458; (1974) 3 All E.R. 887 at 909
for the purpose of homosexual intercourse. In each case the boy said the accused invited him to take the active role while he, the accused, assumed the passive. In each case the particular occasion to which the charge related was not the only incident affecting that boy. At the trial the judge directed the jury that the evidence of S on the count concerning him was admissible as corroborative evidence in relation to the count concerning H, and vice versa. The decision of the House of Lords two years earlier in Director of Public prosecutions v. Kilbourne\(^1\) had established that, where similar fact evidence is admissible, it may constitute corroboration. The accused appealed unsuccessfully first to the Court of Appeal and then to the House of Lords.

The House of Lords held that, because of the striking similarity in the accounts given by the boys S and H, the evidence of each boy was admissible in respect of the count relating to the other. Their Lordships did, however, have some reservations as to the sufficiency of the probative value of the evidence of the two boys. Lord Wilberforce stated: "I confess to some fear that the case, if regarded as an example, may be setting the standard of 'striking similarity' too low"\(^2\). Similarly, Lord Cross remarked: "I must say that I regard this as very much a border-line case"\(^3\).

The trial judge had taken the view that the fact that an adult had induced an adolescent boy to play the active, while he played the passive, part in the acts of buggery was itself a sufficiently unusual feature to justify the admission of the evidence. The majority

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\(^1\) (1973) 1 All E.R. 440; (1973) A.C. 729; (1973) 2 W.L.R. 254; 137 J.P. 193; 117 So. Jo. 144; 57 Cr. App. Rep. 381, H.L.
\(^2\) (1975) A.C. 421 at 445; (1974) 3 All E.R. 887 at 898
\(^3\) (1975) A.C. 421 at 461; (1974) 3 All E.R. 887 at 912
of their Lordships declined to accept this view. Lord Salmon stated: "Whenever these unnatural practices are indulged in, someone ex hypothesi is in the active and someone in the passive role. It may be that it is most unusual for the older man to be in the passive role. If it is so, then there is striking similarity between the two cases. For all I know, however, the one may be as usual as the other, in which case there is not the striking similarity between the case of S and that of H upon which the learned trial judge relied". The majority held, however, that when the other similarities in the stories of the two boys, in particular the accused's nocturnal visits to the dormitories, was added to the peculiar nature of the accused's homosexuality, the evidence was sufficiently probative to be admissible.

Boardman's case firmly establishes that the foundation of admissibility is not a catchword-category approach, but rather a question of whether the preferred evidence exhibits "a strong degree of probative force", in the words of Lord Wilberforce, or in the words of Lord Cross, "whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or was pointing so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in the face of it", or whether there is present "an underlying unity that probative force could fairly be yielded", in the words of Lord Morris, and further-

(2) (1975) A.C. 421 at 463; (1974) 3 All E.R. 887 at 914
(3) Lord Morris; Lord Hailsham; Lord Cross and Lord Salmon see Infra.
(4) D.P. v. Boardman (1974) 3 All E.R. 887 at 897; (5) Ibid at 909;
(6) Ibid at 895
more, the case firmly establishes that the admission of similar fact evidence is a two-step process of first determining the degree of probative value, and second, balancing it against counterbalancing circumstances.

Turcott claims that Director of Public Prosecutions v. Boardman has significantly transformed the Makin rule by shifting the emphasis from kind of relevance to degree of relevance. Hoffman, who was one of the first to identify that the error of the Makin rule was its emphasis on the former, appears to say that Director of Public Prosecutions v. Boardman is only a first step. However, while as Hoffman said, the reasoning of their Lordships in Director of Public Prosecutions v. Boardman "contains the seeds of (the Makin Rules) downfall", it is submitted that such downfall has not, as yet, completely blossomed.

It is however, noteworthy that there is a marked difference in the pattern of their Lordships' judgements. For instance only the speech of Lord Cross explicitly appears to accept the logic of the debunking of the differentiation of reasoning approach. Neither Lord Cross nor Lord Wilberforce relied upon Makin v. Attorney General for New South Wales, but appeared to base their reasoning upon relevancy theory. On the other hand, Lord Hailsham stated that the matter could not "be better stated than it was by Lord Herschell L.C. in Makin". Lord Morris stated that the passage of Lord Herschell has "always been accepted as expressing cardinal principles", and Lord Salmon stated that these principles were stated "with a crystal

(1) See D.P.P. v. Boardman (1974) 3 All E.R. 887 at 896, per Lord Wilberforce
(2) Turcott, supra at 63; and see also Sklar, supra at 78-9
(3) Hoffmann, supra at 195, 200
(4) Ibid at 197
(6) Ibid at 892
clarity". With respect to this dictum, Hoffman has retorted: "(I)t is difficult to stifle some awkward questions. If the Makin rule is as clear as all that, why did it four times give rise to questions of general public importance fit for consideration by the House of Lords, to say nothing of a shoal of reported cases in the Court of Appeal". In a further comment, Hoffman has quoted a passage from Lord Diplock, where in a different context His Lordship stated: "The law is nearly always most obscure in those fields in which judges say: 'The principle is plain but the difficulty lies in its application to particular facts' ".

It is also worthy of mention that Lord Hailsham in his judgement embarked upon a detailed analysis of logical probativeness, prejudice and weight, and acknowledged that similar fact evidence when inadmissible, is such because either, it is 'irrelevant' (i.e. not logically probative), or if it does possess probative value, this is outweighed by its prejudicial effect. His Lordship acknowledged that terms such as "'underlying unity' '...system', '...nexus', 'unity of intent, project, campaign or adventure' '...part of the same criminal conduct', 'striking resemblance' ...are highly analogical not to say metaphorical expressions and should not be applied pedantically", and stated that: "Attempts to codify the rules of common sense are to be resisted". In his judgement, Lord Wilberforce explicitly began with a two-step approach to admissibility, first, determining the degree of probative value and then

(1) D.P.P. v. Boardman (1974) 3 All E.R. 887 at 912
(2) Hoffmann, "Similar Facts After Boardman" (1975), 91 L.Q.R. 193 at 196
(3) Ilkiv v. Samuels (1963) 1 W.L.R. 991 at 1004, as cited in Hoffmann, infra at 196
(4) (1974) 3 All E.R. 887 at 903
(5) Ibid at 904, 906
(6) Ibid at 906
balancing this against the force of prejudice. His Lordship made no reference to *Makin v. Attorney-General for New South Wales*, and by stating that, "questions of this kind arise in a number of different contexts and have, correspondingly to be resolved in different ways," gave indication that the above two-step approach is universal, and crosses the boundaries of the differentiation approach. However, after advancing such a profound statement as if axiomatic, His Lordship then unfortunately, confined his discussion "to the present set of facts, and to situations of a similar character." The requirement for "a strong degree of probative force" to secure admissibility is discussed solely in relation to the reasoning of "the improbability of similar lies." "The improbability of similar lies" is a term coined for the process that can be used where there are multiple similar counts, not sharing entirely the same complainants, or where there is a single count but with multiple witnesses, each testifying to the commission of other alleged similar acts in proof of the offence charged. The process is not really applicable where there are multiple counts sharing the same complainant, as there may be nothing improbable about a single complainant lying similarly as to all occasions. The reasons for judgement of Lord Cross are by far the most closely akin to the principles of relevancy theory and counterbalancing factors as constituting the sole criteria of admissibility. Exclusion of similar fact evidence is not an absolute, but a 'general rule'. "(T)he reason for this general rule is not that the law regards such evidence as inherently irrelevant.

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(1) (1974) 3 All E.R. 887 at 891
(2) Ibid at 896
(4) Ibid at 897
(5) Ibid at 897-98
but because it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was - so that, as it is put, its prejudicial effect would outweigh its probative value. Circumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense... The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it. In the end - although the admissibility of such evidence is a question of law not of discretion - the question as I see it must be one of degree".

Lord Cross also explicitly acknowledged the propriety of propensity reasoning, when stating that the evidence in R v. Straffen was probative because "it was simply evidence to show that Straffen was a man likely to commit a murder of that particular kind".

Boardman's case has not set the law concerning similar fact evidence completely upon a rational basis. Rather it is the first step in a direction which Lord Cross, and possibly also Lord Wilberforce, intend the law to take. R v. Ball and R v. Horwood must remain the landmark cases overtly recognising the propriety of propensity reasoning. R v. Ball has already been extensively discussed. In R v. Horwood, the evidence which showed no more than that the accused

(2) (1952) 2 Q.B. 911 (C.C.A.)
(3) D.P.P. v. Boardman (1974) 3 All E.R. 887 at 909
(4) (1911) A.C. 47 (H.L.)
(5) (1970) Q.B. 133 (C.C.A.)
(6) See ante.
was a homosexual could only have been probative, in the factual context of that case, via propensity. Due to the lack of suspicious or incriminating 'other evidence', the proffered evidence was not admitted. Horwood was charged with attempted gross indecency with a boy. The boy's contention was that Horwood had taken him for a ride in his car to a wood where they got out and where the attempt took place before he could make off. Horwood's answer was that he went into the wood alone in order to urinate, returning to find that the boy had disappeared. When interviewing him a police officer asked whether he was a homosexual and received the reply that he had been but was cured. It was held that the judge ought not to have admitted evidence of this question and answer and the conviction was quashed. However, the court did acknowledge the propriety of propensity reasoning, if it created sufficient probative value: "The authorities show that the correct approach for the court when considering an objection to evidence of this kind is to look first and decide whether the evidence, if admitted, tends to show that the accused has been guilty of criminal acts other than the offence charged and/or that the accused is a person with the propensity for committing offences of that kind and/or that the accused is a person of bad character. If the evidence is of this kind, then prima facie it must be excluded unless it is also relevant to an issue before the jury". It is thought that the word 'relevant' should be interpreted to mean 'sufficiently probative'. In Canada, although some courts have used degree of probative value even if derived via propensity reasoning.

(1) (1970) Q.B. 133
as the basis of admissibility\(^1\), rarely has there been an overt acknowledgment of the propriety of such an approach. However, in \textit{R v. F}\(^2\) the evidence of alleged assaults upon other boys was held admissible on a charge of contributing to the delinquency of a juvenile by means of allegedly committing an indecent assault upon the juvenile complainant. It was held that this evidence was 'clearly relevant', notwithstanding that it 'was realistically relevant only... to disposition' - that of 'a homosexual and paedophilic propensity\(^3\).  

(vi) Judicial Interpretation of Director of Public Prosecutions v. Boardman

"The importance of the speeches in the House of Lords lies in their insistence that the admissibility of similar fact evidence depends on its possession of a high degree of relevance. In the particular context its strength is derived from a 'striking similarity' between the facts alleged by the different witnesses\(^4\). It is no surprise then that despite the admonition in \textit{Director of Public Prosecutions v. Boardman} to do away with the catchword-category mentality of determining admissibility, courts have failed to understand the message of this case, and have continued to apply "highly analogical not to say metaphorical expressions... pedantically"\(^5\). Courts have failed to realise that "(t)he rules of logic and common sense are not susceptible of exact codification when applied to the actual facts of life in its infinite variety"\(^6\). A new catchword test of admissibility has been formed - that of 'striking similarity'.


\(^2\) (1969) 2 C.C.C. 4 (Ont. H.C.)

\(^3\) \textit{Ibid} at P. 7 (Ont. H.C.)

\(^4\) Cross on Evidence, 5th ed. at P. 375

\(^5\) \textit{D.P.P. v. Boardman} (1974) 3 All E.R. 887 at 905 (H.L.) per Lord Hailsham

\(^6\) \textit{Ibid} at 904
Lord Morris stated that the evidence concerning one set of facts could be considered upon a charge concerning another set of facts "if between the two there is such a close or striking similarity or such an underlying unity that probative force could fairly be yielded". Lord Wilberforce described the test as follows: "The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. The probative force is derived, if at all, from the circumstances that the facts testified to by several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence". For Lord Cross the problem was entirely a matter of degree: "In the end - although the admissibility of such evidence is a question of law, not of discretion - the question as I see it must be one of degree". With respect to 'coincidence', Lord Cross said: "The likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar fact allegation and the more striking are the similarities in the various stories". Although it might appear at first sight that Lord Salmon treated the matter somewhat differently, his ultimate insistence on striking similarity and the implausibility of a coincidence leads to the conclusion that his views were the same as those of Lords Wilberforce and Cross. He stated that: "The test must be: is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground

(1) D.P.P. v. Boardman (1974) 3 All E.R. 887 at 895
(2) (1974) 3 All E.R. 887 at 894
(3) Ibid at 910
other than his bad character and disposition to commit the sort of
crime with which he is charged?...It has, however, never been doubted
that if the crime charged is committed in a uniquely or strikingly
similar manner to other crimes committed by the accused the manner in
which the other crimes were committed may be evidence upon which a
jury could reasonably conclude that the accused was guilty of the
crime charged. The similarity would have to be so unique or striking
that common sense makes it inexplicable on the basis of coinciden-
ce"^1. And Lord Hailsham stated: "The 'striking resemblances' or
'unusual features', or whatever phrase is considered appropriate, to
ignore which would affront common sense, may be either in the objec-
tive facts...or they may constitute a striking similarity in the
account by witnesses of disputed transactions"^2.

Clearly, the references to 'striking similarity' are in reference
to the 'objective improbability' reasoning process; i.e. the facts
deposited by each witness bear inter se such an objective improba-
bility of innocent explanation. One must bear this in mind when
reading the enunciated tests in **Director of Public Prosecutions v.
Boardman** and take care not to accept them as being of universal
application. It is also important to note that other reasoning
processes, depending on the factual context of the case and issues,
may not require 'striking similarity', nor, in fact, any similarity
at all, except possibly in the nature of the acts. For example, Lord
Salmon posed an example of where, in order to prove the identity of a

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(1) (1974) 3 All E.R. 887 at 913
(2) Ibid at 906
burglar, it would be necessary that the evidence of other break-ins committed by the accused be of 'striking similarity' (e.g. an unusual method of entry, leaving a distinctive mark, etc.) in order for the evidence to have sufficient probative value. However, Sklar poses a situation where no similarity, let alone any striking similarity is needed. For instance, "were the accused to be caught red-handed inside the house and claimed he had entered the house mistakenly thinking it was his own or looking for a place to sleep or while in a state of automatism, evidence of his burglarising history, as a matter of 'experience and common sense' and without regard to any particular features or similarity would, in ordinary circumstances, be admissible to refute such stories." With respect to issues such as intent or motive, etc, the sustenance of the probative value is usually drawn from inferences from the nature of the other acts, not similarity. For example in R v. Barbour, Duff C.J.C. spoke of "the character of the previous assaults" rather than the similarities. In that case, the accused was charged with the murder of his girlfriend. The prosecution's case was that the accused had killed the woman in a fit of jealous passion aroused by her conduct with another man. Evidence of several previous quarrels and assaults by the accused upon the deceased was admitted. The latest in point of time was about a week before the fatal incident. Following each of these quarrels the accused and the deceased had resumed amicable relations. The accused was convicted and appealed successfully to the New Brunswick Supreme Court. An appeal by the prosecution to the Supreme

(1) (1974) 3 All E.R. 887 at 913
(2) Sklar, "Similar Fact Evidence - Catchword and Cartwheels" (1977) 23 McGill L.J.P. 60 at P. 80
(3) (1938) S.C.R. 465 at 470
Court of Canada was dismissed by a majority of three to two. The view of the majority was that the evidence failed to show anything in the nature of consistent jealousy of, or antipathy towards, the victim on the part of the accused. The evidence was not therefore sufficiently relevant to be admissible. Sir Lyman P. Duff, C.J.C. stated: "If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. But I think, with the greatest possible respect, it is rather important that the courts should not slip into a habit of admitting evidence which reasonably viewed cannot tend to prove motive or to explain the acts charged merely because it discloses some incident in the history of the relations of the parties".

And in R v. Drysdale, there was no 'striking similarity' in the acts of misconduct, except that all were assaults and all were against one girl. In that case the accused was charged with the murder of the three year old daughter of his defacto wife. Evidence was given by the child's mother and a brother that the accused beat the child into unconsciousness; the accused also inflicted injuries on the girl of which she quickly died. Evidence was admitted that the accused had assaulted the little girl on previous occasions. And of this evidence, Freedman J.A. said: "Dealing with the evidence of earlier assaults upon (the deceased) child, I would admit that evidence on the ground of relevance, particularly on the issue of

(1) (1938) S.C.R. 465 at 469; (1938) 71 C.C.C. 1 at 19-20
(2) (1969) 2 C.C. 141 (Man. C.A.)
intent. That evidence could provide a nexus or link with the alleged murder and could show the existence of a continuing animus or malice on the part of the accused towards the child\(^1\).

Another example, to prove animus (and thereby infer mens rea) on a charge of murder caused by poisoning, surely evidence of prior repetitive beatings of the victim by the accused would be probative of that issue. Sufficiency in this instance would not depend upon similarity, but rather upon the continuity and proximity of such acts in time, and a specificity of the victim.

We do know that depending on the circumstances, to rebut a defence of innocent intent in the case of a charge of abortion, all that is required is that the accused should have performed previous abortions with drugs or instruments\(^2\). The same, it is submitted, would be the case to prove knowledge that instruments could be used to procure an abortion\(^3\), or that other instruments could be used for the purposes of counterfeiting. However, with respect to proving identity, something more than sameness in the nature of the offences may be required\(^4\); possibly something such as striking similarity. However, this is not an absolute. Striking similarity was not needed in

\[\text{Thompson v. R}\] where similar fact evidence was admissible to prove identity. Even where 'striking similarity' is useful, it is not the similarity per se, or the degree of such per se, but rather how meaningful or suggestive, in probative terms, is the similarity. 'Striking similarity' cannot, in itself, justify admissibility. If so, it would be nothing more than a new catchword-category justifying

\[\text{\(1\) (1969) 2 C.C. 145-6 (Man. C.A.)}\]
\[\text{\(2\) Cross on Evidence, 5th ed. at P. 386}\]
\[\text{\(3\) E.g. R v. Bond (1906) 2 K.B. 389 (C.C.A.), per Kennedy J.; and Cf Bray J. at 418}\]
\[\text{\(4\) Cross on Evidence, 5th ed. at P. 388; R v. Blackledge (1965) L.R. 397}\]
\[\text{\(5\) (1918) A.C. 221 (H.L.)}\]
admissibility regardless of the probative sufficiency of the evidence. It is noteworthy in any case that there are some instances, the evidence need not have any similarity whatsoever (even in the sense of a common generic offence quality). For example, to prove that an accused possessed the opportunity to have committed a murder, evidence that at a time proximate but not concurrent to the time of the murder, the accused was seen committing an offence of breaking and entering at other premises in the neighbourhood would be probative as rebutting any assertion that the accused was in another part of the country at the time of the murder. In fact, the accused at times need not even be directly involved in the offence. For example in Blake v. Albion Life Assurance Society evidence that the agent of the principal (accused) had previously committed acts of fraud which knowingly resulted in benefit to the accused was admissible on a later charge against him with respect to another occasion because, in light of the prior incident, it was inexplicable that he was ignorant of the fraudulent course of conduct of his agent with respect to this incident.

However, as much as the above cases show that 'striking similarity' is not a pre-requisite to admissibility, some courts, especially since Boardman, have treated it pedantically as a new passport to admissibility. For example, in R v. Johannsen, on a trial concerning five counts of buggery and five counts of gross indecency allegedly committed against five different boys (a count of buggery

(1) E.g. R v. Dursharm (1955) 113 C.C. l (Ont. C.A.); R v. O'Meally (1953) V.L.R. 30 (Aus)
(2) (1878) 4 C.P.D. 94; see also R v. Benwell (1972)9 C.C.C. (2d)158 (Ont. C.A.)
(3) (1977) 65 Cr. App. R. 101
and gross indecency for each boy), counsel for the accused applied to sever the counts on the ground "that there were no striking similarities between each of the coupled counts so as to make the evidence on one admissible on the other". Prosecuting counsel resisted the application on the basis "that the evidence or the disposition did reveal striking similarities between each of the coupled counts".

The application was dismissed and on appeal, one of the grounds was that "there were no striking similarities between each of the coupled counts". The Court of Criminal Appeal held that "there were striking similarities about what happened to each of the boys", and held that the evidence of each count was admissible upon the others.

There have been other cases where the emphasis appeared to have shifted to some extent, from determining degree of probative value to determining whether the evidence could be categorised as 'strikingly similar'. In the recent Canadian case of R v. Simpson, the peculiar nature of the propensity exhibited by the accused rendered similar fact evidence admissible. The accused was charged on two counts of attempted murder. The victim in both cases was a woman. Both cases involved a similar form of attack and both had a sexual connotation. The first victim was attacked after leaving a tavern frequented by the accused. The assailant seized her around the neck from behind, and stabbed her. He then attempted to rape her. The victim testified that her attacker had a body odour. The victim identified the accused as her attacker. The second victim met the accused at the same tavern a month later. They then went to the accused's apar-

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(1) (1977) 65 Cr. App. R. 102
(2) Ibid at 103
(3) Ibid
(4) Ibid
tment; as she was leaving the building she was seized around the neck from behind and stabbed. Her attacker said, "You will never talk". The victim testified that it was the accused who stabbed her as there was no one else present in the vicinity. The trial judge permitted the two counts to be tried together, and declined to direct the jury to disregard the evidence on one count in considering the other. The accused was convicted and appealed to the Ontario Court of Appeal. The court held that the peculiar form of murderous propensity exhibited by the accused, when taken together with the similarities in the circumstances surrounding the two attacks and the fact that both victims testified to their attackers having a body odour, rendered the evidence in each count of sufficient probative value in respect of the other court to justify its admissibility. However, the accused's appeal was allowed and a new trial ordered on other grounds.

And in R v. Tricoglus¹, there was no doubt about the striking similarity between two alleged rapes (forcing the victim to urinate), but the conviction was quashed because of the unsatisfactory nature of the identification evidence. The detail facts are as follows. The defendant was convicted of raping A. A gave evidence that she had accepted a lift from a bearded man driving a Mini. He had driven her to a cul-de-sac and there raped her. The manner of the rape was peculiar, the rapist having odd sexual tastes. Evidence was admitted from G that, a few days before the rape of A, she (G) had been raped in the same cul-de-sac as A by a bearded man from whom she had

(1) (1976) 65 Cr. App. R. 16 (C.A.)
accepted a lift. The method of raping her was virtually the same as in A's case and her ravisher had the same peculiar sexual tastes. G identified the defendant's car when shown it, after some uncertainty about its make. Evidence was also admitted from M and C that in the same vicinity they had been offered, but had refused, lifts from a bearded man driving a Mini. C took the number of the car, which corresponded, except for one figure, with that of the defendant's car, a Mini. Lawton L.J., giving the judgement, said: "In our judgment the evidence of G as to the manner in which she was raped did bear a uniquely and strikingly similar resemblance to the manner in which A was raped. Therefore, prima facie, as a matter of law, G's evidence as to how she was raped was admissible. That was the view which Nield J. took and, in our judgement, rightly took. On the other hand the evidence of M and C as to the unpleasant experience that they had had of being accosted by a man who, to use a colloquial expression, was 'kerb crawling', really has no bearing at all upon the manner in which A was raped."

And in R v. Novac, an application to sever an indictment containing various counts against the appellant alleging buggery and gross indecency with boys said to have been accosted by the appellant in amusement arcades was rejected. The appellant was said to have offered them money or a meal and then taken them to his home or the beach to commit the offences. Bridge L.J., reading the judgement of the court, made the following plea for realism in the matter of striking similarity: "We cannot think that two or more alleged offen-

(1) (1976) 65 Cr. App. R. 107 (C.A.)
ces of buggery or attempted buggery committed in bed at the residence of the alleged offender with boys to whom he had offered shelter can be said to have been committed in a uniquely or strikingly similar manner. He continued "If a man is going to commit buggery with a boy he picks up, it must surely be a commonplace feature of such an encounter that he will take the boy home with him and commit the offence in bed. The fact that the boys may in each case have been picked up by Raywood in the first instance at amusement arcades may be a feature more nearly approximating to a 'unique or striking similarity' within the ambit of Lord Salmon's principle. It is not, however, a similarity in the commission of the crime. It is a similarity in the surrounding circumstance and is not, in our judgement, proximate to the commission of the crime itself to lead to the conclusion that the repetition of this feature would make the boys' stories inexplicable on the basis of coincidence". The appeal in this case was allowed.

The same point made by Bridge L.J. in R v. Novack was emphasised in R v. Inder, where the conviction was quashed partly on the ground that the alleged similarities consisted in nothing more than the normal stock-in-trade of seducers of small boys (the provision of various forms of light entertainment). In R v. Clarke, the accused was convicted of attempted buggery and indecent assault on his stepson aged sixteen and of indecent assault on his stepdaughter aged eleven. The convictions were affirmed because there was evidence of

(1) (1977) 65 Cr. App. R. 107
admissions by the accused, but it was said that the charges should not have been joined because children do not form a special class for the purpose of the admissibility of evidence on sexual charges, and the fact that the offences were committed in or near the children's home, by their stepfather, did not constitute striking similarity within the Boardman principle.

In *R v. Mansfield*¹, the appellant was charged, inter alia, with three counts of arson. Convictions for starting the three fires were confirmed because, in the opinion of the Court of Appeal, there were sufficient similarities in the manner in which the fires were started and the accused's subsequent behaviour to warrant the admissibility of evidence concerning each on the counts relating to the others. The fires were started within a period of three weeks, the first in an hotel where the appellant lived, the second and the third in an hotel where he worked as a kitchen porter. In each case, the method of starting the fire was distinctive; in each the appellant had an opportunity to start the fire; in each case, he was seen nearby acting suspiciously, and lied to the police when questioned; and in the case of the third fire, a waste-paper bin from the appellant's room was found near the site of the fire. At the trial the appellant submitted that there should be separate trials in respect of each fire because the alleged similarities between them were not sufficiently striking to justify admission of the evidence relating to all of them in respect of each one of them. The judge refused to sever the indictment and the appellant was convicted on

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(1) (1978) 1 All E.R. 134; (1977) 1 W.L.R. 1102
all three counts. In the course of the argument Lawton L.J. did suggest that another way of putting the test with regard to admissibility is to ask whether the evidence adduced can be explained away as a coincidence for the question of admitting it only has to be considered if the answer is in the negative. "The unacceptability of the hypothesis of a coincidence is, of course, the basis of admissibility of most similar fact evidence. The only obvious exceptions are cases in which other misconduct is proved as an incident in the transaction under investigation (the stealing of a get-away car for instance), and cases in which it is sought to prove by this means that the accused is lying when he says that he did not know that the conduct under investigation would produce a particular result."1. Creswell J. observed in R v. Cooper2 as follows: "Suppose a charge against a man that he had attempted to procure abortion: the same medicine might be administered with intent or without it. If it could be proved that he had often given that medicine before, and that he knew that abortion had always followed, surely that would be evidence against him".

However, it is perhaps fair to say that this labelling and catch-word-category process - 'striking similarity' - appears to have been stopped to some degree by certain decisions of the Court of Criminal Appeal." For example in R v. Rance and Herron3, Rance, the Managing Director of a company, was charged with corruptly procuring a payment to Herron, and Herron was charged with receiving it. The payment was

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(1) Cross on Evidence, 5th ed. at P. 377
(2) (1849) 3 Cox C.C. 547 at 549
made on a certificate signed by Rance naming Herron as a sub-contractor which he was not. Evidence was held to have been rightly received of two other corrupt payments made on certificates signed by Rance containing false statements concerning work done by the recipient of the money. Though there certainly does seem to have been a striking similarity of technique in this case, Lord Widgery C.J. stated in his judgement that: "It seems to us that one must be careful not to attach too much importance to Lord Salmon's vivid phrase 'uniquely or strikingly similar'. The gist of what is being said both by Lord Cross and Lord Salmon is that evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged. That, we think, is the test which we have to apply on the question on the correctness or otherwise of the admission of the similar fact evidence in the case". The phrase, "if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged" is, it is submitted in accord with the principles of admission/exclusion discussed already, that evidence of similar facts may be admissible if sufficiently probative in a manner above and beyond simply showing mere dispositional capacity without reference or nexus to the specifics of the offence charged. The case of R v. Rance and Herron was approved in some recent cases in Canada. In R v. Scarrott, where the accused was charged on thirteen (13) counts of offences, involving eight young boys and covering a period of four

(3) (1978) 1 All E.R. 672 (C.C.A.); (1978) Q.B. 1016; (1977) 3 W.L.R. 629
and a half years, the trial judge refused counsel's application for separate trials in respect of each boy. During the course of the trial the judge ruled that the evidence given by each boy relating to the count or counts concerning him was admissible on the other counts. The accused was convicted and appealed unsuccessfully to the Court of Appeal. A most salutary warning against an over-ready acceptance of striking similarity as the criterion of admissibility without regard to the question of the nexus between the misconduct on other occasions and that charged was given by Scarman L.J. Delivering the judgement of the court, his Lordship stated: "Positive probative value is what the law requires, if similar fact evidence is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link - an underlying link as it has been called - in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so commonplace that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration".

The Court carefully reviewed the evidence, and held that the similarities in the accounts given of the various incidents by the boys were such as to render the evidence of sufficient probative value for it to be admissible.

There have been some cases on the matter decided since Boardman in

(1) (1978) Q.B. 1016 at 1022; (1977) 3 W.L.R. 629 at 634
New Zealand. The first was in *R v. Geiringer*¹; in it the accused, a doctor, had been charged with rape and the prosecution sought to adduce evidence from four other women to the effect that the accused had assaulted them sexually in one form or another, although only in one case did actual sexual intercourse take place, when they went to visit him for the purpose of gynaecological examination. In the event, Beattie J. held that only the evidence of the witness who claimed that she also had been raped should be admitted. The other evidence, where the women claimed they had been interfered with in a lesser way, should not be admitted because, first, its prejudicial effect would outweigh its probative value, second, because it did not bear a striking enough similarity or underlying unity with the complainant's evidence. Beattie J. was of this opinion because of the evidence given by the three women to the effect that they were uncertain when the medical examination had ceased and the assault had begun. Beattie J. paid considerable attention to Boardman and, particularly, to passages from the judgement of Lords Wilberforce, Cross and Hailsham which emphasised the high probative nature of such evidence if it is to be admitted²; indeed the phrase 'cogent and compelling', earlier quoted and used by Beattie J. at the conclusion of his judgement, is a clear example of the approach taken in Geiringer. Thus, *R v. Geiringer*³ represents a straightforward adoption of the principles laid down in Boardman, without any attempt to open up the doctrine still further.

In another case, *R v. Katavitch*⁴, the accused, the manager of a

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¹ (1976) 2 NZLR 436; see also *R v. Te One* (1976) 2 NZLR 510
² Ibid
³ (1976) 2 NZLR 436
⁴ (1977) 1 NZLR 398
sauna bath, was charged with being the manager of premises used as a place of resort for the purposes of indecent acts. Direct evidence was given of homosexual acts taking place on third and fourth June 1976, but there was no evidence of the accused having been in that part of the premises at the time the acts took place. The Crown then sought to adduce evidence of homosexual acts having taken place between November 1975 and March 1976. The purpose of this evidence was directed to the issues of whether the accused knew that the premises were so used. Henry J. held that the evidence was admissible.

However, R v. Katavitch does not mask any extension of the Boardman principles. Henry J. was at great pains to point out, that the evidence was admitted to rebut three defences raised by the accused, namely: lack of knowledge, that the business was genuine and that the proven homosexual acts were coincidental. This exception to the general rule prohibiting the admission of similar fact evidence goes back, in fact, to Makin's case2. Thus, of the two reported New Zealand cases above, in which reference was made to Boardman, the first - R v. Geiringer - provides unequivocal support for Boardman, and the other - R v. Katavitch - really says nothing new.

As already seen in the earlier discussed case of R v. Scarrott3, where the accused was alleged to have committed an assortment of offences of indecency against eight boys, counsel for the accused argued that the similar fact evidence "did not possess that quality

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(1) (1977) 1 NZLR 403
(2) (1894) A.C. 57
(3) (1978) 1 All E.R. 672 (C.C.A.); (1978) Q.B. 1016; (1977) 3 W.L.R. 629
of striking similarity which the House of Lords has said is necessary
in order to make it admissible". The Court of Criminal Appeal
accepted "that test of admissibility of similar fact evidence may be
described as one of striking similarities", and that this appeared
"to be a description acceptable to the House of Lords of the test of
admissibility, whatever the purpose of adducing the evidence, whe-
ther, for instance, it be to prove intention, to rebut a possible
defence of accident, to support an identification to corroborate or
to rebut the possibility of innocent association". Clearly this is
contrary to those cases where no similarity was needed for the evi-
dence to be admissible. Furthermore, the court accepted the
formulation of the test as put forth by Lord Salmon in Director of
Public Prosecutions v. Boardman as being the "general principle" of
admissibility. However, the court did add some restrictive comment
to the formulation of Lord Salmon, Carman L.J. stating; "I now come
to the one comment which this court would make on the statement of
general principle made by Lord Salmon. Hallowed though by now the
phrase 'strikingly similar' is (it was used by Lord Godard C.J. in R
v. Sims in 1946 and has now received the accolade of use in the House
of Lords in Boardman v. Director of Public Prosecutions), it is not
more than a label. Like all labels it can mislead; it is a possible
passport to error. It is, we repeat, only a label and it is not to
be confused with the substance of the law which it labels". After
quoting the passage of Lord Widgery C.J. in R v. Rance and Herron,
the court stated that: "We therefore have to consider in the appeal

(1) (1978) 1 All E.R. 675
(2) (1978) 1 All E.R. 672 at 675 (C.C.A.)
(3) Ibid
(4) Ibid at 676
whether the evidence sought to be adduced by the Crown does reveal similarities which may be described as striking, or, as we prefer to put it, which may be described as giving to the evidence positive probative value. We must bear in mind that our decision must proceed not on an attempt to categorise the law under a vivid or unforgettable label, but on the basis of seeking out the substance of the law and seeing whether, the law being in substance what it is, the evidence sought to be adduced possesses the necessary degree of probative value. At the end of the day it appears to us that what has to be determined is whether the similar fact evidence sought to be adduced possesses, logically considered, a probative value sufficiently positive to assist the court to determine whether or not the offence charged against the accused was committed by him".

It is perhaps true to say that all the reported cases since Boardman, turn on the admissibility of similar fact evidence to confirm the testimony of a Crown witness on account of the striking similarity borne by the evidence to the facts to which he deposes. However, it must be said that allowance should also be made for the reasoning processes supporting the reception of this kind of evidence in the earlier cases. The argument based on the accused's disposition to commit crimes in a particular way\(^2\), or sexual offences with a particular person\(^3\), or the peculiar relevance of the accused's general disposition to the rebuttal of mistaken identification\(^4\), or on a variety of the kinds of reasoning which, though not relying on the

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(1) (1978) 1 All E.R. 672 at 677 (C.C.A.)
(2) R v. Straffen (1952) 2 Q.B. 911; (1952) 2 All E.R. 657
(3) R v. Ball (1911) A.C. 47
(4) Thompson v. R (1918) A.C. 221
accused's disposition, are not always based on striking similarity, must all be borne in mind. It does not seem to matter much whether the basic rules are formulated purely in terms of degrees of relevance, or in terms of the specific probative value of the similar facts. Although Boardman's case opened up the law relating to the admissibility of similar fact evidence from the conditions laid down in Makin, it is all very clear now that the cases after Boardman, have not been a particularly happy collection. It is submitted that they have drawn the principle far too widely and have thereby paved the way for the reception of evidence under a new catchword-category — ('striking similarity'). Anyhow all said and done, it is perhaps best to say that only the future will reveal the extent to which courts will desist in treating 'striking similarity' as a new catchword label.
THE RELEVANCE OF DEFENCE: WHEN ISSUES ARISE

It is clear from earlier discussions that in spite of persistent warnings and sounds of caution, the Courts have consistently attempted to analyse cases in such a manner as to be able to classify and force them into recognised categories of admissibility. Thus in effect, a recognised category becomes a passport for admissibility if the facts of the case can be fitted within it. Various artificial rules have developed depending on the type or form of classified defence and it appears that, the dictum of Lord Herschell, "or to rebut a defence which would otherwise be open to the accused"¹ has contributed much to this confusion and obfuscation of the true principles involved. One would think that the true question is one of analysing the issues and the degree of probative value. It is not a determination of whether a specific 'defence' has arisen in the course of the case or has been specifically raised by the accused.

As Cowen and Carter stated: "The facts which it is open for the accused to deny by way of defence are co-extensive with the facts which the prosecution is obliged to prove as part of its case. (Footnote: Or, exceptionally, for example on an issue of insanity, the facts which the accused is obliged to assert by way of defence are co-extensive with those it is open to the prosecution to deny). If evidence is relevant to the prosecution's case, it is accordingly also relevant to a possible defence. If it is not relevant to the prosecution's case, it is excluded on the general ground that all irrelevant evidence is excluded"². Judicial recognition of this fact

¹ Makin v. Att.-Gen. for New South Wales (1894) A.C. 57 at 65 (P.C.)
² Cowen and Carter, Essays on the Law of Evidence (1956) at P. 117
of co-extensiveness is evidenced in the dicta of Lord Hewart C.J. in R v. Armstrong¹ that "any evidence that tended to prove designs must of necessity tend to negative accident and suicide", and of Bruce J. in R v. Ollis² that it is "quite true that in many cases to negative mistake or accident is to leave no other alternative, but that the acts was intentionally done with a criminal intent".

The probative value of an item of similar fact evidence, and therefore its admissibility, will often depend upon the defence raised by the accused. In relation to other defences the evidence may be of quite limited probative value and therefore inadmissible. The prejudicial effect of similar fact evidence makes it important that admissibility be confined to cases where the evidence is of high probative value having regard to the issues actually in dispute between the parties. The point being made here will be better appreciated by considering some cases in the form of illustrations. In Perkins v. Jeffrey³ the accused was charged with indecently exposing himself to a certain Miss T. The prosecution wished to call other women to testify that on previous occasions the accused had exposed himself to them. The Divisional Court held that the relevance of this evidence, and therefore its admissibility, depended upon the defence raised by the accused. If the accused's defence was that he had not exposed himself wilfully or with intent to insult Miss T, the evidence would be admissible as rendering such a defence highly improbable. If, however, the accused's defence was one of mistaken identity by Miss

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¹ (1922) 16 Cr. App. R. 149 at 157 (C.A.)
² (1900) 2 Q.B. 758 at 774
³ (1915) 2 K.B. 702; see also R v. Williams (1977) 25 C.C.C. 103 (Ont. G.S.)
T, the evidence would not be of sufficient probative value to justify admissibility. Another significant case for consideration is the earlier discussed case of R v. Rodley¹. In that case, the accused was charged with breaking and entering with intent to rape. The evidence for the prosecution was to the effect that the accused broke into the house between midnight and 1am, that the prosecutrix, hearing the noise came downstairs, when the accused seized her and pulled up her clothes. At this point the woman's father came downstairs, and the accused fled. The accused's defence was that he had gone to the house for the purpose of courting the prosecutrix with her consent, that he did not break into the house and did not intend or attempt to rape her. The prosecution tendered evidence that at about 2am on the same morning the accused went to the house of another woman, about three miles from the prosecutrix's house. He gained access to her bedroom down the chimney and, with her consent, they had sexual intercourse. The accused was convicted and appealed to the Court of Criminal Appeal. The court held that the similar fact evidence ought not to have been admitted. However, one would think that had the accused's defence been a complete denial of the incident, the similar fact evidence would have been admissible in order to show that at the time in question he was in a lustful state and prepared to break into dwelling places in order to satisfy that lust. But in this case, the accused's defence was that he had entered the first house not with intent to commit rape, but with intent to have voluntary intercourse. Evidence that shortly afterwards he

(1) (1913) 3 K.B. 468; see also R v. Starkie (1922) 2 K.B. 275
entered another house where he succeeded in his aim was of little if any relevance in order to rebut this defence.

Another pertinent case is the Canadian case of _R v. Campbell_. In that case, the accused was charged with performing an unlawful abortion. His defence was a denial that he had performed any operation on the woman. Evidence that the accused had performed abortions upon other women was admitted by the trial judge, and the accused was convicted. On appeal to the Court of Appeal for British Columbia the accused's conviction was quashed by a majority of three to two. The majority took the view that had the accused admitted operating upon the woman, but denied that the operation performed was an unlawful abortion, the similar fact evidence would have been admissible. The evidence would have been relevant as rendering a defence of lack of intent highly improbable. However, in the context of a defence that the accused was not the person who had performed the abortion, the similar fact evidence was not of sufficient probative value to justify admissibility.

In Makin's case Lord Herschell said that evidence of similar facts may be admissible if relevant to an issue before the jury. The question then is as to when an issue arises which makes it relevant. The difficulty is that a plea of not guilty puts everything in issue; the prosecution must prove the whole of the case including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. Moreover the accused is not required

(1) (1947) 1 D.L.R. 904; (1946) 86 C.C.C. 410; see also _R v. Anderson_ (1935) 4 C.L.R. 32; (1935), 64 C.C.C. 205 (B.C.C.A.); _R v. Doubrough_ (1977) 35 C.C.C. 46 (Ont. C.C.)
(2) (1894) A.C. 57 at 65
by the common law of criminal pleading to specify the defence upon which he is relying and his "plea of not guilty may be equivalent to saying: 'Let the prosecution prove its case if it can' "\(^1\).

However, seldom is a criminal case contested on all issues. The issues at context are usually narrowed for the purpose of litigation. Therefore, not only does a general plea of 'not guilty' prevent the prosecution from crediting an accused with a particular defence that is in itself not material to any of the issues that must be proved by the prosecution, but it does not permit the prosecution to credit the accused with a particular defence or contestation of a particular issue which has not in some manner been substantially raised in the case as being contestable. A general plea of 'not guilty' does not allow the prosecution to adduce evidence in proof of any matter which may theoretically or conceivably be in issue. In Thompson v. R\(^2\), Lord Sumner put the test in its strictest form thus: "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice". Humphreys J. took this to mean that the defence must be fairly open to the accused and in fact raised by him before evidence of his misconduct on other occasions

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\(^1\) Per Lord Du Parcq in Noor Mohamed v. R (1949) A.C. 182 at 191
\(^2\) (1918) A.C. 221 at 232 (H.L.)
can be admitted to rebut it\(^1\), but in *Harris v. Director of Public Prosecutions*\(^2\), Lord Simon made the point that the prosecution is not obliged to wait until the accused makes his defence known before leading similar fact evidence, otherwise a submission that there was no case to answer might succeed although evidence was available which, unless its effect were displaced, clearly established guilt by permissible means notwithstanding the fact that it also showed that the accused was a man of criminal propensities\(^3\). Lord Simon observed that\(^4\): "When Lord Herschell speaks of evidence of other occasions in which the accused was concerned as being admissible to 'rebut' a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which overthrow it. If it were so, instances would arise where magistrates might be urged not to commit for trial, or might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld". He continued with a quotation by Avory J. in *Perkins v. Jeffreys*\(^5\):

"(I)t must be borne in mind that in criminal cases, and especially in those where the justices have summary jurisdiction, admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of a particular defence that is going to be set up". The

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(2) (1952) A.C. 694 at 705
(3) Ibid
(4) Ibid
(5) Ibid
Court of Appeal in New Zealand had said in *R v. Whitta*¹ that "There is no logical difference between evidence adduced to prove the guilt of the accused and evidence adduced to rebut a defence open to him". Generally a defence which is subsequently abandoned will not warrant the withdrawal of such evidence given and accepted on the ground of its relevance to the existing defence. This is a truism so far as civil cases are concerned but it is also valid with regard to criminal proceedings. The following remark of a New Zealand Judge, Deniston J. in *R v. Rogan*², which was made long ago while he was posing a hypothetical situation, would surely be applicable to a common law country trial for burglary at the present day: "Thus if on a charge of burglary it is relevant to prove that the accused was at a certain place on the day of the burglary and it was proposed to prove that fact by evidence that he on that day committed another offence in that town, admission of the fact that he was there on that day would make the proof unnecessary and it would be excluded".

Where, in cross examination of a prosecution witness or in some other way, it becomes clear that certain defences are not being taken by the accused, the prosecution ought not to be permitted to lead similar fact evidence admissible only to rebut these defences. In *Harris v. Director of Public Prosecutions* Viscount Simon stated³: "The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words (in *Makin v. Attorney-General for New South Wales*⁴) to mean that the prosecution must withhold such

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¹ (1921) NZLR 519
² (1916) 35 NZLR 265 at 304; see also *R v. Munn* (1930) NZLR 1017; *R v. Anderson* (1951) NZLR 439; *R v. Hare* (1952) NZLR 688
³ (1952) A.C.694 at 706-7; see also *Noor Mohammed v. R* (1949) A.C. 182 at 191-2; *R v. Miller* (1951) V.L.R.346 at 353
⁴ (1894) A.C. 57 at 65
evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, mens rea is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally... What Lord Sumner meant when he denied the right of the prosecution to 'credit the accused with fancy defences' (in Thompson v. R1) was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause".

In R v. Hall2 Goddard L.C.J. said: "It would not, therefore, be right at once in all cases to assume that a prisoner is going to set up a particular defence, but he may have shown perfectly clearly, by what he has said at the time of arrest or by the conduct of his case at the magistrates' court, the defence which he is going to raise; or it may be that some particular defence does not emerge until cross examination takes place in the court of trial, from which it can be seen that the prisoner is going to set up the defence of mistake or accident, or, as in this case, innocent treatment instead of filthy manipulation".

In Australia3, and New Zealand4, at least, the sensible rule has

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(1) (1918) A.C. 221 at 232 (H.L.)
(2) (1951) 35 Cr. App. R. 167
(3) R v. Yuille (1948) V.L.R. 41 at 46
been adopted that, in cases of doubt, the trial judge should ask the accused or his counsel, in the absence of the jury, to indicate whether he proposes to take the defence which the similar fact evidence will be admissible to rebut.

And in Canada, it appears that the above principles were misapplied in Leblanc v. R1 by the Supreme Court of Canada. In the case, the accused was charged with criminal negligence causing death2. He was a bush pilot, and was to pick up the deceased and his companion. The accused, in order to frighten the men on the ground as a joke, intended to make a 'pass' at them; that is, to fly very low over them. He miscalculated, flew too low and the plane hit and killed the deceased. The weather conditions were ideal at the time and the mechanical fitness of the airplane was established. The accused testified and admitted that he was making a 'pass'. The prosecution as part of its case was allowed to prove that in the several weeks preceding the fatal 'pass' the accused had made three other low 'passes', twice over persons standing on the ground and once over persons sitting in a boat. The accused was convicted and appealed unsuccessfully to the Court of Appeal of Quebec. He then appealed to the Supreme Court of Canada. By a majority of six to three the Supreme Court held the evidence was properly admitted and dismissed the accused's appeal. The majority held the similar fact evidence was admissible to establish guilty intent, i.e. to preclude any possible defence that mechanical failure or some other factor beyond the control of the accused caused the aircraft's sudden descent.

(1) (1975) 29 C.C.C. 97
(2) Criminal Code, R.S.C. 1970, C. C-34, Ss 202, 203
The main judgement of the minority was delivered by Dickson J. His Honour stated: "Evidence of other offences is admissible to negative a defence of innocent intent or accident only if such a defence is raised by an accused or it can be said from the facts of the case that such a defence was rationally open to the accused". His Honour further stated: "I do not think the evidence of similar acts introduced in this case was admissible on the ground suggested or on any other ground. The accused did not intend to kill (the deceased) or to cause him bodily harm, otherwise he would have faced a murder charge. He intended to make a 'pass' with the aircraft; his real intent, his identity and the actus reus were never in doubt or an issue. There was nothing in the evidence...to suggest mechanical failure or aircraft defect which might support a defence of accident. The aircraft was inspected two days later and found to be in good flying condition. In these circumstances, I incline to the view, with great respect, that the Judge should have awaited some intimation that accident was going to be raised as a ground of defence before admitting similar fact evidence to rebut a possible but improbable defence of accident."

It is submitted that the view of the minority in Leblanc v. R is preferable to that of the majority. It is, with respect, suggested that the case constitutes an example of "credit(ing) the accused with fancy defences in order to rebut them at the outset with some damning pieces of prejudice".

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(1) (1975) 29 C.C.C. 97 at 103
(2) Ibid at 104-5
(3) Thompson v. R (1918) A.C. 221 at 232
In *R v. Sims* the Court of Criminal Appeal considered the conflicting principles of admissibility. Goddard L.C.J. stated the following passage which is one of the reasons why the case has had a chequered career: "We think that the view that the admissibility of similar fact evidence depends on the nature of the defence raised by the accused is a result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition toward the particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to receive a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view".

There have been conflicting meanings given to the above dictum. According to Nokes, the approach by Lord Goddard's statement was set to reverse the settled approach provided by Lord Herschell in Makin's case. Nokes alleged that Lord Goddard was laying down that evidence of similar facts was relevant and admissible unless there were some ground for exclusion. Professor Montrose however disagreed with such interpretation of the dicta referring to Nokes' interpretation as 'erroneous'. Instead he said what *R v. Sims* set out to do was to affirm the rule in Makin, that evidence to show disposition is inadmissible. He said that the true meaning of the dicta is that

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1. (1946) *K.B.* 531 at 539 (C.C.A.)
3. (1894) *A.C.* 57 at 65
4. Prof. Montrose - "Basic Concepts of the Law of Evidence" (1954) 70 *L.Q.R.* 527 at 546
"There is no rule of exclusion of similar fact evidence which is relevant otherwise than through disposition"; and that "There is 'no novelty' "no new approach" about this. I must say it is hard to comprehend how the above dicta of Lord Goddard can be given the meaning attributed to it by Professor Montrose. At any rate the approach by Lord Goddard in R v. Sims was not approved by the Privy Council in Noor Mohammed v. R¹ and they seem to prefer Nokes' view of it. It is submitted that Goddard L.C.J. went too far in the above dictum in attempting to refute the opinion that a specific defence must be raised by the accused before it can be said that an issue has been raised such that similar fact evidence may be admissible. Continuing from the passage quoted earlier, Goddard L.C.J. had this to say²: "In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able, by confining himself at the trial to one issue, to exclude evidence that would be admissible and fatal if he ran two defences, for that would make the astuteness of the accused or his advisors prevail over the interests of justice. An attempt was made by the defence in R v. Armstrong³, to exclude evidence in that way, but it did not succeed".

One writer suggests that it would appear to follow from the dictum of Goddard L.C.J. that the prosecutor could say: "I know that the

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¹ (1949) A.C. 182 at 194 (P.C.)
² (1946) K.B. 531 at 539 (C.C.A.)
³ 16 Cr. App. R. 149 at 157; (1922) 2 K.B. 555 at 565
defence that you have put up is that you were not present when the offence was committed, but it would be open to you to plead that you did, but with innocent intent; I therefore adduce evidence to prove that you are the sort of man who has committed the offence on other occasions.¹

The latter-quoted remarks of Goddard L.C.J. in R v. Sims are admittedly in conflict with those of Lord Sumner in Thompson v. R where His Lordship stated: "The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose (i.e. the admission of prejudicial similar fact evidence). The prosecution cannot credit the accused with fancy defences in order to rebut him at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its character, may be better off in regard to admissibility of evidence than a man whose acts are at any rate capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one - still, so it is². Subsequent dicta have expressed preference for the approach of Lord Sumner³.

Goddard L.C.J. subsequently had an opportunity to re-define the prior position of the Court of Criminal Appeal as stated in R v. Sims⁴. In R v. Hall⁵, Goddard L.C.J. stated: "...if one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a

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² (1918) A.C. 221 at 232 (H.L.)
³ Noor Mohamed v. R (1949) A.C. 182 at 192 (P.C.); Harris v. D.P.P. (1952) A.C. 694 at 706-7 (H.L. Per Viscount Simon
⁴ (1946) K.B. 531 at 539 (C.C.A.)
⁵ (1952) 1 K.B. 302 at 307 (C.C.A.)
defence otherwise open to the accused.

One objection that was taken in this case was that that would be tantamount to saying that in every case where the prisoner pleaded not guilty the evidence must be open. I do not think that is right, and Lord Sumner in Thompson v. R1 said it was not. In Criminal Cases, with very few and immaterial exceptions, the prisoner does not plead in writing; he pleads orally and a plea of not guilty is a plea of the general issue, and when the general issue is pleaded all defences are open to a prisoner, but it would not, on that account, be right at once in all cases to assume that a prisoner is going to set up a defence which is theoretically open to him. He may, however, have shown perfectly clearly the defence which he is going to raise by what he said at the time of arrest or by the way in which the matter was conducted at the magistrate's court; or it may be that some particular defence does not emerge until some cross examination takes place in the court of trial, from which it can be seen that a prisoner is going to set up a mistake or accident, or, as in this case, innocent treatment. As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion, evidence may be given which otherwise might be inadmissible, and it is not the less admissible because it shows, or tends to show, that the prisoner had been guilty of another offence. That was made quite clear in Thompson v. R.

It could be said that in view of the previous dicta, that "as soon

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(1) (1918) A.C. 221 at 232 (H.L.)
as it becomes clear\(^1\) is not enough; that an issue is "really in dispute"\(^2\) must be substantially clear; that is, "raised in substance" as Lord Sumner stated\(^3\), or as Viscount Simon in *Harris v. Director of Public Prosecution* stated, "evidence of similar facts involving the accused ought not to be dragged into his prejudice without reasonable cause"\(^4\). "(I)t must be a meaningful, viable issue"\(^5\).

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(1) *R v. Hall* (1952) 1 K.B. 302 at 307 (C.C.A.)
(2) *R v. Bond* (1906) 2 K.B. 389 at 417 (C.C.A.) per Bray J.
(3) *Thompson v. R* (1918) A.C. 221 (H.L.)
(4) (1952) A.C. 694 at 706-7 (H.L.)
(5) THE CATEGORIES OF RELEVANCE

For the purposes of exposition, the cases in which evidence of misconduct on other occasions has been held admissible must be divided into categories, and it is proposed to discuss them under two headings - those in which the evidence concerns incidents in the transaction under investigation or offences of a continuing nature, and those in which the alleged misconduct on other occasions rebuts a defence or explanation fairly attributable to the defendant or accused. As a matter of law it does not seem to make any difference whether the alleged misconduct occurred before or after the events under investigation; nor as a matter of strict law, does it seem to make any difference whether the evidence is given in-chief or elicited in cross examination.

(i) Incidents in the Transaction under Investigation: - In the cases about to be discussed, the evidence of misconduct other than that charged is admitted because it is relevant for some reasons quite independent of its tendency to show bad disposition. One can best appreciate and examine this issue by considering first, a hypothetical situation where someone who was charged with murder was reported to have escaped from the scene of the crime in a stolen car, or take another case, where the proceeds of a robbery were said to have been found at the place where later crime was committed. In the former, evidence tending to show theft of the car, or the perpetration of the robbery by the accused in the latter case is admissible. Though such evidence may prove that the accused has a criminal disposition, it

also connects him with the crime charged to the same extent as would have been the case if he had escaped in his own car or left his belongings at the scene of the alleged crime\(^1\). A case exemplifying this reasoning, and demonstrating that the other conduct or facts need not be similar, is the Australian case of R v. O'Meally\(^2\); the accused had been charged with murder. Evidence was adduced at trial that there had been three robberies by some unknown person on the night of the murder and that articles from each of these robberies had been found at the scene of the killing. Other articles taken during the course of these robberies were found in the possession of the accused four days later. This evidence was probative in the same manner as the hypothetical situations discussed above. Both of the hypothetical situations and the case of R v. O'Meally adequately illustrate incidents in some transaction under investigation, though they may also qualify as proof of identity via the use of circumstantial evidence.

Another case illustrative of the point is that of R v. Whiley and Hames\(^3\). In that case, A, B and C were charged with burglary at railway station X. Evidence that on the same night burglaries were committed at stations Y and Z, articles from the two latter stations, but not from X, being found on A, and articles from X found upon B and C, and that jemmies corresponding with marks at one or other of the stations were found upon all the prisoners, was held admissible, because first, the three events being so intermixed that it was

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\(^1\) Cross on Evidence, 5th ed. at P. 379
\(^2\) (1953) V.L.R. 30
\(^3\) (1804) 2 Leach 983 at 985
impossible to separate them; and second, it helped to explain why none of the X articles was found on A, i.e. that his share of the booty might have been derived wholly from the Y and Z articles.

The same principle applies to other situations and not just robbery cases, e.g. where the case against the accused was that he stirred up racial hatred by reference to his experiences in prison, evidence was admitted of what he said although it showed that he had been guilty of other crimes\(^1\), also in the Irish case of Attorney-General v. Joyce and Walsh\(^2\), where a man and a woman were tried jointly on the charge of having murdered the woman's husband, it was held inter alia that the fact that the accused man, to the knowledge of the accused woman, put guano into the milk which was used by the deceased was admissible in evidence against them, as it formed part of one entire transaction which was under investigation by the jury.

It is worthy of mention that the conception of the 'same transaction' as a unifying element is essentially procedural. Cross\(^3\) suggested that this conception "seems to have originated in cases concerned with the question whether charges of two or more felonies could properly be joined in the same indictment, the idea being that this was permissible if they formed part of the same transaction". "When applied to the law of evidence, the conception has the advantages and disadvantages of all title headings. It is a convenient description for a miscellaneous class of cases which evidence is admissible on account of its connection in time, place or circumstance with the event under consideration; but it sometimes leads to

\(^1\) R v. Malik (1968) 1 All E.R. 582; (1968) 1 W.L.R. 353
\(^2\) (1929) I.R. 526
\(^3\) Cross on Evidence, 5th ed. at P. 380
misplaced emphasis on the question whether the 'same transaction' is involved without due regard being had to the respects in which it is contended that the evidence is relevant. It will be helpful to illustrate the meaning of the conception of the 'same transaction' by some examples. For instance, the cloak of the same transaction has been held to render admissible evidence of a series of takings on the same day from the same till by a shop assistant; cheques drawn on earlier dates on a charge of obtaining by false pretences; evidence of other rapes and indecent acts in a case of multiple rape; evidence of unidentified voices raised in anger in the room where the killing took place. It has also been held to apply to the continuous extraction of gas from the same pipe, and the removal of coal from a number of different seams by the same owner of adjoining mineral rights. The purpose for which such evidence was received has varied from case to case. The only common feature is that the element of continuity gives the additional facts a relevance that they would not possess in its absence; a typical example is R v. Ellis. In that case the prisoner was charged with stealing six marked shillings from the till of the prosecutrix by whom he was employed as a shopman. The evidence was that marked money was placed in the till, and the prosecutrix's son watched the prisoner go to it with money received from customers. On several occasions, Ellis was seen to withdraw his hand from the till with his fist clenched and move it in the direction of his waistcoat pocket. The contents of

(2) R v. Ellis (1826) 6 B&C 145; (3) R v. Le Vard (1955) NZLR 266;
(6) R v. Firth (1869) L.R. 1 C.C.R.; (7) R v. Blesdale (1848) 2 Car. & Kir. 765; see also R v. Shepherd (1868) L.R. 1 C.C.R. 118 and R v. Henwood (1870) 11 Cox C.C. 526. The authorities are reviewed in R v. Flynn (1955) 21 C.R. 1,5; (8) (1826) 6 B. & C. 145
the till were examined by the prosecutrix's son from time to time, and, in each instance, they were found to be less than they should have been. On his arrest, the prisoner was in possession of a sum corresponding to the deficiency in the till, consisting of some unmarked money in addition to the six marked shillings. The evidence tending to show that he had stolen or embezzled the former in the course of gaining possession of the latter was admitted because: "It went to show the history of the till from the time when the marked money was put into it up to the time when it was found in the possession of the prisoner".

In a comment on this case and the general principle behind it, Cross stated as follows1: "If a man were charged with stealing money from a till on the first (1st) of January, evidence that he stole money from the same till on the 1st, or even 31st December, could, generally speaking, only serve the purpose of showing that it was probable that he was guilty of the crime charged because he had committed the same kind of crime before, and it would therefore be inadmissible, but the evidence tending to show how Ellis stole or embezzled the unmarked money also showed how he took the marked coins: 'If crimes do so intermix the court must go through the details'"2.

Another process of probative reasoning with regard to the conception of 'the same transaction' is to use the similar fact evidence to prove that the accused was at a particular place at a particular time, or that some other state of affairs existed (for example, that

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(1) Cross on Evidence 5th ed. at P. 380
(2) Lord Ellenborough in R v. Whiley (1804) 2 Leach 983
the accused possessed a particular object, etc.) at a material time. Thus, for example, if the accused denies that he was in the neighbourhood in which the crime was committed, evidence that he committed another crime there shortly before or after the occurrence which forms the subject matter of the charge would be admissible because it is relevant in the same way as the making of a social call at a material time would be relevant. It cannot be over-emphasised that the criminal aspect of the actions of the accused are completely immaterial to the probative value of the evidence. The evidence would be probative in the same manner and to the same degree as evidence which disclosed that the accused was at a particular place because he had had tea there with his great-aunt only minutes before. In *R v. Ducsharm*\(^2\), the accused was charged with murder. Evidence that the accused had broken and entered a building near the scene where the body of the deceased was found was admitted "to show that the accused was in the vicinity of the crime about the time when the crime was committed"\(^3\). Although theoretically probative, the case has been criticised; that, based on the whole of the facts and circumstances in the case - (*R v. Ducsharm*) - the evidence was not sufficiently probative to have been admissible, and Laidlaw J.A. dissenting in part was of this opinion. The evidence of the break and entry in the vicinity of the area where the murder was committed occurred a week before the murder. Laidlaw J.A. stated: "In my opinion, the evidence in question was not relevant or admissible.

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(2) (1955) 113 C.C.C.1
(3) Ibid at P. 4
unless there was additional evidence showing that the breaking and entering of the Bouchard premises and the theft of the goods in possession of the accused occurred such a short time before or after the crime of murder was committed, that a jury might reasonably conclude from it that the accused was in the vicinity at that time. That essential additional evidence was not adduced, and the jury could not reasonably reach the conclusion from the evidence in question that the accused was in the vicinity of the crime with which he was charged at the time it was committed. It is necessary to point out that the jury may have to be directed with regard to the limited purpose for which the evidence may be used.

Further examples of cases in which the behaviour alleged against persons accused of crime has rendered their misconduct at other times admissible as an incident in the transaction under investigation, are provided by R v. Salisbury and R v. Cobden. In R v. Salisbury, a postman was charged with stealing a letter containing banknotes belonging to one Cox. These notes had been inserted in another letter from which the original contents had been abstracted and were traced to the possession of the accused. It was held that evidence of his interception of this letter was admissible as something essential to the chain of facts necessary to establish the larceny of Cox's notes. In R v. Cobden, A, B and C were charged with breaking into a railway booking office and stealing property there. None of this property was found in C's possession, and it was held that evidence of thefts from other booking offices on the same night might

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(1) (1955) 113 C.C.C. 1 at 10 (Ont. C.A.); see also R v. Ward (1963) 56 R. 56 (Aust.)
(2) R v. Floyd (1972) N.S.W.L.R. 373
(3) (1831) 5 C. & P. 155
(4) (1862) 3 F. & F. 833
be given because, if it were proved that C was in possession of property stolen from these other stations, that fact together with the rest of the circumstances of the case, might be evidence that all three prisoners were engaged in each crime, and that C had received his share of the booty from the other offices. Bramwell, B. said: "The events of that night relating to these burglaries are so intermixed that it is impossible to separate them".

I think the principle applied in the above English cases explains the decision in Morrison v. MacLean's Trs.\(^1\), where in an action of reduction of a trust disposition and settlement and two codicils, the instrumentary witnesses for each deed being the same two persons, Lord Justice-Clerk Inglis charged the jury that if they were satisfied regarding one of the deeds that the witnesses did not see the testator sign or hear him acknowledge his signature, that fact was relevant to their consideration of whether in the execution of the other deeds the same irregularity had occurred. The reason for this was said to be that if the testator, when executing one of the deeds, acted upon a mistaken belief as to the legal requirements for testing, it was not improbable that he acted in the same way with regard to the others - (being part of the same transaction). It must be noted that the three deeds were closely related in date and in subject matter, were under reduction in the same action, and bore to be signed and witnessed by the same three persons.

Evidence which forms part of the transaction under investigation

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\(^1\) (1862) 24 D. 625 at 630
may also consist of an earlier attempt to commit the crime charged. For instance evidence that the accused previously attempted to commit the very crime he is alleged to have committed does, of course, possess a relevance far beyond showing a general propensity to commit crimes of the type charged. In the Canadian case of Paradis v. R\textsuperscript{1}, the accused was charged with conspiracy to commit arson of a furniture factory. In its decision, the Supreme Court of Canada held that evidence that the accused previously offered another man money to burn the same factory was admissible.

Another of the Canadian cases decided on the same principle is R v. Gibson\textsuperscript{2}. In that case, the accused induced the deceased to attend at a lonely spot by means of a false pretence that he wished to conduct a business transaction there. There had also been a prior meeting where it was stipulated that the deceased was to pay for the sale of goods only in cash. The deceased, accompanied by a colleague, attended at the arranged location. On the pretence that the seller (the accused claiming only to be middle man) would only deal with one man, the accused led the deceased away from the colleague to another isolated spot, and there allegedly killed the deceased, robbing him of his money. The accused returned to the colleague, lured him to the same isolated spot, and allegedly beat and robbed him also. The accused was charged with having committed murder, with respect to the death of the deceased. Evidence as to the incident with the colleague was admitted into the trial proceedings on a number of grounds. Evidence, independent of the incident with the colleague, had indi-

\textsuperscript{1} (1934) S.C.R. 165; (1934) 2 D.L.R. 88; see also R v. Doughty (1921) 64 D.L.R. 423; 38 C.C.A. 83 (Ont. C.A.)
\textsuperscript{2} (1913) 13 D.L.R. 393; 21 C.C.C. 477 (Ont. C.A.)
cated that the accused was probably undertaking a scheme to obtain money from the deceased. The evidence as to his conduct with respect to the colleague "showed that his conduct towards the two men was all part of one and the same occasion, and that the mode in which it was carried out would necessarily be relevant to the proof of the scheme and its accomplishment". Furthermore, each of the two men had portions of the purchase price, neither having the whole. Therefore, the mode in which the accused obtained the second portion of the proceeds was relevant to how he may have obtained the first part. The two were joined so closely in time that they were part of one and the same transaction to obtain money. The commission of one explained the likelihood of the commission of the other, as Kennedy J. stated in *R v. Bond*:

"Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible". Evidence of previous dealings between the accused and the complainant, or an accomplice, which are not directly connected with the offence charged may also give pertinent historical background to explain the present transaction between the two. For example, if a man goes up to a bar and asks for 'the usual' one way to find out what he meant would be to inquire what he had previously been given when he made this request, and if it were before the court

(1) (1913) 21 C.C. 447 at 484; see also *Att.-Gen. v. McCabe* (1926) I.R.P. 129
(2) (1906) 2 K.B. 389 at 400; see also *Att.-Gen. v. Joyce and Walsh* (1929) I.R. 526
such evidence would be admitted to make the request intelligible to the court.

It is important to point out that there is one basic assumption upon which all similar fact evidence is based where relevancy is derived from some sort of propensity. That assumption is the basic assumption of continuity. Cowen and Carter state¹: "Propensity evidence is dangerous because its probative value depends, and depends always, entirely upon the assumption that the propositus has not mended his ways. That he may have done so is a possibility to which a lay trier of facts is often unwilling to give due regard"². He continued later and said: "(The reasoning that the) possession of a common characteristic by the accused and by the criminal tends to show them to be one and the same person...overlooks the fact that similar fact evidence shows only that the accused had the common characteristic at a particular time or series of times. The commission of the crime shows only that the criminal had that characteristic at a particular but different time. That they both had the same characteristic at the same time (i.e. the time of the commission of the crime) follows only if it is assumed that the accused's characteristic had a continuing quality, or, in other words, if it is assumed that the accused has not mended his ways. The making of the assumption is the very thing found objectionable in propensity evidence. The similar fact evidence does not demonstrate the indefinitely continuing quality of the characteristic; this has to be deducted from the characteristic itself. The existence of this

(2) Ibid at P. 139
quality is, as in all cases of propensity evidence, an essential link in the chain of relevance\textsuperscript{1}. It should also be added that not only can the continuing quality of the characteristic be deduced from the characteristic itself, but that it can also be deduced or supported by the existence of the 'other evidence' in the case.

Generally, evidence of a similar nature which shows that at a point of time proximate to the commission of the crime charged, the accused possessed a propensity for the commission of the crime charged may be admissible. The sole relevance of such evidence is, of course, via propensity. The factor which gives evidence of this nature its great weight is that it shows not merely that the accused possesses a certain sort of propensity, but that he exhibited this propensity and was prepared to act upon it at a point of time closely proximate to the commission of the crime charged.

For instance if A is charged with maliciously shooting at B, evidence that he had attacked B earlier on the same day may be admissible on the ground that the attacks were all part of one transaction, and that was exactly what happened in \textit{R v. Woke}\textsuperscript{2}, where A was charged with maliciously shooting B. B had arrested A, who fired at him and escaped, but fifteen minutes later, being re-arrested, shot at B again. Evidence of the second shot, though a distinct felony, was admitted as part of one continuous transaction and to rebut the defence that the first shot was accidental.

Also illustrative is the Australian case of \textit{O'Leary v. R}\textsuperscript{3}. The

\textsuperscript{1} Cowen and Carter, \textit{Essays on the Law of Evidence} (Oxford 1955) at 142-43
\textsuperscript{2} (1823) Russ. and Ry. 531; 168 E.R. 934
accused and the deceased were both employees at an isolated timber
camp in South Australia. They, together with other fellow employees,
took part in a drunken orgy which commenced on Saturday morning and
continued until late on Saturday night. At about midnight the de-
ceased retired to his cubicle which was a short distance from that of
the accused. In the early hours of Sunday morning the deceased was
found in his cubicle in a dying condition. He had been struck on the
head eight or nine times with a bottle after which kerosine had been
poured over him and set alight. Shortly before the discovery of the
deceased, the accused had been seen in possession of a bottle. A
pullover belonging to the accused was found close to the deceased's
cubicle. The prosecution led evidence that at various times during
the day of the drinking orgy, the accused had committed assaults upon
a number of persons. He knocked one person down, with some provoca-
tion, but later repeated the assault without provocation, causing the
person to be sent to the hospital after he kicked him (Kimber) in the
body and in the head. Another person was punched about the head with
heavy blows, and then having fallen to the ground, was punched and
kicked. Another person - now the third - was grabbed by the throat
and the accused threatened 'to do' him. The accused struck and
kicked another man, and abused and threatened to shoot three other
persons. All of this evidence was admitted into the trial by the
trial judge. And on appeal, the High Court of Australia also held
the evidence to be admissible. According to the court, the evidence
did not merely show that the accused was of a violent disposition;
its significance was that it showed the accused was of a violent disposition, and was prepared to act on that disposition, on the evening in question. Dixon J. stated: "In my opinion the evidence objected to was admissible, because, from the time on Saturday 6 July when the prisoner and the party with him came under the influence of drink right up to the conclusion of the scene in the early hours of the following Sunday morning in the presence of the deceased’s body lying in front of the huts, a connected series of events occurred which should be considered as one transaction. The part which the prisoner took in the drunken orgy which, as the facts suggest, culminated in the final attack upon the deceased man would appear to me to be relevant to the question whether the prisoner was the assailant and, if so, whether he was at the time capable of forming, and did form, the intention which would make his crime murder.

The evidence disclosed that, under the influence of the beer and wine he had drunk and continued to drink, he engaged in repeated acts of violence which might be regarded as amounting to a connected course of conduct. Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event”.

The evidence was given even greater probative value by the fact

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(1) (1946) 73 C.L.R. 566 at 577; approved by the Privy Council in Ratten v. R (1972) A.C. 378; (1971) 3 All E.R. 801. Contrast the facts in R v. Ciesielski (1972) 1 NSWLR 594
that the killing took place at an isolated timber camp. Thus there were a strictly limited number of persons who could have committed the crime\(^1\). That earlier in the evening one of these men had been on a drunken rampage was obviously of tremendous probative value. Had the killing taken place in a town where any of a large number of persons may have committed the crime, the evidence would have been of much less weight. Quite clearly the probative value of any particular item of evidence will vary having regard to all the surrounding circumstances of the particular case.

Another pertinent case is that of \textit{R v. Rearden}\(^2\), where a man was charged with rape of a child; once it was proved that he had threatened to injure her if she complained of his conduct, it was held that evidence of subsequent penetrations might be given on the ground that the threat gave them such a continuity with the first as to render them part of the same transaction.

The case of \textit{R v. Mortimer}\(^3\) provides a further neat illustration of similar fact evidence deriving great relevance from its close temporal proximity with the crime charged. In that case, the accused was charged with murder, the allegation of the prosecution being that he had knocked down a woman cyclist by deliberately driving a motor car at her. Evidence was admitted to the effect that on the previous evening he had knocked down two other women cyclists in a similar way and had stopped his car and assaulted them, and that shortly after the incident which was the subject of the murder charge, he had knocked down a further woman cyclist and had stolen her bag. Here

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\(^1\) See \textit{Ibid} at 582 - Williams J.
\(^2\) (1864) 4 F. & F. 76 Cf \textit{R v. Langdon} (1920) NZLR 495; \textit{R v. Horne} (1903) 6 WAR 9; \textit{R v. Hissey} (1973) 6 SASR 280
\(^3\) (1936) 25 Cr. App. Rep. 150
the evidence showed not merely that the accused had a propensity for knocking down women cyclists, although such a propensity would of itself have been sufficiently unusual to render the evidence admissible, but also that the accused was subject to that propensity, and was prepared repeatedly to act upon it, on a particular evening and throughout the following day.

On the other hand if there is inadequate proximity in time, a different situation arises. A fairly recent case of particular interest due to the lapse of time and the nature of the charge is the Canadian case of R v. Williams¹. The accused was charged with two offences: first, under section 146(1) of the Criminal Code (Canada), with having sexual intercourse with a girl under 14; and second, under Section 153 of the Code, with having sexual intercourse with his stepdaughter, the complainant on both counts being the stepdaughter, who alleged that the acts of intercourse had taken place on a regular basis, under threats of violence, since she was little more than 11 (eleven) years old. The accused was acquitted on the second count, but convicted on the first, on which evidence was admitted, for the purpose of corroboration, of a similar act committed more than 10 months after the complainant had reached the age of 14, and the conviction was upheld on appeal. It was argued that because of the date on which the similar act was alleged to have taken place the evidence was not even admissible on the first count, quite apart from being capable of affording corroboration. Jessup J.A. said²: "No

¹ (1973) 12 C.C.C. (2d) 453 (Ont. C.A.)
² Ibid at 457
doubt such evidence of particular acts must have a sufficient nexus in time and in many cases that necessity will raise a very difficult question. But here the complainant alleged what amounted to a continuous transaction – her defilement over a period of years. In my opinion, in such circumstances the appellant cannot avail himself, on the question of the admissibility of the separate acts constituting such transaction, of the artificial severance of the transaction resulting from the applicability of Sections 146 and 153.

In some cases evidence has been received and cross-examination permitted about a party's misconduct on other occasions because it tends to confirm testimony about matters that were to some extent collateral to the main issue. The relevance of the evidence is that if the account given by the witness is corroborated as to the collateral matter, it is more probable that the witness is also telling the truth in relation to the main issue in dispute. Thus in this context similar fact evidence is admissible as going to support the credit of a prosecution witness. With respect to similar fact evidence supporting credibility, Eggleston J. stated¹: "The materiality of questions of credibility arises not because of the relevance of the facts investigated to the facts in issue but of the relevance of those facts to the question whether the evidence of the person deposing to them should be believed. In this sense, the evidence is not per se relevant to the facts in issue; and only becomes admissible because of the particular person whose credibility is under investigation is called as a witness."

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The reasoning process to confirm collateral testimony can operate in one of two ways. In the first, the accused, in the course of making inculpatory statements to a witness or to the complainant, may have disclosed the fact that he had committed other crimes. In order to support the truth of the witness's account of the statements made by the accused, evidence that the testimony of these collateral matters is, in fact, true tends to make the truth of those portions of the witness's testimony which are directly material to the fact(s) in issue, also probable. If the witness is not merely interjecting 'truthful fillers' into an otherwise false testimony, the confirmation of the testimony of the witness on these collateral matters increases the credence of the testimony as a whole. For example in R v. Chitson¹ the accused was charged with carnal knowledge of a girl aged fourteen. The prosecutrix gave evidence that on the day after connection had taken place, the accused told her that he had previously had similar relations with another young girl. It was held by the Court of Criminal Appeal that the accused was properly cross examined about his relations with the other girl. The court stated that the cross examination of the accused on this aspect of his alleged statement to the complainant "...was of vital importance to the truth of the girl's evidence as to the offence itself that there should be some probability of that particular part of her evidence being true. In fact the value of the evidence would be in proportion to the impossibility of the girl's having been able to invent the

¹ (1909) 2 K.B. 945
statement attributed by her to the prisoner". A.T. Lawrence J. stated that the cross examination was admissible as it "...tended to show that he was guilty of the offence with which he was charged, for if he had made that statement to the prosecutrix at the time alleged by her, that fact would strongly corroborate her evidence that the prisoner was the person who had had connection with her."

Another pertinent case for consideration is R v. Keenaway. In that case a solicitor was charged with forgery of a will. Two accomplices testified that the will was forged in pursuance of a scheme to obtain money from third persons by way of an advance. Originally, one of the accomplices was to act as a legatee and the accused as the executor of the bogus will. The accomplices testified that though the accused signed the will, he objected to posing as the executor because he had forged a will in a similar scheme some 18 years previous and he, having then played the part of the executor, was afraid suspicion might be directed towards him in the present instance. The accused testified on his own behalf and denied, among other things, ever having made such a statement. The prosecution was allowed to cross examine the accused to show that he did, in fact, commit the prior forgery. Reading L.C.J. stated: "...it cannot be said that evidence that he in fact forged the earlier will was not evidence tending to corroborate that of the accomplices, for if he in fact did forge it the probability is that he told them so and gave that as his reason for refusing to be executor again. No doubt proof of the fact that he committed the earlier crime would not conclusive-

(1) (1909) 2 K.B. 945 at 947
(2) Ibid
(3) (1917) 1 K.B. 25
ly prove that he told them he had committed it, but it would be evidence to support their statement that he did. We are of the opinion, therefore, that the judge was right in allowing the cross examination, and that the appeal fails".

The same reasoning process applies, if someone voluntarily confesses, not merely that he is guilty of the crime charged, but also that he has misconducted himself in some other way; evidence tending to confirm this latter part of his statement is admissible because it would be strange if it were true while the first part was false. In *R v. Evans*², the accused was charged with murder in the death of his child. In his statement to the police, he admitted killing both the child and his wife, the bodies of whom were found together. Although there was no charge with respect to the death of the wife, the portions of the statement concerning her death were admitted, not only on the question of causation of the death of the child, but as confirmation of the truth of the confession as a whole.

The second manner in which similar fact evidence may be used to confirm a collateral matter is not via confirmation of the making of a statement by the accused, but rather by supporting or explaining the quality of a witness. In *R v. Lovegrove*³, the accused was charged with manslaughter as a result of his performance of an illegal abortion upon a woman who, as a consequence of infection, died. The husband of the deceased woman testified that, having received the name and address of the accused from another woman, he went to the

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(1) (1917) 1 K.B. 25 at 30
(2) (1950) 1 All E.R. 610; see also *People v. De Pomples* 410 III. 587, 102 N.E. 2d 813 (1952)
(3) (1920) 3 K.B. 643 (C.C.A.)
home of the accused and arranged with her for his wife to go there in order that the accused might perform an abortion on her. The husband testified that he subsequently accompanied his wife to the accused's house where an abortion was performed as a result of which she died. The defence of the accused was a denial of the evidence of the husband and a denial that he had ever seen the deceased, although he admitted that the husband had come once inquiring as to accommodation. The prosecution called the woman who had given the name and address of the accused to the husband. She confirmed the conversation that the husband claimed to have had with her and added that she herself had undergone an abortion at the hands of the accused. The Court of Appeal held that this latter evidence was admissible because it tended to support the truth of the husband's version of what transpired. Clearly, the personal knowledge of the woman that the accused performed abortions also gave added insight into the reasons why the husband attended at the home of the accused after having been referred there by this woman. Was it more likely, to procure accommodation or to procure an abortion?

It is important to note that the admissibility of the similar fact evidence may also depend upon the nature of the evidence given by the accused. If in *R v. Lovegrove* the accused had admitted the deceased's husband had come to her house and attempted to arrange an abortion, but had denied that she performed the abortion, evidence of the other woman as to the abortion performed on her by the accused would not have been admissible. In such event the evidence would not

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(1) (1920) 3 K.B. 643 (C.C.A.) 1
have acted as corroboration upon any point in dispute between the
testimony of the deceased's husband and the accused.

It has been said that cases such as R v. Kennaway¹, R v. Chitson²
and R v. Evans³, should be regarded as right on the borderline of
admissibility of similar fact evidence⁴. To admit evidence with such
a high degree of potential for prejudice in order to do no more than
support the credit of a prosecution witness involves considerable
risk of injustice. In fact, it is queried whether the evidence in R
v. Evans⁵ really had any significant probative value with respect to
the charge of murdering his child. Long after the conviction and
execution of the accused, a Commission of Inquiry concluded that the
accused probably killed his wife but not his child⁶.

Of the use of similar fact evidence to corroborate a portion of a
witness's account, Stone wrote⁷: "No one who has pondered this prob-
lem can fail to realise that often when evidence of other offences is
offered, for example, to corroborate the testimony of a material
witness, relevance for that purpose is being used as a peg upon which
to hang the dirty linen of the defendant, so that the jury may
determine what sort of man it is upon whose acts they ought to render
a verdict." It has been questioned whether similar fact evidence
should be permitted, on probative grounds, to merely confirm collate-
ral matters not substantially in dispute or material to the case. In
a similar vein, similar fact evidence has been held to be inadmissi-
ble for the purpose of rebutting collateral matters in the testimony

(1) (1917) 1 K.B. 25
(2) (1909) 2 K.B. 945
(3) (1950) 1 All E.R. 610
(4) Cowen and Carter, Essays on the Law of Evidence at P. 154
(5) (1950) 1 All E.R. 610; (6) Report of Inquiry on the Case of
Timothy John Evans (Brabin Report) (Cmnd. 3101, 1966)
(7) Stone, "The Rule of Exclusion of Similar Fact Evidence: England"
(1932) 46 Harv. L.R. 954 at 938
of an accused as the Canadian case of *Latour v. R*¹ shows. There, the accused, on trial for robbery of a jewellery store, set up a defence of alibi to the effect that at the material time he was working at his employer's business in a nearby town and did not go to the town where the robbery took place. The accused was cross examined as to whether he had ever gone to a certain other jewellery store. The accused emphatically denied this. In rebuttal, the Crown called a clerk of this latter store who testified that the accused robbed this store several months after the robbery for which he was presently on trial. The Supreme Court of Canada held that this evidence had been wrongly admitted. The evidence of a subsequent robbery at a different store months later in no way tended to rebut the accused's evidence as to his credibility as it merely involved a collateral fact that he had denied ever visiting the latter store. On the facts, the evidence of the other robbery did not fulfill the conditions for admissibility as similar fact evidence, for it was not relevant to any question which was important to the outcome of the case.

(ii) Offences of a Continuing Nature:— The definition of the crime or civil wrong under investigation in some cases involves an element of continuity and can only be established by proof of that which occurred on other occasions. In *Brown and wife v. The Eastern and Midlands Railway Co*², in an action for a nuisance it appeared that the plaintiff was driving at night in a cart drawn by a horse along a public highway. When the horse shied at a heap of earth and refuse

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(1) (1977) 33 C.C.C. (2d) 377 (S.C.C.)
placed by the defendants on their land adjoining the highway, the
cart was upset and the plaintiff was injured. Evidence was tendered
by the plaintiff to prove that other horses had shied at the heap on
the same day. The court held that if the heap was of such a nature
as to be dangerous by causing horses passing on the highway to shy,
it was a public nuisance, and that the evidence showed that the heap
was likely to cause horses to shy, and was therefore admissible.
Stephen J. said in his judgement:

"It is perfectly true that evidence of events similar to the one under inquiry on account of their
general similarity, is not admissible. You must not prove, for
example, that a particular engine driver is a careless man in order
to prove that a particular accident was caused by his negligence on a
particular occasion; nor that a person accused of crime is a habitual
criminal; but when the question is whether a particular act is a
public nuisance, it is difficult to see how it can be proved to be so
except by showing cases in which it has interfered with a public
right. If a trade is alleged to be noxious by producing unwholesome
smells it may surely be proved that such a smell is frequently per-
ceived, or that it has an injurious effect on those who perceive it".

The same principle applies to other offences of a continuing or
cumulative nature, such as trading when insolvent or permitting a
house to be used as a brothel or a common gambling house. In Ex
parte Burnby, an information charged the defendant, a licensed
victualler, with permitting his house to be used as a brothel on the

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(1) Ibid at 393
(2) R v. Brady, R v. Ram (1964) 3 All E.R. 616
(3) McCann v. Jeffrey (1922) VLR 682
(4) (1901)2 Q.B. 458
26th, 28th, 29th, and 31st days of January and 1st, 4th, 5th and 6th
days of February in the same year, contrary to Section 15 of the
Licensing Act 1872. The court held that the fact of the days named
being non-consecutive did not prevent the charge from being a charge
of one continuing offence; that the information was consequently not
bad for duplicity; and that the defendant might on such an informa-
tion be lawfully convicted of so permitting his house to be used on
all the days named.

Other occasions where the principle applies to offences of a con-
tinuing nature are cases for example of contributing to the
deliquency of a juvenile\(^1\); it also includes persistent importuning in
a public place as in [Dale v. Smith\(^2\)]. In that case, it was alleged
that on the evening of February 12, 1966, the appellant, who was the
deputy headmaster of a school spoke to two or three groups of youths
at a railway station. He kept bumping into two of the youths saying
"Hello" or "Bumped into you again", and asked one of them if he would
like to look at some sexy photographs. On the following evening,
the two youths were waiting at the station and when one of them went
to the public lavatory the appellant was there and said "Hello" to
him. The appellant then went to a cafe, looked into a window and saw
a boy of about 10 years old. He went into the cafe, sat opposite
the boy and talked to him, and showed him an object which might have
been a piece of paper or cardboard, whitish in colour. The appellant
and the boy left the cafe together and the three youths followed. As
a result of something which the appellant said to him, the boy left

\(^1\) R v. Christakos (1947)2 D.L.R. 151; (1946)87 C.C.C. 40
\(^2\) (1967)2 All E.R. 1134
the appellant who then went into a coffee bar. One of the youths followed him and requested him to go to the police station. At the police station the appellant was searched and forty-five (45) indecent photographs were found on him which he said he had found in a lavatory at the station. On appeal against conviction of persistently importuning in a public place for immoral purposes, contrary to Section 32 of the Sexual Offences Act 1956, it was held that the appellant had been rightly convicted because, apart from the undoubted invitation to the small boy, the justices were entitled to treat the evidence of the appellant's saying "Hello" to the youth in a public lavatory as a separate importuning, since the same word had been used the evening before and was then followed by an importuning by asking one of the youths if he wanted to look at some sexy photographs.

Proof of crimes or civil wrongs on other occasions may be rendered admissible by the definition of the offence charged, and it therefore has a relevancy quite distinct from its tendency to show that the defendant or accused is a person of bad disposition or someone who exercises inadequate control over his property. Examples of the application of the principle is also available in other jurisdictions. For instance, in The Sudan, the Standard Local Government (Townships) Regulations 1938 used to provide that no house shall be used to the general annoyance of the inhabitants of the vicinity, either as a brothel or by disorderly persons of any description. It

(1) Regulation 156 (1)
was held that the offence of causing annoyance under these regulations was not dependant upon one specific instance, and the court must be satisfied that such behaviour was a frequent occurrence. Similarly, the offence of keeping a gaming-house under Section 237 of the Sudan Penal Code of 1974, seems to require evidence of more than one instance. In India using a place once for the purpose of gambling would not suffice, and it is thought that this is the view the courts in The Sudan would follow.

A New Zealand example is afforded by Section 2 of the Gaming Amendment Act 1920, which made carrying on the business of a book-maker illegal. In R v. Whitta, the Court of Appeal of New Zealand regarded as relevant and admissible evidence of systematic betting by way of business prior to the dates specified in the indictment since they threw light on the nature of the bets made during the specified period, and as they showed that the bets were not casual but were made with intent to carry on the business of a bookmaker. The Court was dealing with a section which referred to the 'business' of a book-maker, and the prosecution had to prove accused's systematic conduct as an ingredient of the offence charged.

Where the driving of a motor car is in question, evidence of the nature of the driving by the accused on a previous occasion may or may not be relevant and therefore admissible on this basis, depending upon the existence of a connecting link between the two incidents.

It is pertinent to make mention of the Scottish case of Ogg v. H.M. Advocate. In that case a pannel was tried in the High Court on an

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(2) Sesha Ayyar v. Krishna Ayyar (1935)59 Mad 562
(3) (1921) NZLR 519; distinguished in R v. Kearns (1956) NZLR 448 - not concerned with similar fact evidence
(4) Per Salmond J. in (1921) NZLR 519 at 527
(5) R v. Lewis (1913) VLR 217 and R v. Harvath (1966) VR 533
(6) (1938) J.C. 152
indictment, the first charge in which set forth "that you...did on various occasions between January 1930 and 1st June 1937, the particular dates being to the prosecutor unknown, in your dwelling place at...; commit acts of gross indecency with X". An objection was taken to the relevancy of this charge on the ground that the latitude of time which had been taken was so exceptional as to render the charge irrelevant from lack of specification. The presiding judge (Lord Russel) sustained this objection in view inter alia, of the fact that what was libelled as the offence was not a continuous course of conduct, but acts which were alleged to have taken place on various occasions during the course of seven years, the particular dates of these occasions being unknown and unspecified.
(6) REBUTTING A DEFENCE OR EXPLANATION FAIRLY ATTRIBUTABLE TO THE DEFENDANT OR ACCUSED

It is a well established principle, as earlier discussions have shown, that apart from special conditions and statutory enactments, evidence is not admissible to prove that the person accused has a general propensity to commit a crime similar in character to that with which he is charged. On the other hand it is well settled that proof of similar acts is allowed where the object of the evidence is to prove a plan or system, or to prove a guilty intent, or to negative certain defences which are open to the prisoner.

Five of the principal grounds on which evidence of the accused's misconduct on other occasions may be said to go beyond showing a general disposition towards wrongdoing, or the commission of a particular kind of crime, and to have specific probative value in relation to the charge before the court are that (i) it tends to rebut a defence of accident or involuntary conduct; (ii) to rebut a plea of ignorance or mistake; (iii) to rebut an innocent explanation of a particular act or the possession of incriminating material; (iv) to negative false identification of the accused as the culprit; or (v) to rebut the defence of innocent association. Each of these heads will be subsequently discussed. It is noteworthy that as a matter of law, it seems immaterial whether the alleged misconduct occurred before or after the events under investigation, and in fact, as we shall see in some of the leading cases to be discussed later, it occurred afterwards. Also as a matter of strict law, it does not

(1) See Makin v. Att. Gen. for New South Wales (1894) A.C. 57; R v. Bond (1906) 2 K.B. 389
(2) See D.W. Logan "Evidence of Subsequent Acts" 50 L.Q.R. (1934)
seem to make any difference whether the evidence is given in-chief or elicited in cross examination. The provisions of Section 1(f) of the Criminal Evidence Act, 1898 (to be discussed later) must be borne in mind in the case of the cross examination of the accused, and the court may always disallow cross examination to the issue on that which has not been the subject of evidence-in-chief¹.

It is significant to note that the heads of admissibility enumerated above are not mutually exclusive².

(1) REBUTTING DEFENCE OF ACCIDENT OR INVOLUNTARY CONDUCT

The reason, or even an indication for the test of negativing the defence of accident or involuntary conduct is the simple human logic and experience that "the same accident should repeatedly occur to the same person, is unusual, especially when it confers a benefit on him"³. This doctrine is called the 'doctrine of chances or coincidence'⁴.

It is significant to note that the evidence adduced here may fall short of establishing that on other occasions the accused in fact committed any criminal acts. Here the relevance of the evidence is of a different nature. The evidence establishes first, that a series of like transactions has occurred. Secondly, that the accused was connected with each of these transactions, and in respect of each he may or may not have committed a crime. As the number of transactions multiply, however, it becomes clear that either the accused has committed a crime in respect of each transaction or an increasingly

(1) Cross on Evidence, 5th ed. at P. 382; (2) See Ibid.
(3) R v. Bond (1906) 2 K.B. 389, 420-421 per Lawrence J.
(4) Wigmore, Vol. 2 §302
remarkable coincidence has occurred. A useful and simple illustration of this type of relevance is provided by the analogy of tossing a coin. The chances of the coin landing heads on one toss are, of course, even. If the coin is tossed twice the chances of its landing heads on both occasions are 4 to 1 against. If the coin is tossed ten (10) times the chances of its landing heads on each occasion are 1,024 to 1 against. At this stage the transaction is susceptible to two possible interpretations. Either a remarkable coincidence has occurred, or the coin is not true. With each toss, the likelihood that the coin is not true increases. Similar fact evidence possessing a relevance of this nature is often spoken of as going to rebut a defence of accident or involuntary conduct.

Wigmore also explained the defence of accident or involuntary conduct in the same terms as stated above. He said: The argument here is purely from the point of view of the doctrine of chances - the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all... . (A)n unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be a true explanation of them. Thus if A, while hunting with B, hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the

(1) See Richard Eggleston, Evidence, Proof and Probability (1978) Ch. 2
(2) Wigmore on Evidence, 3rd ed. (1940) Vol. 2 note 2 see at § 302
third occasion A receives B's bullet in his body, the immediate inference (i.e. as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertant shooting on three successive similar occasions are extremely small...".

Cowen and Carter\(^1\) aptly explained the reasoning process here when he observed as follows: "An accident can happen. A mistake can be made. But, in the absence of any special explanation, it is improbable that many and similar accidents will happen or that many and similar mistakes will be made. Of course it is true that this multiplication does not make accident or mistake any less likely in any one given case. But it is always open to the accused to avoid any possible injustice on this account by telling the truth about the other alleged accidents or mistakes. He will not do so for obvious reasons: indeed he may be being charged as well in respect of the other happenings".

As Bruce J. said in \(R\ v.\ Ollis\)^2, "It is true that in many cases to negative mistake or accident is to leave no other alternative, but that the act was intentionally done with a criminal intent". Reading L.C.J. in \(R\ v.\ Boyles\ and\ Merchant\)^3, pointed out both the negative and positive aspects thus: "Its object is to negative such a defence as mistake or accident or absence of criminal intent, and to prove the guilty mind, which is the necessary ingredient of the offence charged". But intent must be in issue; if it is not, then the justification fails\(^4\).

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(2) (1900) 2 Q.B. 758 at 774
(3) (1914) 10 Cr. App. R. 180 at 193
(4) \(R\ v.\ Rabinovitch\) (1952)103 C.C.C. 392 (Que. C.A.)
In some cases, due to the particular circumstances and the other evidence, merely one other similar incident to that of the offence charged would create an improbability of accident, and, possibly to such a degree that the evidence would be sufficiently probative to be admissible. As Bray J. stated in *R v. Bond*¹: "One other death under similar circumstances would tend to show the improbability of accident or mistake, and would on that ground be admissible". If "instances are multiplied, the weight of the evidence is greatly increased"² and it may become so strong as to definitely rebut the defence of accident and show commission of the offence charged, on the part of the accused as a conclusion. Such was the reasoning process employed in *Makin v. Attorney General for New South Wales*³ and *R v. Smith*⁴, and a host of other cases. The defence of accident may be raised in a variety of different situations according to whether it is contended that the conduct of the accused had no causal connection with the fact of which complaint is made, or that such fact was the unintended consequence of that conduct or that such conduct was not voluntary; and there are reported decisions to be discussed later dealing with each of these situations.

(a) The Question of Causal Connection: It is perhaps worthy of mention that of the different situations in which the defence of accident may be raised, the question of causal connection has been the most frequent before the courts. It is no doubt the most dramatic. It was, for example, the ground upon which evidence of the bodies of babies buried in the Makins' several backyards was received

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¹ (1906) 2 K.B. 389 at 416 (C.C.A.)
² Ibid at 413
³ (1894) A.C. 57 (P.C.)
⁴ (1915) 11 Cr. App. R. 229; see also *State v. Lapage* 57 N.H. 245, 294 (1876)
in their trial for the murder of one of the infants. Similarly, it was the ground upon which evidence of the deaths of two wives by drowning in their bath while the accused, their husband, was on the premises was admitted on the husband's trial for the death of a third wife by drowning in her bath - not surprisingly called the 'brides of the bath' case. It is the ground commonly urged in multiple poisoning cases whenever accidental poisoning could explain the poison death charged.

The leading case is _R v. Geering_. In that case, a woman who was responsible for the feeding of her household was charged with murdering her husband by giving him arsenic. Pollock C.B. admitted evidence of the later deaths of the accused's sons from arsenical poisoning first, because it confirmed the evidence already given to the effect that the husband's death had been caused by arsenic and secondly because it would enable the jury to determine whether he took the poison accidentally. Referring to the case, Cross said: "It would certainly have been a strange thing if a number of people whose food was prepared by the same woman had each taken arsenic accidentally over a comparatively short period." In this case, as in others to be discussed, there is "such an underlying unity between the offences as to make coincidence an affront to common sense." It will be useful to consider other cases to do with charges of murder by poisoning, and in which similar fact evidence was admitted on the principle and reasoning process employed in _R v. Geering_.

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example in *R v. Cotton*¹, where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers, and a lodger in her house had died previous to the present charge from the same poison was held to be admissible. In *R v. Heeson*², upon an indictment for murder by poison of S in October 1877, evidence was held admissible of the previous and subsequent deaths of J and L under like circumstances and from similar symptoms, to show that the poisoning was not accidental: and where it is proved that a motive for the death of S might exist, by the fact of the prisoner having insured the life of S in a benefit and insurance society, it was held that evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J and L by showing that they also, were each of them insured by the prisoner in the same or kindred societies. Another case decided upon the same principle is *R V. Flannagan and Higgins*³. F and H were jointly charged, on indictment for the murder of the husband of H, with causing his death by the administration of arsenic. Evidence having been given that the deceased had died from arsenic and had been attended by the prisoners. The court held, (Butt J. delivering the judgement) that it was competent for the prosecution to tender evidence of other cases of persons who had died from arsenic and whom the prisoners had access, exhibiting exactly similar symptoms before death to those of the case under consideration, for the purpose of showing that this particular death arose from arsenical poisoning.

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¹ (1873) 12 Cox C.C. 400
² (1878) 14 Cox C.C. 40
³ (1884) 15 Cox C.C. 403
not accidentally taken, but designedly administered by the accused. However, in R v. Winslow\(^1\), such evidence was rejected. The case has proved to be unpopular and lonely in its dissention from well established principle. In that case, on an indictment against the prisoners for murdering A.J. evidence was held not to be admissible that three others in the same family died of similar poison and that the prisoner was present at all the deaths, and administered something to two of these patients. It is significant to point out that no reasons were given for the judgement in the case. The case was commented on and disapproved of in R v. Flannagan and Higgins\(^2\) and I agree with the disapproval. Perhaps it is significant to note that R v. Winslow\(^3\) was probably the first case decided after R v. Geering\(^4\), and the other cases only came later, so it could have been possible that the judge in Winslow felt that the issue was still contentious and not established, and in fact it is not impossible he was unaware of the decision in Geering. However, even though the case may be treated as irreconcilable with the other cases cited above\(^5\), it has been suggested that it may yet be reconciled with the other cases on the ground that in R v. Winslow there was no evidence rendering it probable that the accused administered poison to any of his victims\(^6\).

In any case, whatever the position may be the case does not represent the position of the law as far as the question of causal connection goes. The principles stated in R v. Geering and followed in the subsequent cases, are also followed in other jurisdictions, as wit-

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(1) (1860) 8 Cox C.C. 397
(2) (1884) 15 Cox C.C. 403
(3) (1860) 8 Cox C.C. 397
(4) (1849) 18 L.J.M.C. 215
(5) See also Makin v. Att. Gen. for New South Wales (1894) A.C. 57 at 64
(6) 46 H.L.R. 969
nessed in the Indian case of Lala v. R. In that case the accused on the 7th of June 1909, administered dhutura poison to A and B, both of whom died from effects thereof; and on the following day he administered the same poison to C and D, the former became ill and recovered, but the latter died. The court held that the events which occurred on the 7th and 8th June were relevant to the case of charge of murder of D as forming incidents in a series of similar transactions occurring about the same time and tending to show system and intention to negative the idea of accident. Likewise in the Canadian case of R v. Neill Cream, where a doctor was charged with murdering a woman by strychnine, evidence of deaths of three other persons with whom the accused was intimate by administration of strychnine, and of his attempted administration of the poison to a fourth, was held admissible after connecting these acts with the accused by showing his possession of strychnine and that this was the cause of all the deaths.

In R v. Floyd, the New South Wales Court of Criminal Appeal emphasised the requirement that "some involvement" between the accused and the similar acts is required. In that case the accused was charged with murder by thalium poisoning of his wife, Mola in March 1970. The Crown led evidence that the sister-in-law of Mola had displayed symptoms of thalium poisoning in early 1971 to rebut the evidence that the administration of the poisoning by the deceased was accidental and that the deceased received it from the hand of some third person. The evidence connecting the accused with the symptoms dis-

(1) 32 PLR 1191:12 Cr. LJ 125: 9 IC 731; see also Kashiram v. R 73 IC 262: 6 NLJ 144: A 1923 N248
(2) 166 C.C.C. Sess Pap 1417, 1451
(3) (1972)1 NSWLR 373
played by the sister-in-law was his familiarity with the poison and his opportunity to put it in her food and drink without arousing suspicion. The appeal did not concern the admissibility of the evidence but rather the use which ought to have been made of the evidence. The trial judge directed the jury that they might use the subsequent poisoning only if they were in doubt as to the charge on the indictment. Then they might use this poisoning if they were satisfied that the accused was the poisoner in each case. It would seem, therefore, that the jury were not to use the similar acts in their consideration of the second of the two defences referred to.

If the jury was not satisfied that the accused was responsible for the subsequent poisoning, then it was to be disregarded entirely.

In Canada, evidence of other fires proved to have been set by the accused, or attempts to get others to set the fire, have been held to rebut the defence of accident and to show design or malice. While in India, it has been held that previous attempts to kill a boy by an accused is admissible to rebut a suggestion of accidental drowning of the boy by the accused.

The most apt description of the reasoning process in these cases was given by Evatt, J. in Martin v. Osborne, who said: "...Poisonings and fires though often the result of accident do not in ordinary human experience recur in the same family circle or in the case of the same occupier. Accordingly evidence is allowed to prove the recurrence of such poisonings or such fires respectively without

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(2) See R v. Petrisor (1931) 56 C.C.C. 389 (Sask. C.A.); R v. Pinsk (1934) 63 C.C.C. 201 (Sask. C.A.)
proof that the party concerned was more than 'involved' in order to show the high degree of improbability attending the hypothesis that the poisoning or fire under particular scrutiny was an accident”.

I believe sufficient illustrations with regard to poisoning cases have been given above, and as pointed out by Evatt J. above the same principles apply to fires. A similar observation was made in Moorov v. H.M. Advocate: "A man whose course of conduct is to buy houses, insure them, and burn them down, or to acquire ships, insure them and scuttle them or to purport to marry women, defraud and desert them, cannot repeat the offence every month, or even perhaps every six months". The inference from this could also be that where any of such situations listed above recurs even over a fairly long period of time, may be annually or biannually, and on a recurring basis as well, it would still qualify to rebut a defence of accident. So, the fact that it had not occurred every day or every month or every six months, is not enough to disqualify it as a rebuttal; the natural occurrence of such situations, save for remarkable coincidence, is supposed to be remote. Thus, if A is accused of deliberately setting fire to his house to obtain insurance money, admissible evidence tending to show that the fire was not accidental can include details of fires at his two previous houses for which he received insurance compensation. So in R v. Bailey where the accused pleaded accident in a case of setting fire, previous abortive attempts to set fire to the same premises was held admissible. In the Indian case of Nurul Amin v. R, where successive shops of the accused, each insured, were

(1) (1930) J.C. 68 at 89
(2) 2 Cox C.C. 311
(3) (1939)1 Cal. 511; A1939, C335
burnt down in three successive years, evidence of previous fires were admissible to show that they were not accidental but designed.

There are some famous cases that should be examined here. The classic case is, of course, that of Makin v. Attorney-General for New South Wales¹ which has earlier been discussed. The accused (husband and wife) were charged with the murder of M, a baby whose body was found buried in a garden formerly belonging to them. The couple had assumed the custody and care of the child from its parents in return for money. The defence of the accused was that the child died as a result of natural causes, and that if they were guilty of anything, it was merely of having improperly buried the child. The prosecution adduced evidence that bodies of twelve other infant children had been discovered buried on the grounds of residences where the accused had lived at various periods of time. Several of these children had also been received by the accused on receipt of money for their maintenance and care. In most cases, the money was inadequate to support the child beyond a limited period of time. The evidence was held admissible to rebut the defence raised by the accused.

Certainly, it was necessary for the Crown to negative the hypothesis that M's death was accidental or due to natural causes. The improbability of all the babies whose remains were discovered having died in this way, the remarkable coincidence which would have to be assumed if someone other than the accused, shown by admissible evidence to have taken five babies into their care, were responsible for

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¹ (1894) A.C. 57; see also R v. Dean (1895) 14 NZLR 272, R v. Cooper (1923) NZLR 1237; R v. Stawyczaj (1933) 60 C.C.C. 153 (Man.C.A.) (1933) 4 C.L.R. 725
the burial of the bodies found on their premises, their technique of relieving other mothers of the charge of their unwanted children for a low premium, all went to show that the Makins were, in the words of the male defendant, 'baby farmers'. It is worth noting that there was no question of the case being affected by Lord Herschell's first proposition because the Crown was not asking the jury to infer that the accused killed M because their conduct on other occasions showed that it was something they were likely to do: "on the contrary, any view about the character of the Makins is derived from a conclusion that they were guilty and not vice versa"\(^1\). The reasoning was of the all or nothing variety. So far as the similar fact evidence was concerned: "Either you draw the inference that the Makins had murdered all the children, or you draw no inference as to any of them"\(^2\).

The other classic case is that of \( R \ v. \) Smith\(^3\), the 'brides in the bath case'. The accused was charged with the murder of Bessie Munday with whom he had gone through a bigamous form of marriage, being, at that time married to another woman. Shortly after the marriage, the accused left his new bride, but was reunited with her eighteen (18) months later. A will was executed by Bessie Munday naming the accused as the beneficiary. Shortly after the reunion, a bath was installed in the house and, three days later, Bessie Munday was found dead in it. The accused claimed that she must have died as a result of drowning during an epileptic seizure. Prior to the death the accused had taken her to a doctor and had described to the doctor symptoms, supposedly suffered by his wife, consistent with epilepsy.

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(1) Hoffman, 91 L.Q.R. 199
(2) Eggleston, Evidence, Proof and Probability, 77
(3) (1915)11 Cr. App. Rep. 229 (C.C.A.); see The Trial of George Joseph Smith, ed. Watson (1922) for a fuller account of the facts.
The prosecutor adduced evidence that eighteen (18) months after the death of Bessie Munday, the accused went through a form of marriage with another woman. She also died in her bath. Prior to the death of each of these latter women, the accused had taken each to a doctor suggesting to him that the wife suffered from epileptic seizures. Furthermore, each of the women had subscribed for an insurance policy on her own life and had executed a will naming the accused as beneficiary. The accused was convicted, and appealed unsuccessfully to the Court of Criminal Appeal. The Court held the similar fact evidence to have been properly admitted. There were only two possible explanations of the succession of events which had occurred. Either the accused was an extremely unfortunate individual in that three times over a period of less than three years a 'wife' of his had died in a precisely similar and highly unusual accident. Alternatively, the accused was engaged in the business of marrying and then murdering unfortunate women for financial gain. The high order of coincidence required for the first hypothesis to be true justified the admissibility of the similar fact evidence.

Thus undoubtedly in Makin v. Attorney-General for New South Wales¹, and R v. Smith², the purpose for which the evidence was tendered was to rebut the possibility that the deaths were due to natural causes rather than at the hands of the accused. The evidence was tendered in order to prove, not only that the deaths were homicidal, but that it was also more likely that the accused were the authors due to the

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(1) (1894) A.C. 57
(2) (1915)11 Cr. App. Rep. 229
improbability of an innocent coincidence of association with all the victims. Also like Makins' case, R v. Smith is an all or nothing case. The argument was not: "it is highly probable that Smith murdered Bessie Munday because he subsequently killed two other girls in the same way"; but rather: "either all three deaths were accidental in the sense that Smith had no causal connection with them, or else he was responsible for each of them". The unlikelihood of the first hypothesis was put very clearly in the following remark of Lord Maugham: "No reasonable man would believe it possible that Smith had successfully married three women, persuaded them to make wills in his favour, bought three suitable baths, placed them in rooms which could not be locked, taken each wife to a doctor and suggested to him that she was suffering from epileptic fits, and had then been so unlucky that each of them had had some kind of fit in the bath and been drowned".

Based on the general experience of human nature and the law of probabilities, the likelihood of such a striking coincidence of similar misfortune occurring merely by chance was, to say the least, improbable, if not highly suspicious. As the trial Judge, Scrutton J. remarked in his charge to the jury: "If you find an accident which benefits a person and you find that the person has been sufficiently fortunate to have that accident happen to him a number of times, benefitting him each time, you draw a very strong, frequently irresistible, inference that the occurrence of so many accidents benefitting him is such a coincidence that it cannot have happened.

(1) Cited in Williams, The Proof of Guilt (3rd ed.) 230
unless it was a design. To this charge, Roading L.C.J. in the Court of Criminal Appeal remarked, "I think that puts it very accurately and states exactly the reason why the evidence is admissible."

To paraphrase one literary writer of the time: To lose one (wife) may be regarded as a misfortune, to lose (three) looks like carelessness.

Another famous case which deserves mention here though has been discussed earlier, is Noor Mohammed v. R. In the case the accused was charged with the murder of his de facto wife, Ayesha. The case arose in the Supreme Court of British Guyana. Ayesha had died as a result of taking potassium cyanide. The accused was a goldsmith, lawfully in possession of potassium cyanide for the purpose of his business. The accused was shown to have been on bad terms with Ayesha, and the prosecution case was that he had either tricked or forced her into taking the poison. The prosecution was permitted to lead evidence that two years and four months earlier the accused's wife, Gooriah, with whom he had also been on bad terms, had also died as a result of taking potassium cyanide. The accused was convicted of murder, and appealed to the Privy Council, where the conviction was quashed. Delivering the judgement of the Privy Council, Lord Du Parcq stated: "There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly

(1) (1915)11 Cr. App. R. 229 (C.C.A.) at 233
(2) Ibid at 230
(3) Oscar Wilde, The Importance of Being Earnest, Act 1
(4) (1949) A.C. 182
tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in Makin's case 'that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried', and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed their Lordships are not satisfied that its admission can be justified\(^1\).

It is submitted that the Privy Council was correct in this decision, and that the similar fact evidence was not of sufficient weight to justify admission\(^2\). There were likely explanations as to the deaths of the two women. Either they had taken potassium cyanide by mistake or as a means of suicide, or the accused had murdered them. Another possible hypothesis could have been that the accused killed one woman but not the other. In this instance, however, the coincidence required for the first hypothesis to be true was not of a sufficiently high order to render the evidence admissible. Only two incidents were involved, and the circumstances of death were not of great peculiarity. The significance of Noor Mohammed v. R\(^3\) as such in the present context is that if there had been evidence that the accused had administered poison to Ayesha consistent with circumstances of accident or mistake, evidence of his conduct with regard to

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\(^1\) (1949) A.C. 182 at 192-3


\(^3\) (1949) A.C. 182
Gooriah might well have been admissible to rebut these defences.

Clearly, the principles underlying the decisions in the cases above with regard to the question of causal connection is applicable to negligent cases. In Hales v. Kerr the defendant was a barber, and the plaintiff contended that he had contracted a disease in consequence of the practice adopted by him with regard to the cleansing and keeping of his razors. It was held that evidence might be given to the effect that another customer had contracted a similar disease shortly after he had been attended by the defendant. To quote from the judgement of Channel, J.: "It is not legitimate to charge a man with an act of negligence on a day in October and ask a jury to infer that he was negligent on that day because he was negligent on every day in September... But when the issue is that the defendant pursues a course of conduct which is dangerous to his neighbours, it is legitimate to show that his conduct has been a source of danger on other occasions, and it is legitimate inference that, having caused injury on those occasions, it has caused injury in the plaintiff's case also". No doubt this observation will be held to be applicable to an allegation of criminal negligence.

Finally, it is important to note that there is a special statutory rule governing poisoning cases in New Zealand. Section 23 of the Evidence Act 1908 provides: "Where in any criminal proceeding there is a question whether poison was administered or attempted to be administered by or by the procurement of the accused person, evidence

(1) (1908)2 K.B. 601
(2) (1908)2 K.B. 601 at 604-5; see also Reddecliffe v. North Canterbury Hospital Board (1946) N.Z.L.R.368
(3) See Akerele v. R (1943) A.C. 255; (1943) 1 All. E.R. 367
tending to prove the administration or attempted administration by or by the procurement of the accused, whether to the same or to another person, and whether at the same time as the time when the offence charged was committed or at any other time or times, shall be deemed to be relevant to the general issue of 'Guilty' or 'Not Guilty', and shall be admissible at any stage of the proceedings, as well for the purpose of proving the administration or attempted administration by or by the procurement of the accused as for the purpose of proving intent". The provisions of the statute cannot be said to have in any way altered the position already obtained at common law. By and large in New Zealand, the English cases with regard to cases of poisoning have been freely cited and followed.
(b) **Unintended Consequences:** The defence of accident may be tantamount to saying, "Although I caused the injuries of which complaint is made, I did not intend to do so". This may be a complete defence or it may amount to the contention that an allegation of intentional wrongdoing should be reduced to a charge based on negligence. The present category is a further illustration of the point that the probative value of a particular item of evidence may depend upon all the other evidence in the case. Evidence which shows the accused previously committed a crime similar to that presently charged may render extremely improbable any defence that in the instant case the accused lacked the relevant mens rea. The pertinent case in this respect is *R v. Mortimer*; the facts of the case have already been stated in an earlier discussion. However the facts briefly are that the accused was charged with murder, the allegation of the prosecution being that he had knocked down a woman cyclist by deliberately driving a motor car at her. Evidence was led to the effect that during the course of that day and the previous evening the accused had knocked down three other women cyclists in a similar way. The evidence was admitted to show that the accused intended to knock the deceased down. If he had done so accidentally, though while driving with a high degree of negligence, the verdict should have been one of manslaughter, but the Court of Criminal Appeal held that the evidence had been rightly admitted to show intention and accordingly affirmed the conviction. The evidence was highly relevant and specifically probative via a number of different, but related, chains of reason.

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(1) (1908) 2 K.B. 601 at 604-5; see also Reddecliffe v. North Canterbury Hospital Board (1946) N.A.L.R. 368
(2) Cross on Evidence, 5th ed. at P. 383
ning. First, it established that the accused possessed a propensity of a highly unusual and specialised nature. Secondly, it established not only that the accused possessed such a propensity, but that he possessed and was prepared to act on the propensity at a point of time very proximate to the incident the subject of the charge. Thirdly, it rendered extremely improbable any defence the accused might raise that he did not intend to hit the woman he was charged with having killed. Delivering the judgement of the Court of Criminal Appeal Lord Hewart L.C.J. stated: "It appears to us that it was of crucial importance to show that what was done in relation to (the deceased woman) was deliberately and intentionally done... In our opinion, this evidence...was plainly necessary to prove something which was really in issue, namely, the intent with which the prisoner did the act, if he was the person who did it".

There are other instances in which similar fact evidence may be admissible as rendering highly improbable any defence of lack of criminal intent. For example in the now familiar case of Perkins v. Jeffrey, the accused was charged with exposing himself with intent to insult females on various occasions at the same place and about the same hour. The Divisional Court held that evidence of the prior conduct would be admissible if, but only if, the accused put forward the defence that he had not exposed himself wilfully or with intent to insult. In such event the evidence would possess great probative value in rendering such a defence highly improbable.

(1) (1936)25 Cr. App. R. 150 at 157
It is significant to point out under this heading that it is sometimes permissible to give evidence in proof of intent of acts which are not shown to be attributable to the accused. In *R v. Grills*¹ the accused was charged with administering thalium poison in 1953 with intent to murder. Evidence was given of the administering by the accused and also that in 1947, 1948 and 1949 persons to all of whom the accused had access, had died of similar poison and that other relatives had suffered the effect of thalium. This evidence was held to be rightly admitted by the Court of Criminal Appeal of New South Wales relying on the dictum of Evatt J. in *Martin v. Osborne*².

(c) Involuntary Conduct: One case dominates the discussion here, and it is *R v. Harrison-Owen*³. In the case, the accused was charged with burglary. He was found in a house, where a party was in progress, at 1a.m. He had taken a handbag from a car parked outside, and found in it a key with which he had let himself in. The accused's defence was that he had no recollection of entering the house, and that he must have done so in a state of automatism. The trial judge directed counsel for the prosecution to put a number of previous convictions for housebreaking and larceny to the accused saying: "in view of this defence that has been raised - that there was no intention in the act from start to finish, and that his presence in the house was purely accidental". The accused was convicted by the trial judge. But it was held by the Court of Criminal Appeal that in the circumstances evidence of the accused's prior convictions for burglary were not admissible - the accused's convic-

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(1) (1954)73 W.N. (N.S.W.)303
(2) (1936)55 C.L.R. 367 at 384, 385, but see *R v. Floyd* (1972)1 NSWLP 373
(3) (1951) 2 All. E.R. 726
The judgement of the Court of Criminal Appeal can be construed to mean that similar fact evidence is never admissible to rebut a defence of automatism. Such a result would be odd, for there might well be features in the accused's conduct on other occasions which render it relevant for some reason other than its tendency to show bad disposition on the part of the accused. For example, he might have said that he was acting in a black-out when found in someone else's house on a former occasion, or the method employed on the occasion under investigation may be so strikingly similar to that employed on other occasions when there was no black-out as to cast doubt on the veracity of the accused's story. It is submitted that the view taken by the Court in R v. Harrison-Owen\(^1\) was unduly favourable to the accused. The similar fact evidence possessed very great probative value, rendering extremely improbable the accused's defence of lack of mens rea. R v. Harrison-Owen has been criticised\(^2\) and doubted\(^3\), and it is likely that it will not be followed in any English court today.

In the course of his speech in Bratty v. Attorney-General for Northern Ireland\(^4\) Lord Denning questioned the decision in R v. Harrison-Owen, and expressed the view that the accused could have been asked about his other burglaries in order to rebut the defence of automatism. The facts of Bratty's case are as follows. The appellant was convicted at Downpatrick Assizes of the murder by

\(^1\) (1951) 2 All E.R. 726
\(^2\) See R. Cross, Reflections on Bratty's Case (1962) 78 L.Q.R. 238
\(^3\) Note Per Lord Denning in Bratty v. Att.Gen. for Northern Ireland (1963) A.C. 386 at 410
\(^4\) (1963) A.C. 386
strangulation of an eighteen (18) year old girl. In a statement made to the police the appellant said that when he was with the girl he had a 'terrible feeling' and that 'a sort of blackness' came over him but, nevertheless, he was able to give some account of what had occurred. Three separate and independent defences were raised at the trial, namely, (i) that the appellant was not guilty because at the material time he was in a state of automatism by reason of suffering from an attack of psychomotor epilepsy; (ii) that he was guilty only of manslaughter since he was incapable of forming an intent to murder on the ground that 'his mental condition was so impaired and confused and he was so deficient in reason that he was not capable of forming' such intent; (iii) that he was guilty but insane in consequence of suffering from a disease of the mind. In the course of his judgment, Lord Denning made the following observation¹: "...until recently there was hardly any reference in the English books to this so-called defence of automatism. There was a passing reference to it in 1951 in R v. Harrison-Owen where a burglar, who broke into houses, said he did not know what he was doing. I should have thought that, in order to rebut this defence, he could have been cross examined about his previous burglaries; but the Court of Criminal Appeal ruled otherwise. I venture to doubt that decision". In so far as this statement suggests that, contrary to the implications of the judgement of the Court of Criminal Appeal in R v. Harrison-Owen, similar fact evidence may be admissible to rebut automatism, Lord Denning's observation is greatly to be welcomed, but it is to be hoped that it

(1) (1963) A.C. 386 at 410
will not be construed to mean that similar fact evidence is invariably admissible to rebut a defence of automatism, even if there is no nexus between the conduct of the accused on the occasion under investigation and on other occasions.

It should be noted that the ground of the decision of the Court of Criminal Appeal in _R v. Harrison-Owen_ was that the trial judge confused accident and intent, but this is a statement that needs to be enlarged. The previous convictions only went to show that the accused was a man of dishonest disposition and could have no further relevance but, if they had all followed upon a defence similar to that raised by the accused, the facts upon which they were based coupled with a succession of pleas of this nature would have been extremely relevant as suggesting a strange coincidence - whenever the accused was found inside someone else's house, he said he went there in a state of automatism.

One case from which the Court of Criminal Appeal in _R v. Harrison-Owen_ can take cover is _R v. Porter_. In that case, the appellant was charged with obtaining money by false pretences, the allegation of the prosecution being that a certain business carried on by him falsely represented to be a bona fide association honestly carried on in a position to offer advantages in return for the subscription of members. The appellant had carried on in 1930 a similar business and had made representations similar to those made in the present case and had, as a result, been convicted of obtaining money by false pretences.

pretences. He was asked in cross examination a number of questions about the previous business, but no reference was made by the prosecution to that business having resulted in any charge or conviction. The Court held that as there was sufficient nexus in method and circumstances between the two businesses, the cross examination on the previous business was admissible. The significant point here is that no allusion was made in cross examination to previous conviction. In his comment on R v. Harrison-Owen, Rupert Cross said "...it (is) to be hoped that Lord Denning's doubts about the correctness of R v. Harrison-Owen will not be taken to mean that the actual cross examination in that case was proper. The decision can, it is submitted, be supported on a ground-not mentioned in the judgement, namely, that proof of the previous convictions without more merely showed that the accused was the kind of man who would commit burglary. He was stopped from denying his guilt on the former occasions, but, without more evidence concerning the details of his conduct on these occasions, the convictions could do no more than show burglarious disposition"\(^1\). Strong support for this argument is provided by the already discussed decision of the Court of Criminal Appeal in R v. Coombes\(^2\). Rupert Cross continued: "This point is worth labouring because, should it ever come to be supposed that previous convictions are admissible either in chief or as the subject of cross examination whenever similar fact evidence is admissible, the true basis of the rules governing the reception of such evidence will be undermined in a manner most prejudicial to the fair trial of the accused"\(^3\).

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(1) Reflections on Bratty's Case (1962) 78 L.Q.R. 238 at 244
(2) (1961) 45 Cr. App. R. 36
(3) (1962) 78 L.Q.R. 238 at 244
On the whole, although the decision in R v. Harrison-Owen\(^1\) may be justified on account of the fact that evidence showed no more than a propensity to commit housebreaking without reference to the circumstances, it would be unwise to treat the case as a decision to the effect that similar fact evidence is never admissible to rebut an allegation that the conduct of the accused was involuntary; I reckon that much is clear from the criticisms.

Care should be exercised in ascertaining precisely what manner the similar facts evidence advances the prosecution case. In R v. Miller\(^2\), the full court of the Supreme Court of Victoria ordered a retrial of Miller who was accused of the murder of his twelve months old daughter. The Crown alleged that he had struck the child in anger and that while the blow was not of itself sufficient to injure, it caused her to fall to the ground where she struck some sharp object. Evidence was led that some years previously he had struck his infant son who had died some three days later. It was suggested by the Crown on appeal that the evidence would be relevant (i) to rebut the possible defence that the excess of force in the blow was not intended, (ii) to rebut the defence that the accused did not intend to strike the child at all, and (iii) to show that from past experience the accused ought to know that such violence can cause grievous bodily harm. This evidence was held\(^3\), to be not 'legally relevant' since (i) the Crown evidence did not suggest excessive force; (ii) neither side suggested the blow was involuntary, and as

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\(^1\) (1951) 2 All E.R. 726
\(^2\) (1951) V.L.R. 364
\(^3\) (1951) V.L.R. 353
to (iii) that this past experience could not tell the accused any-
thing about the risks attaching to a fall from the bed.

(ii) Rebutting Accused's Plea of Ignorance or Mistake of Fact

Evidence negativing ignorance or mistake of fact is often spoken of
as 'proof of guilty knowledge'. Where it is admitted or proved that
a person acted in a particular way, the contention that he did so as
a result of a mistake or ignorance of fact may yet have to be rebut-
ted before the case against him is established. Substantially
similar conduct with practically identical results on other occasions
is clearly of the utmost relevance in order to negative such a plea,
and it has been received in evidence for this reason in a number of
cases.

Cowen and Carter argue that there is some element of propensity
reasoning in a proof that the accused possessed knowledge of particu-
lar facts, just as there is in proof of guilty passion or intention
etc. He stated: "Cases of knowledge are upon analysis not different
from cases of intention and emotion in this respect. Evidence sho-
wing that the accused knew that other goods received on other
occasions were stolen is clearly relevant via propensity to show that
he knew that particular goods received on a particular occasion in
similar circumstances were stolen. Evidence of possession of knowl-
dge of a particular counterfeiting technique at various times in the
past is relevant via propensity to show possession of knowledge of
the same technique on the instant occasion. That his second example
of evidence of knowledge is a case of propensity evidence is not so
immediately obvious. But it is so: the retention of the knowledge, or propensity to keep on knowing, is a crucial factor in the mental process constituting relevance"\(^1\).

The evidence of prior acts may be probative if, during the course of commission the accused had acquired knowledge of a certain quality, nature or essence, the possession of which is material to the prosecution of the offence charged. Depending upon the circumstances of the case and the nature of the knowledge, it may be possible to infer that the accused is likely to retain such knowledge, and that, therefore, he possesses the same with respect to the offence charged. A good case example, and one which happens to be squarely along the lines of the hypothetical of Cowen and Carter is that of \textit{R v. Petryshen and Saiko}\(^2\). In that case, the accused were charged with possessing instruments, knowing them to be capable of being used for counterfeiting. A witness testifying on behalf of the accused (Saiko), stated that the accused had no knowledge of the nature or the possible use to which the instruments could be put. The trial judge, whose decision was affirmed by the British Columbia Court of Appeal, allowed the Crown to cross-examine the witness as to a previous conviction of counterfeiting to which the witness and the accused (Saiko) were parties, in order to establish that the accused (Saiko) had knowledge of the potential use to which the materials, found in his possession, could be put. The retention of this knowledge over time would, in the words of Cowen and Carter, be a

\(^1\) Cowen and Carter, Essays on the Law of Evidence (1956) P. 134
\(^2\) (1956)115 C.C.C. 217 (B.C.C.A.); 18 W.W.R. 662; see \textit{R v. Adeniyi} (1937)3 W.A.C.A. 185; see also \textit{R v. Forster} (1855), Dears.456 169 E.R. 803; \textit{DeBlois v. The Queen} (1964)44 C.R. 399 (Que.C.A.)
propensity to keep on knowing" from which it could be inferred that the accused knew the nature of a potential use for the materials in his present possession.

It is important to realise that it is the assumption of continuity which makes this evidence relevant, and not the criminal nature of the prior acts. The probative value is not as a result of the fact that the accused is of bad character or has a disposition to counterfeit or to possess counterfeiting materials, rather the probative value is determined via his mental state of awareness of certain facts or the quality of certain facts (i.e. to know that one can counterfeit with these materials) and to continue knowing such until the present. Clearly, it is submitted, the fact that the accused acquired his knowledge through the commission of a criminal act was immaterial, or only slightly material, to the determination of the probative value of the evidence. If the evidence, instead, had disclosed that he had acquired his knowledge of counterfeiting potential of the materials possessed through legitimate means (for example, while working for a police department or say the Canadian Mint), this hypothetical evidence would have been probative in a similar way. The criminality of the prior acts is not material. The material point is that an accused had acquired knowledge of a certain nature, and has retained it during the period of time when the offence charged was alleged to have been committed. An assumption must be made that an accused still possesses that type of knowledge at the present time. The assumption is made on the basis

(1) Cowen and Carter, Essays on the Law of Evidence (1956) at P. 134
of the character of the knowledge possessed and his likelihood, or propensity, to retain that type of knowledge.

The other way similar fact evidence may tend to establish knowledge, is that the evidence may derive its relevance from the improbability that an act of a certain class would be likely to be repeated on a series of occasions without the accused possessing awareness of certain accompanying facts. For example, in *R v. Francis*¹, the accused was charged with attempting to obtain money from a pawnbroker upon a ring by the false pretence that it was a diamond ring. His defence was that he did not know it was worthless, and the Court for Crown Cases Reserved held that evidence had been rightly received that at an earlier but proximate time - two days previously - he had obtained money from another pawnbroker upon a chain which he falsely represented to be a gold chain, and that he had attempted to obtain from other pawnbrokers money upon a ring which he also represented to be a diamond ring. The accused was convicted, and his conviction affirmed by the Court for Crown Cases Reserved. Delivering the judgement of the Court, Lord Coleridge C.J. stated: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a

¹ (1874) L.R. 2 C.C.R. 128 *R v. Gunn* (1826) 11 Mod. 66, 88 E.R. 891
presumption that he was not acting under a mistake. It is not conclusiv e, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority.\(^1\)

It is clear from the case of \textit{R v. Francis} that striking similarity is probably not a sine qua non of the admissibility of similar fact evidence to rebut a defence of ignorance or mistake. It is worthy of mention that it is extremely unlikely that evidence of the other obtainings in the case would be admissible until it became clear that the accused was to rely on the defence of ignorance or mistake. He might be going to allege that he made no pretence with regard to the ring or else that the ring produced by the pawnbroker was not the one he pledged.

There is no doubting the fact that \textit{R v. Francis}\(^2\) is accepted as a statement of authority in Scotland. In \textit{Gallaher v. Paton}\(^3\), Lord McLaren said: "Now, when the question is whether the accused person made false statements, knowing the statements to be false, and for the purpose of obtaining money to which he was not entitled, I do not know of any better way of estimating the criminal intention than by the proof that he had made similar false statements on the same day to other people, and apparently with the same object. In a civil case such evidence would be admitted without doubt or difficulty, and

\(^1\) Ibid at 131-2; see also \textit{R v. Gregg} (1964)49 W.W.R. 732; (1965)3 C.C.C. 203 (Sask. C.A.); \textit{R v. Rhodes} (1899)1 Q.B. 77 at 82; \textit{R v. Weeks} (1816)8 Cox C.C. 451

\(^2\) (1874) L.R. 2 C.C.R. 128

\(^3\) (1909) S.C. (J) 50
in criminal practice there is a parallel case, where it has been adjudged that evidence attempting to pass off base coin to other persons is proof of guilty knowledge in the case of the base coin which the accused person successfully passed off.¹

In H.M. Advocate v. Ritchie and Morren², the accused were charged with uttering a base shilling, and having in their possession six base shillings, with intent to utter them. In the course of the proof, the prosecution proposed to lead evidence in regard to various unsuccessful attempts made by the pannels to utter coin, which was refused as base. The counsel for the defence objected to the competency of such proof. Repelling the objection, the Lord Justice-Clerk said: "The onus lies on the prosecutor to prove guilty knowledge on the part of the pannels - that is his knowledge that the coin which the indictment charges him uttering was bad. For this purpose, it is quite competent to prove that the pannel was, on the same night, in possession of a quantity of other bad money, or at least of money which was rejected as bad, and received back by him as such."³

Similarly in the Nigerian case of R v. Adeniyi and others⁴, the appellants were charged with being in possession of moulds in preparation for coining current silver coins contrary to Section 148(3)(c) of the Nigerian Criminal Code. At their trial, evidence of previous uttering of counterfeit coins by the appellant was admitted in order to prove guilty knowledge against the appellant. It was held on appeal that the evidence was properly admitted. Thus to prove the

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(1) (1909) S.C. (J) 50 at 55
(2) (1841)2 Swin. 581
(3) (1841)2 Swin. 581 at 583
(4) (1937)3 WACA 185
guilty knowledge of someone charged with the offence of illegal coining contrary to Section 148 of the Nigerian Criminal Code, evidence may be given by virtue of Section 17 of the Nigerian Evidence Act, of the accused having previously uttered counterfeit coins. Section 17 of the Nigerian Evidence Act provides ostensibly to cover the similar facts evidence rule. It provides thus: "When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant". However, in R v. Griliopoulous & Ors, where the accused were charged with receiving stolen tin from P, and evidence was given to show that they received on the same day and also a week earlier stolen tin from other persons; it was held that evidence of the other instances of receiving stolen tin could not be used to prove the act of receiving charged; that act must be proved aliunde. If the particular act of receiving is proved, the other instances would then show that the receiving was accompanied by guilty knowledge that the tin received was stolen.

In the Indian case of R v. Aloomiya, the court held on a charge of keeping a gambling house, evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge and intention.

A number of other cases relating to other matters have been decided on the same reasoning process. In R v. Mason, evidence of the possession of other forged deeds was admissible to prove that the

(1) See R v. Weeks (1861) 8 Cox C.C. 455
(2) (1953) 20 N.L.R. 114
(3) 28B, 129; 5Bom. L.R. 805
accused had knowledge that the deed uttered by him, being the subject-matter of the charge, was a forgery. In *R v. Porter*¹, in order to rebut a defence that a false prospectus of a business was the result of excessive optimism, rather than the result of an intention to defraud, evidence was admitted of having previously obtained subscriptions for shares to a business of the same name by means of a similar prospectus. In fact, the knowledge acquired and the improbability that the accused would not possess it on a similar occasion is not solely dependant upon whether such knowledge was acquired as a direct result of his own conduct. In *Blake v. Albion Life Assurance Society*², an assertion by the principal that he was ignorant of the fraudulent course of conduct of his agent was rebutted by evidence of similar conduct by his agent on other occasions, from which the principal knowingly benefitted. Similarly in the Canadian case of *R v. Benwell*³, where on a trial for charges of engaging in the business or occupation of betting, and of keeping a common betting-house, evidence of prior charges and convictions against employees for placing bets for consideration was held to be admissible for the purpose of proving that the accused employers had "complete awareness of the illegal nature of the activities in the business"⁴.

As a matter of fact, it may safely be assumed that knowledge that a certain result is likely to follow from particular conduct may always be proved by reference to similar results that have followed from the same conduct of the same person on an earlier occasion⁵.

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¹ (1935) 25 Cr. App. R. 59; see also McGovern v. Galt (1948) VLR 285
² (1878) 4 C.P.D. 94; Blake v. Albion Life Assn. was applied in Parker v. Wachner (1917) NZLR 410
³ (1972) 9 C.C.C. (2d) 158 (Ont. C.A.); see also R v. Debendra, 36 C. 573; 13 C.W.N. 973
⁴ Ibid at 168
⁵ (1849) 3 Cox C.C. 547 - *R v. Cooper*
An illustration could be found in the Sudan, in the case of Sudan Government v. Sherif Ahmed Sharfi\(^1\), where the accused was charged with cheating by inducing the complainant to desist from legal action by giving him a post-dated cheque, subsequently dishonoured. Guilty knowledge by the accused was proved by showing that he was in the habit of drawing post-dated cheques which were dishonoured on maturity. Clearly, there was the knowledge in this case by the accused of what was likely to be the result of his conduct especially as it was not his first time.

The Indian case of R v. Juggankhan\(^2\) could be said to be of that ilk too. It was a case of death due to a lethal dose of dhatura; the defence was that there was in the record of medical experience cases in which the drug has been successfully administered for curing guinea-worm. It was then said to be open to the prosecution to show that the experiment carried out by the accused himself in exactly similar circumstances had shown that far from being a cure, the drug is a certain killer.

One means of proving guilty knowledge in a case of uttering is to establish that the accused himself forged the document uttered, and evidence to that effect is admissible for that purpose\(^3\). In Barr v. H.M. Advocate\(^4\), an indictment charged the accused with uttering as genuine a number of receipts containing signatures, "each of such signatures being forged". At the trial in the Sheriff Court objection was taken on his behalf to the competency of the prosecutor leading evidence to show that the accused had himself been the for-

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(1) (1950) KTM PM NS 296 50, unrep.
(2) See s. 362 A, Sudan Penal Code, 1974, which makes issuing a cheque for which there is no cover an offence
(3) Walker and Walker, The Law of Evidence in Scotland at P. 26
(4) Barr v. H.M. Advocate, (1927) J.C. 51; see also the trial of Donald Merrett, Notable British Trials
ger, the grounds of objection being (i) that the indictment merely charged the accused with uttering, whereas the prosecutor was attempting to prove that he both forged and uttered, a different and more serious crime, and (ii) that, in any event, the accused had not received fair notice that the prosecutor intended to prove that he was the forger, and that, in the absence of such notice, he was entitled to assume that such a case was not to be made against him and that he need not be prepared to meet it. The objection was repelled, and the accused, having been found guilty by the jury, appealed to the High Court of Justiciary. The Court dismissed the appeal. The Lord Justice-Clerk observed that, in a charge of uttering, if the prosecutor intends to prove that the accused was himself the forger, the better practice would be to libel that circumstance in the charge.

In Scotland, the prosecution may lead evidence of collateral facts from which guilty intention or guilty knowledge may be inferred, and such evidence is both admissible and necessary when the act itself is neutral in quality, and is susceptible either of a guilty or of an innocent interpretation such as accident, self-defence or unintentional injury or deceit. So in a charge of wilful fire-raising evidence was admitted that shortly before the fire the accused removed some of his own goods from the building and, in a case of murder of an illegitimate child by its parents, the prosecution, in order to show knowledge and premeditation, was allowed to prove that both accused

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(1) MacCreadie (1862)4 Irv. 214; see also H.M. Advocate v. Smillie (1883)10 R. (J) 70 at 71.
discussed the question of the mother's pregnancy with a doctor five months before the child's birth\(^1\).

It is significant to mention here, that evidence of a similar act in respect of which the accused had been acquitted on an earlier occasion may be admissible to show guilty knowledge\(^2\). But generally nothing should be heard about an acquittal.

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\(^1\) H.M. Advocate v. Wishart (1870) 1 Couper 463

\(^2\) R v. Ollis (1900) 2 Q.B. 758 (false pretences); R v. Spreckley and Cootes (1958) 123 C.C.C. 344 (B.C.C.A.)
(iii) Rebutting Innocent Explanation of a Particular Act or of the Possession of Incriminating Material

Of course, a completely innocent explanation is always possible not only with respect to the offence charged but with respect to the other occurrences as well. For example, in Makin v. Attorney General for New South Wales¹, the deaths may all have occurred simply because the accused were poor, if not negligent, child rearers, or were carriers of a disease to which the infants all succumbed. There are yet other innocent explanations that one could use to explain this peculiar or rather unusual situation. However, the mere possibility of such is not sufficient; there had to have been some factual basis for causation of the deaths in that manner on the evidence so as to be able to constitute a reasonable doubt countering the drawing of an inference of improbability of innocent coincidence and, thereby, guilt. In the result, because the improbability of the coincidence was derived inter se from among all of the incidents in Makin v. Attorney-General for New South Wales, the improbability applied equally to each individual incident when viewed as a whole. In cases of this sort², one draws the inference that the accused killed all the infants, or draws no inference of culpability as to any of the incidents. While it can be said that the accused committed the offence charged, and probably the other incidents as well, it did so as a by-product of the conclusion that the evidence established a system or propensity.

I believe that the Canadian case of R v. Stawyczny³ falls within

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(1) (1894) A.C. P. 57
(3) (1933)4 D.L.R. 725; (1933)60 C.C.C. 153
this category of cases. In that case the accused was charged with the murder of the newly born child of his de facto wife. The mother gave evidence that immediately following the birth of the child he grabbed it by the neck. She told him to let it alone. He replied that he would be ashamed to let people know and continued to hold it by the neck for ten minutes or more, choking it. He then put the child's body in a box and buried it in the garden. The mother gave further evidence that intimacy between her and the accused resumed, and that a year later she gave birth to a boy, and the following year to twin boys. She testified that the accused also strangled these babies a few minutes after their birth. He also put their bodies in boxes which he buried in places in the garden. The bodies of four babies were found buried in the garden.

The accused was convicted and appealed to the Manitoba Court of Appeal. By a majority decision the Court held that the similar fact evidence had been properly admitted and dismissed the appeal. It was suggested by the majority, however, that while the fact of the deaths was admissible, the testimony of the mother that it was the accused who killed the three subsequently born children was not admissible. Prendergast C.J.M. stated: "In the present case, what the Crown sought to establish was not that the accused murdered those three children... . The Crown's object in this case was to show that these children all died within a few minutes after their birth, which was for the purpose of suggesting to the jury that it is not in the
course of nature or usual events that they should have all died of accident or disease in such a brief time, or in other words, that the cause of their death was designed and that a crime was thus committed whoever may have been responsible for it. If that had been all the woman's evidence and it had not gone farther, surely it would be admissible..."

His Honour held, however, that the testimony of the mother that the accused killed the three later born children was properly received because of the difficulty which would have been involved in trying to elicit testimony as to the deaths of the children without receiving testimony as to the part played by the accused in these deaths. It is, with respect, suggested that the distinction which His Honour attempted to draw was in fact misconceived. The relevance, and the only possible relevance, of the similar fact evidence was that it tended to show that the accused murdered all four children. If that was the purpose for which the evidence was adduced, there could be no objection to direct testimony as to that fact.

However, the main purpose of the present discussion is to consider ways or rather how to rebut innocent explanation of a material act or of the possession of incriminating material. Generally, in many cases the major issue is whether a particular act which is admitted or proved was done for an innocent purpose or with guilty intent. The innocent purpose is often negatived by 'evidence of system', frequently a synonym for evidence of a propensity to commit a particular crime by means of a particular technique. A similar question

(1) (1933) 4 D.L.R. 725 at 730; (1933) 60 C.C.C. 155 at 158
may also arise with regard to the possession of incriminating material - which is that - is there any innocent explanation of the possession? If not, the possession of the incriminating material may be a significant item of circumstantial evidence, or unlawful possession may be the gist of the crime. The discussion of the present topic will now proceed under the main questions - issues - outlined above.

(a) Evidence of System: Similar fact evidence may often be admissible to show that the crime charged constitutes merely one incident forming part of a systematic course of conduct engaged in by the accused. The question then is that, what is meant by 'system' or 'a systematic course of conduct'. The answer to this question is provided by one of the leading cases concerning 'system' which is that of R v. Bond¹. Of the case Cross said: "The judgements in this case are of great historical interest for two reasons. In the first place, they were delivered at a time when it was thought that there was a general rule against the proof of criminal acts of the accused other than those charged in the indictment subject to a strictly limited number of exceptions; secondly, they contain some reflections on the implications of the statement that similar fact evidence is admissible to prove 'system' "².

A. T. Lawrence, J. in R v. Bond said: "A system is not necessarily criminal: most men carry on business on a system, they may even be said to live on a system. Where, however, acts are of such a charac-

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¹ (1906) 2 K.B. 389
² Cross on Evidence, 5th ed. at P. 362
ter that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least show that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person¹.

Also in the same case, Bray J. stated as follows: "The word 'system' implies a connection between the acts of which evidence is sought to be given and the act with which the prisoner is charged. A number of acts of theft do not, as a rule, constitute a system. They are isolated acts having no connection with one another. On the other hand, the transactions of a long firm are the result of a formulated scheme and part of a system. The ground on which in cases of this class evidence is admitted of acts not charged in the indictments is, in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan (say) for obtaining money by fraud, that the act with which the prisoner is charged is part of a planned fraud, and that the other acts of which evidence is sought to be given when proved will show the existence of the plan and, therefore, the guilty mind of the prisoner².

Having ascertained what is meant by 'system', we can now consider the facts of R v. Bond³ which, as earlier stated, is one of the leading cases on 'system' and subsequently other cases will be considered. In that case, the accused, a medical doctor, was indicted for

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(1) (1906)2 K.B. 389 at 420
(2) (1906)2 K.B. 389 at 415
(3) (1906)2 K.B. 389
using certain instruments with intent to procure the miscarriage of a particular woman whom he had impregnated during a period of time when she was dwelling at his residence. The prosecution sought to adduce evidence from another woman, whom the accused had also impregnated and who had obtained an operation at the hands of the accused some nine months prior to the date of the alleged offence. In addition, the prosecution sought to adduce evidence of a statement made by the accused to this latter witness that he had 'put dozens of girls right'\(^1\), and that he would put her 'right'. The accused admitted that he had used instruments upon the complainant, but claimed that he had done so for an innocent purpose - to examine her for leucorrhoea. It should be noted that no actual miscarriage resulted to the complainant, and she in fact did bear a child. The sole issue at trial was the intention with which the accused had acted. Did the accused use the instruments for the purpose of a lawful medical procedure or with the intent to procure her miscarriage?

Kennedy, J. in his judgement stated that it is "not allowable to show on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted"\(^2\). However, it is submitted that His Lordship then analysed and determined admissibility, not only upon the basis of relevancy theory, but also via the probative value of an established propensity. With respect to the incident nine months earlier, Kennedy J. stated, that standing alone, that evidence was inadmissib-

\(^1\) (1906)2 K.B. 389 at 419
\(^2\) (1906)2 K.B. 389 at 395
le. It was no more than "proving one crime in order to raise a presumption that another crime had been committed by the perpetrator of the first"\(^1\). The reason being that on its own, the evidence of the prior abortion was an "isolated act". This was "not just ground for any inference, and an act on which no inference can justly be drawn ought not to be allowed to be before the jury"\(^2\). Kennedy J. therefore, was stating that the evidence of the one prior incident alone was not admissible because it was not sufficiently probative of the issue. No inference could be drawn from it, according to His Lordship. His Lordship then, further stated that: "The admissibility, not merely the weight, of the evidence depends, in my view, upon the evidence which it is proposed to adduce being evidence of such conduct as would authorise a reasonable inference of a systematic pursuit of the same criminal object"\(^3\).

This is no more than saying that if the evidence was probative enough to show that he had a propensity to procure the "criminal object" of abortion, then ceteris paribus it was more likely that he committed the present offence charged. Proof of commission of the offence charged necessarily proves that he used the instruments for an unlawful purpose. Likewise, evidence tending toward proof of the former tends toward proof of the latter. The offence charged would then be another incident of a manifestation of his propensity, or an incident of his systematic course of conduct. However one expresses it, this is reasoning via propensity. This is so, because as the above passage of Kennedy J. indicates, one needs to establish ab

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(1) (1906) 2 K.B. 389 at 406
(2) See Ibid
(3) Ibid
initio a propensity or "such conduct as would authorise a reasonable inference" from which "a reasonable inference" towards the offence charged can be made. According to Kennedy J. the evidence of the prior abortion when combined with the evidence of the statement of the accused that he had "put dozens of girls right" sufficiently established "a course of conduct"¹ and the evidence was admissible. His Lordship concluded that if the evidence was admissible "it showed that the prisoner's scheme or system when the indulgence of his passion had got girls into trouble was to use these instruments upon them to relieve himself of the burden of paternity"². It could be said then that in light of the existence of that propensity, it was more likely that, given the fact that the accused had impregnated the complainant, his purpose in using the instruments upon her was to procure her miscarriage. On the other hand, it was of course possible that Bond had acted with innocent intent so far as the complainant, in the case under trial, was concerned although he had deliberately endeavoured to procure the abortion of the other (prior) woman who gave evidence. However, it is true that even so there would have been an element of coincidence in the fact that he had achieved by accident a beneficial result, relief from the burden of paternity, which he had previously sought to achieve deliberately by the same means. It was also possible that both operations had been performed with innocent intent and resulted in accidents, but the prosecution was entitled to remind the jury: "that the same accident

(1) (1906) 2 K.B. 389 at 406
(2) (1906) 2 K.B. 389 at 425
should repeatedly occur to the same person is unusual, especially so when it confers a benefit on him".  

Bray J. (Darling J. concurring) was of the opinion that there was "nothing inconsistent in a doctor one day using these instruments for an unlawful purpose and in another case many months afterwards using them for a lawful purpose, unless you can show a course of conduct, and not merely one or two isolated cases". In any event, the evidence was thought by Bray J. to be admissible, because it proved "system or course of conduct". His Lordship stated that in order to be probative the evidence would not have to "show that the prisoner carried on the business of an abortionist", but that the existence of a "habit of treating women in a state of pregnancy with a view to procure abortion" would suffice. This would be "a system or course of conduct".

While in R v. Bond proof of system was held to have been rightly admitted against a doctor charged with aborting girls pregnant by him, there have been cases where evidence tending to show that the accused was a practised abortionist has also been admitted in order to negative innocent intent in the use of drugs or instruments when there was no such connection between the patients and the accused as that which existed in Bond's case (i.e. no personal relationship).

In R v. Starkie, evidence of use of drugs was held admissible on a charge involving use of instruments. The appellant, a medical man, was charged upon an indictment containing separate counts - (a) for having used instruments with intent to procure the miscarriage of

(1) (1906)2 K.B. 389 Per A.T. Lawrence J. at 420-1
(2) (1906)2 K.B. 389 at 418
(3) (1906)2 K.B. 389 at 414, 418
(4) (1906)2 K.B. 389 at 418
1 Cf Maxwell v. Smith (1935) NZLR S.47; R v. O'Shaughnessy (1912) 31 NZLR 928; 14GLR 640; R v. Reddaway (1948) NZLR 1118
three women, and (b) for having administered and supplied poison or other noxious thing to a fourth woman with the like intent. All four charges were tried together, and upon counts (a) the appellant was acquitted, but upon counts (b) he was convicted. The court held that the evidence against the appellant upon counts (a) was admissible upon the trial of counts (b) and vice versa, not to prove the use of the instruments or the administration of the drug, but to rebut the defence of innocent intention; and the judge at the trial was said to be right in allowing all the counts to be tried together.

Of cases of this type Cross asked: "Would these cases now be treated as ones in which Crown witnesses confirm each other's testimony by deposing to strikingly similar incidents, or would the fact that the defence was one of innocent intent be said to enhance the relevance of the similar fact evidence? The point might be material if the defence were a denial of the acts charged".

One of the leading Canadian cases in this area of the law is Brunet v. R. In that case, the charge was against a surgeon for procuring an abortion by an instrument and the defence raised admitted the use of an instrument but attempted to justify. This defence appears to have been backed up by the evidence of the surgeon himself and the opinions reported do not show that any expert evidence was brought forward to discredit the theory that the use of instruments would be justified under the physical conditions which the accused swore he found in the patient, i.e. a miscarriage already begun. Nothing

(1) Cross on Evidence, 5th ed. at P. 386
(2) (1928) S.C.R. 375; (1928)3 D.L.R. 822; 50, C.C.C.1
appears on the question of the surgeon's remuneration for the service performed so as to show motive from any excessive charge. The accused made mention to the complainant of other similar operations. The other persons who were operated upon were not named in the conversation, and it would seem that by calling two persons operated upon by the accused at remote dates, the accused was at least indirectly, called upon to affirm or deny whether they were the persons he had talked about, and to affirm or deny that the conditions to which they deposed were consistent with the physical conditions he found in their cases. In its judgement the Court held that, where in answer to a charge of using instruments to cause an abortion, the accused sets up in defence that the instruments were used to prevent septic poisoning in a miscarriage already begun, and he gives his own testimony to that effect, he becomes liable to be cross-examined as to alleged previous criminal acts similar to that alleged and performed via similar manner, and, on his denial of same, to have his plea of innocent intent negatived by proof of the other similar criminal acts although these occurred two or four years previous to the offence charged; such evidence would be admissible apart from any evidence of system.

Another leading Canadian case in this area of the law is R v. Campbell. The accused, a registered naturopathic physician, was charged with and convicted of using an instrument on the complainant with intent to procure her miscarriage. From the beginning of the case to the admission of the evidence in the case for the prosecu-

(1) (1947)2 C.R. 351; (1946)3 W.W.R. 369; 86 C.C.C. 410; see also R v. Hiechuck (1950)98 C.C.C. 44 (Man.C.A.); R v. Anderson (1973) 5 SASR 256
tion, it was clear that the defence of the accused was "a 'categorical
denial' that he was the man who had committed this crime"\(^1\), or
that he "had nothing to do with this woman". The accused maintained
that same defence throughout the case for the Crown and through his
own case in defence. It appeared that the accused was admitting that
someone had performed an abortion (considering the circumstances of
the case, it was hardly possible to deny that someone had procured
her miscarriage) but denied that it was he who had done so. The
evidence of the complainant, if believed, established that the ac-
cused undertook to perform an operation on her designed to produce a
miscarriage; that such operation was performed by him at his 'down-
town office' by the use of surgical instruments; and that the com-
plainant, on the direction of the accused, subsequently attended a
nursing home at which place during her confinement the miscarriage
occurred. The prosecutor adduced in chief the evidence of two
witnesses who testified as to the commission of similar acts by the
accused prior to, approximately concurrent with, and also subsequent
to the date of the alleged offence. One witness testified that she
had had an operation performed on her in the same manner as that
deposited to by the complainant, and that she further received post-
operative care at the hands of the accused at the same nursing home.
While there, she saw the complainant in bed as a patient, but did not
see the accused attend to her, although he was present at the nursing
home. Another witness, the owner of the said home, testified that

\(^1\) (1946)86 C.C.C. 410 at 419 (B.C.C.A.); Cf R v. Boynton (1934)63
C.C.C. 95 (Ont.C.A.); see also W. B. Common, Q.C. in 6 Crim.
L.Q. (1964) at 433-43
for approximately three years prior to the date of the alleged offence, she had been receiving abortion patients from the accused in her own home at which place the accused attended to those patients. Commencing three months after the date of the alleged offence, she rented a house which the accused equipped as a nursing home and there, under the direction of the accused, she cared for approximately 50 to 70 abortion cases in a period of approximately five months.

It appears to the majority of the British Columbia Court of Appeal that the accused did actually concede that someone had performed a criminal operation. Smith J.A., speaking for the majority, stated: "The defence was a 'categorical denial' that he was the man who had committed this crime. It seems to me that this statement of the defence displaced any need on the part of the Crown to prove 'intent' by adducing evidence of similar acts, for the Crown could rest content upon the uncontradicted evidence of the complainant as to the acts performed and the proof of intent which she gave. By his defence of "I am not the man", the Crown was left with the sole duty (after bringing forward the evidence of the complainant) of establishing that the accused was in fact the man who performed the illegal operation. Upon proof of this single issue the appellant must have been found guilty". Simply put, what the majority was saying is that, on a charge of unlawfully using an instrument with intent to procure a miscarriage, where it is manifest at the commencement of the trial that the defence is a categorical denial that the accused was the man who committed the crime, it is improper for the Crown to

(1) (1946)86 C.C.C. 410 at 419-20
put in evidence as part of its case a previous conviction against the accused for a similar offence, and evidence of similar acts indicating that on numerous occasions the accused had carried out similar operations upon other women. The question of the intent with which the act was done not being in issue, such evidence is irrelevant, and as it cannot be said that the accused suffered no substantial wrong from the admission of such evidence, the conviction has to be quashed and a new trial was directed.

The majority appeared to ground their decision as shown above, on the fact that since the case did not concern the issue of 'intent', but solely the question of whether the accused was the party who performed the operation, the evidence accordingly was inadmissible. I don't think that anything is wrong with this decision or the reasoning behind it. 'Intent' was not in contention; basically evidence of system is used to prove guilty intent or rather to negative lack of intent or innocent purpose. The point of contention in R v. Campbell and the defence offered in the case seems to mark its distinction from other cases cited above. However, there were two dissenting justices of Appeal; they were of the opinion that the evidence was admissible. Both their Lordships were of the opinion that the issue of mens rea (i.e. intent to prove miscarriage) was still in issue. It appears that the dissenting justices of Appeal considered the defence of the accused to be a categorical denial of everything, and not simply an admission that someone did it, with a
denial that it was he; and therefore, the issue of mens rea was at issue. The decision of the majority has also been criticised in respect of its reasoning, which it is submitted, appears to revert to the erroneous belief that similar fact evidence could not be used to prove actus but only mental elements once the actus was proved.

Evidence of what is said to constitute system has frequently been admitted in support of an allegation of fraud. For example in R v. Rhodes\(^1\), the accused was charged with obtaining farm produce by means of a false pretence - an advertisement implying that the dairy - "Norfolk Farm Dairies" - to which the advertisement referred, was a bona fide existent business. This, in fact, was not the case. On at least two subsequent occasions, via the implementation of a similar advertisement, the accused had acquired farm produce. This latter evidence was admitted into the trial against the accused. It was held that evidence that he had obtained eggs on two subsequent occasions by means of a similar advertisement was rightly admitted by the Court for Crown Cases Reserved because it went to show the nature of the accused's business i.e. the falsity of the pretence - showing a general scheme, to defraud. However, it is thought that the decision might have been different if the other similar transactions had been of an isolated character and not part of a general scheme connected by the continuing advertisement. In R v. Effiong Edet Ita\(^2\), the West African Court of Appeal approved the dictum of Jackson Assist. J. to the effect that "when the gist of the offence is fraud, intent is material and evidence of other similar acts is admissible to prove

\(^{1}\) (1899)1 Q.B. 77  
\(^{2}\) (1943)9 WACA 35
that intent".

In R v. Hurren\(^1\), on a charge of obtaining credit by fraud, it was held that evidence of similar transactions either prior or subsequent to the act charged may be given, if such transactions have some nexus or connection with the offence charged, e.g. as forming part of a scheme for gaining the confidence of house-holders and thereby getting money on account of work which the prisoner never intended to fulfil. Another similarly decided case is R v. Wyatt\(^2\), where upon an indictment for obtaining credit by means of fraud, it was proved that the defendant hired furnished apartments from the prosecutrix and occupied them for three days, when he left without paying for them or for the food supplied to him. Evidence was admitted that a short time previous to the particular transaction the defendant had gone to several houses and hired apartments and left without paying, and that he still owed the money when he went to the house of the prosecutrix. The Court held that the evidence, being evidence of similar acts committed by the defendant at a period immediately preceding the commission of the alleged offence, was admissible as tending to establish a systematic course of conduct, and as negativing any accident or mistake or the existence of any reasonable or honest motive on his part. In R v. Ollis\(^3\), the prisoner was convicted of obtaining money by false pretences by means of bad cheques on 24 June, 26 June and 6 July. The Court for Crown Cases Reserved held that evidence had been rightly admitted concerning the obtaining of a

\(^{1}\) (1962) 46 Cr. App. Rep. 323
\(^{2}\) (1904) 1 K.B. 188
\(^{3}\) (1900) 2 Q.B. 758
cheque in exchange for another valueless cheque on 5 July. The accused had already been tried and acquitted on a charge relating to this latter cheque, but his bank account, which had not been operated for three years, only showed a credit balance of three and ninepence, and the majority of the court considered that the evidence went to show that he was engaged on a systematic course of fraudulent conduct.

A pertinent case for comparison is that of R v. Sagar\(^1\), which decision contrasts in an interesting way with the decisions above, as the use to which the evidence was put in this case is different. The prisoner was charged with having obtained goods by false pretences. The false pretence alleged in the indictment was that he had pretended that he was carrying on a genuine and bona fide business as a manufacturer's agent and merchant. The court held that receipts sworn to by the prisoner as having been given to him as acknowledgements of payments for goods purchased by him other than those the subject of the charge, and entries in his bank pass-books showing payments made by him for goods supplied to him, were admissible as evidence on his behalf that he was in fact carrying on a genuine and bona fide business.

There are other examples of evidence of system in support of an allegation of fraud, available from other jurisdictions. In the Canadian case of R v. Gregg\(^2\) for instance, the accused was charged on six counts of obtaining grain by deceit\(^3\). The accused entered into agreements with farmers by which he obtained barley on his underta-

\(^1\) (1914)3 K.B. 1112
\(^2\) (1965)3 C.C.C. 203; see also R v. Salerno (1973) V.R. 59; Bruck v. R (1942)80 C.C.C. 52 (Que.C.A.)
\(^3\) Criminal Code s. 323(1) (Canada)
king to pay for the barley once the precise quantity was ascertained. The accused sold the barley, but made no payments to the farmers. Similar fact evidence was admitted that the accused, both on an earlier and on a subsequent occasion, had entered into similar arrangements with other farmers. In these cases also the accused had obtained produce but had made no payments in return. It was held by the Saskatchewan Court of Appeal that in respect of each count the similar fact evidence, including the evidence on the other five counts, was admissible to rebut any defence of innocent intent. The evidence established not merely that the accused was a confidence trickster, but that he was a confidence trickster who habitually obtained similar property by employing the same fraudulent device.

In R v. Finlayson\(^1\), the accused was charged with larceny from the Crown. He, being a supervisor of roads in the service of Western Australian Government, was required to submit a wages sheet setting out the entitlement to wages of the men under his supervision. He would then receive the pay cheques and hand them on to the workmen. The allegations against him were that he received three cheques destined for one Kinsella, that he forged an endorsement and kept the proceeds of the cheques. It was apparent that he received and cashed the cheques due to a workman, Kinsella. The prosecution anticipating the defence that the accused cashed the cheque pursuant to some arrangement with Kinsella sought to put in evidence the fact that the accused had on two prior occasions performed precisely the same

\(^{1}\) (1912)14 C.L.R. 675
acts. Under the Western Australian Criminal Code, fraudulent intent is an essential element of stealing. The High Court had no difficulty in approving the admission of the similar acts to prove a fraudulent system\(^1\), and rebut any defence of an innocent arrangement.

Similarly, \textit{Elrich v. Queensland Linseed Industries Ltd\(^2\)}, was an action by the purchaser of certain shares seeking damages for inter alia, fraudulent misrepresentation. The plaintiff alleged that he relied on the misrepresentation made on behalf of the defendant that the shares he was buying were forfeited and that there was only fifteen shillings in the pound (£) unpaid on each. He discovered later that the shares were not in fact forfeited and that he was obliged to pay the full twenty shillings for each share. The defendant admitted that no shares in the company had been forfeited. The plaintiff called evidence that the same agent of the defendant had represented to other people that certain shares for sale had been forfeited. Henchman J. admitted this evidence warning the jury that the similar acts were not evidence of the making of the representation but merely as to whether or not it was made fraudulently\(^3\).

\textit{In Samuel Thomas v. Commissioner of Police\(^4\)}, the appellant was issued with books of 'tote' tickets for sale to the public at a race meeting. It was proved that he had removed a few tickets from the bottom of each of some of the books, instead of from the top downwards serially. Evidence was given that, on a former occasion on which tickets had been entrusted to him for the same purpose, some had been found to have been removed from the bottom of the books as

\begin{enumerate}
  \item R v. Rhodes (1899)1 Q.B. 77; see also R v. Hally (1962) Qd. R. 214;
  \item R v. Gill (1906)8 WALR 96
  \item (1935) QWN 26
  \item See R v. Wyatt (1904)1 K.B. 188
  \item (1949)12 WACA 490
\end{enumerate}
in the present case. It was held that this evidence was both relevant and admissible. It is clear that this shows a particular system of stealing.

There are also relevant examples from the Scottish courts. In H.M. Advocate v. Joseph, in an indictment the charges against the accused were that, having conceived a fraudulent scheme for obtaining money from the public in Scotland and elsewhere by means of counterfeit drafts, he (1) on 21 September 1927 uttered in a bank in Dundee a forged document which purported to be a draft of a finance company in New York, and (2) on 23 September in the same bank pretended by telephone from London that the draft was genuine. The indictment further charged the accused with pretending, in pursuance of the scheme, in an hotel in Brussels, in October, that a forged document was a genuine draft of the same finance company. Lord Murray delivering the judgement of the Court held that, while admittedly the incident in Belgium could not be made the subject of a substantive charge, that incident and the crime charged were sufficiently closely connected to admit of evidence relating to that incident being used by the prosecution for the purpose of supporting the other charges.

Another pertinent Scottish case is Gallacher v. Paton. In that case an advertising agent was charged on a summary complaint that he did 'pretend' to a female shop assistant that her employer paid yearly for an advertisement in a directory, and 'did thus induce' the shop assistant to pay him 1s. 6d. 'and did thus defraud her' of

(1) (1929) J.C. 55
(2) (1909) S.C. (J) 50
that amount. At the trial of a charge of obtaining money by false representations, evidence was admitted of similar representations having been made by the accused to other persons on the same day. The court held that the evidence had been competently admitted. Lord McLaren said: "A false statement made to one person may be explained away, but when a system of false statements is proved, the probability is very great that the statements were designedly made. Unless a decision to the contrary could be produced, I am unable to hold that the law will reject as inadmissible evidence on which every one would act in the ordinary affairs of life, and which is calculated to produce conviction to any fair minded person who hears it".

In the Indian case of R v. Debendra², where the accused falsely telling one B that he was the manager of an estate and could procure for him (B) a post in the estate, induced him to pay a sum of money as security for the post, but afterwards failed to keep his promise; evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was admitted, not to establish the factum of the offence but the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasions in question was dishonest and fraudulent.

In Sudan Government v. Mohamed Abdulla Imam³ the accused was charged with cheating by dishonestly inducing delivery of money from the complainant, under the pretence that by using his skill he would increase that money. Further evidence was admitted to the effect

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(1) (1909) S.C. (J) 50 at 55
(2) 13 CWN 973; 36 C 573; see also Nurul Amin v. R A1939 C.335; 1939 1 Cal. 511
(3) (1972) SLJR 222, CA
that the accused had cheated several other persons and obtained money from them under the same pretence. According to the court evidence of similar instances was admissible to show that the accused was operating under a definite system. He asked his victims for various sums of money for different rituals and ceremonies using the pretence that such sums were necessary for 'making' or 'creating' a larger sum of money.

It is perhaps worth mentioning that the use of the evidence of system is not confined to cases of fraud only; evidence of what is said to constitute system has also frequently been admitted in support of sexual offences. For example in the Canadian case of R v. Christakos¹ where an accused, being a manager of a number of cafes, is charged with contributing to the delinquency of a young girl employed by him, evidence that the accused used his position as employer to compel other young girls employed by him as waitresses and cashiers to submit to his sexual desires and that he kept a room in a hotel where he frequently brought these girls and had carnal knowledge of them is properly admissible to establish a planned system of debauchery and demoralisation of a group of juveniles. Evidence on such a charge is not confined to the investigation of a single crime to the exclusion of other offences since the entire atmosphere and conditions in which the juvenile lives or is employed as well as the character of the accused is in issue. Dennistoun J.A. said: "The accused man's dealings with this group of girls are

(1) (1946)87 C.C.C. 40 (Man.C.A.)
so interlaced that they cannot be segregated without distorting the whole picture. His scheme of defilement was so complete and co-ordinated that it should be uncovered in its entirety\(^1\). This decision was followed in another later Canadian case of R v. Thompson\(^2\), where Judson J. upheld the admission of similar acts against the accused, a teacher charged with indecently assaulting pupils, saying "it tends to show a planned method and system of debauching of the child".

A similar process of reasoning was employed in the Australian case of Griffith v. R\(^3\); the prisoner was charged and convicted on two counts of a presentment, the first count charging him with the rape of a woman A.B., and the second with the rape of a woman C.D. Each of these women gave evidence amply sufficient to support the charge she made against the prisoner. In order, however, to strengthen its case the Crown adduced evidence that the prisoner, in committing the crimes in question, was pursuing a plan or system which he devised for enticing unsuspecting women to lonely places and there criminally assaulting them. His plan was to insert in newspapers sham advertisements, fraudulently offering to women domestic positions which were entirely fictitious, or else to answer mala fide and in a false name, the bona fide advertisements of women seeking such positions. By such means, by holding out to her a false prospect of employment, he inveigled the woman A.B. into meeting him at East Malvern Railway Station, and then under various false pretexts he induced her to pass through several paddocks in the vicinity of the Railway Station, in

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(1) (1946) 87 C.C.C. 40 at 45 (Man. C.A.)
(2) (1954) 107 C.C.C. 373 (Ont. H.C.)
(3) (1937) A.L.R. 653
one of which he criminally assaulted her. In the case of the woman C.D., the prisoner took almost the same steps to entice her to a lonely spot, near East Malvern Railway Station, where he criminally assaulted her. In two other cases, in which the prisoner had, for the same purpose, adopted precisely the same method, his plan had miscarried. The prisoner having been convicted on both counts, applied to the High Court for special leave to appeal from his conviction. The grounds of application included inter alia, that the evidence relating to 'similar acts' had been improperly admitted.

Sir John Latham, C.J., in delivering the judgement of the Court said of the ground that "this evidence of a plan or system was relevant and admissible, and the fact that some of the evidence related to the operation or exercise of such a plan or system after the date of the last offence with which the prisoner was charged, does not make the evidence any the less admissible". His Honour had already said, in reference to the evidence of similar acts, "If the evidence were believed, it was such as to produce a moral certainty of the guilt of the accused".

There is also a relevant example from the Sudan. In Sudan Government v. Abdel Farrag Gabir, the accused was charged with raping one woman, Aisha, and with attempted rape of two others. These women were unacquainted, but all three attacks allegedly occurred in the same neighbourhood. The manner in which the accused approached his prospective victims was unusual, in that he proposed

(1) (1940) AC CP 63 40, BNP Maj Ct 21 40, unrep.
sexual intercourse first, and after the woman's refusal he brandished a knife to compel her. All three assaults were allegedly committed with the same knife and the same proposition. Cumings J., President of the Mayor Court, pronounced: "As to Aisha's charge, there is very little evidence to support her and incriminate the accused if one does not look at the other incidents as evidence that there was a system in these matters, and that the accused, a man addicted to this very unusual system, was in the neighbourhood. I have allowed the Court to take those other incidents into consideration, and as a result we have convicted the accused of the rape of Aisha". Holding that evidence of the other two women was admissible to prove the charge of rape against the accused, Creed C.J. made an observation that: "As the Court says, the manner in which the accused approached his prospective victims in the neighbourhood was very unusual and showed a systematic course of crime". The learned Chief Justice's observation, it is submitted, should not be understood as referring to crime in general, but the particular crime in question.

Evidence of system may be given to support the argument that the purpose of a series of acts must have been the performance of some further act constituting the actus reus of the crime charged. The argument is best expressed in the decision in the Australian case of Martin v. Osborne¹ - (as earlier mentioned, it used to be thought that similar fact evidence was never admissible to prove the actus reus, but such a view is untenable in the light of such cases as R v. Ball²). In Martin v. Osborne, the accused was charged with operating

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¹ (1936)55 C.L.R. 367; (1936) A.L.R. 261
² (1911) A.C. 47
a commercial transport vehicle without a licence. A 'commercial transport vehicle' was defined by statute as a vehicle employed to transport passengers in consideration of reward. It was independently proven that, on the day in question, the accused had driven a motor vehicle on a journey between two cities - from Ballarat to Melbourne - picking up and dropping off passengers along the way. However, there was no evidence that he did so for reward. This element of the offence was proven via the introduction of evidence that, on the two days previous to the day of the offence charged, the accused had conducted similar journeys. Once one assumed, as a basic premise, that men are rarely so altruistic as to repeatedly provide free passage at their own expense, it became improbable that the accused made the journeys, embarking and disembarking passengers, without concurrently receiving a fare for his efforts. Evatt J. stated: "Where a question in issue is whether, on a particular occasion, the proved acts of a party were accompanied by the performance by such party of a further act, it is permissible to show that such party was, at or about the time in question, engaged in a special kind of business, line of conduct, or manner of living, according to the exigences of which the proved acts would ordinarily be accompanied by the performance of the further act in issue so as to constitute a typical instance of the business, line of conduct, or manner of living in which the party was so engaged. Provided that the business, line of conduct or manner of living is of such charac-
ter as to render it very highly improbable that on the occasion in question the performance by the party concerned of the further act in issue would not accompany his proved acts"¹.

Finally it is important to mention the point that on the trial for an offence on a given date, evidence of conduct on a later date similar to that proved on the date charged is admissible as tendering to prove system. In R v. Adamson² - an appeal from a conviction for larceny - the prisoner was charged with larceny on 24th March 1911. It appeared that he and a man A acting in concert with another, adopted the following device. Observing a girl leaving a bank, A took off his hat and coat, which he gave to the appellant to hold. Running after the girl with a pencil in his hand, he told her that there was something wrong with the cheque which she had presented. She then handed the money she had obtained at the bank to A who handed her an envelope which was said to contain a cheque. On being opened subsequently it was found to contain blank telegraph forms. A pleaded guilty. Appellant was convicted and he appealed from his conviction on the ground inter alia of wrongful admission of evidence. On the point of law the complaint was that counsel for the prosecution in opening the case, referred to the fact that when the two men were arrested on 31st March, a week after the alleged offence, the appellant was seen in the company of A, outside a bank, and blank telegraph forms were found on both of them. He relied upon that fact as evidence of a system. It was submitted that the statement made by the counsel, and the evidence given in support of it, ought

¹ (1936)55 C.L.R. 367 at 402
² (1911)6 Cr. App. R. 205
not to have been admitted. Evidence was given that on 31 March the
two men were seen waiting outside a bank, and then A, with an envelope
in his hand, followed a boy who had just left a bank, giving his hat
and coat to appellant to hold, just as in this case. They were both,
in fact, taken in charge on 31st March for loitering for the purpose
of committing a felony, but not on this charge. To this Pickford J.
said: "...The main ground of this appeal is that evidence was admit-
ted to show that a week later appellant was assisting A in the same
way. In our opinion that evidence was admissible".

(b) Purpose of Possession of Incriminating Material: It is clear by
now that the existence of a design or plan is admissible to prove
that an act done subsequently was the result of a design or plan, and
that the existence of a design can be evidenced by conduct. Also, as
Wigmore rightly observed: "The acquisition or possession of instru-
ments, tools other means of doing the act, is admissible as a
significant circumstances; the possession signifies a probable design
to use". However, generally, the fact that the accused had posses-
sion of material similar in nature to that which may have been used
in the commission of the crime charged is not always of high proba-
tive value. It is submitted that too much significance was placed
upon this fact in R v. Armstrong. The accused, a solicitor, was
charged with the murder of his wife by administering arsenic to her.
It was admitted that the wife died of arsenic poisoning. The ac-
cused's defence was that he had not administered poison to her, but

(1) Wigmore On Evidence (3rd ed.) Chadbourne Series at Sec. 137 (1940)
(2) (1922)2 K.B. 555; Cf Noor Mohamed v. R (1949)1 All E.R. 365
that she had committed suicide. The accused had purchased a quantity of arsenic and made it up into a number of small packets, each containing what would be a fatal dose. His explanation was that he had purchased it for use as a weed-killer in his garden. To rebut this defence, the prosecution was permitted to lead evidence of an incident occurring eight months after the death of the wife. The accused was acting for the vendor in a contract for the sale of land. The purchaser's solicitor had warned him that unless the contract was concluded by a certain date, the purchaser would reclaim his deposit. Thereupon the two solicitors met at the accused's home for tea. The accused handed the other solicitor a buttered scone, saying: "Excuse my fingers". The purchaser's solicitor became ill shortly afterwards, vomiting copiously. A sample of his urine revealed arsenic poisoning. The accused was convicted, and appealed unsuccessfully to the Court of Criminal Appeal. Delivering the judgement of the Court Lord Hewart C.J. stated: "(Prior to the death of this woman) the appellant purchased a quarter of a pound of white arsenic and took it home. With what design did he make that purchase and provide himself at that particular time with that poison? Was it for the innocent purpose of destroying weeds or for the felonious purpose of poisoning his wife? The fact that he was subsequently found not merely in possession of but actually using for a similar deadly purpose the very kind of poison that caused the death of his wife was evidence from which the jury might infer that poison was not in his possession at the earlier date for an innocent purpose".

(1) (1922)2 K.B. 555 at 566
From the facts as stated above, the evidence of the attempted poisoning of the solicitor showed no more than that the accused had a propensity for murder by poisoning. Such a propensity is not sufficiently unusual to render the evidence admissible. The fact that prior to the death of his wife, the accused purchased arsenic does not appear to add significantly to the probative value of the similar fact evidence. There is uncertainty as to whether the accused really did attempt to kill the other man. It is suggested, therefore, that the similar fact evidence in R v. Armstrong¹ ought to have been inadmissible. Cross for some other obscure reason criticised the case when he said: "This is a somewhat surprising decision so far as the admissibility of similar fact evidence is concerned, for the defence of accident was not raised. The accused's conduct would have been highly relevant to that defence, but the relevance of the evidence for the purpose for which it was admitted was not very great"². Cross's criticism seems to be based on another ground other than the one I pointed out and I would humbly differ with him on his ground of criticism. Cross's view that the evidence could have been admissible had the defence been that of accident is rather mistaken because the view is that for the accused to have suggested suicide by the victim is as good as raising a defence of accident. It is, however, interesting to note that R v. Armstrong was mentioned in the House of Lords without any suggestion of disapproval in Harris v. Director of Public Prosecutions³. In R v. Reddaway⁴, evidence of the accused's posses-

(1) (1922) 2 K.B. 555
(2) Cross On Evidence (5th ed.) at p. 387
(3) (1952) A.C. 694; (1952) 1 All E.R. 1044
(4) (1948) NZLR 1118
sion of a number of abortifacients was held rightly admitted in toto although some of the articles found were not suitable for carrying out the crime charged in the precise manner alleged.

In R v. Hodges\textsuperscript{1}, the accused was charged with possession of house-breaking instruments, by night without lawful excuse. He was found in possession of skeleton keys, one of which had been filed down. For his defence the accused maintained that they were for the innocent purpose of gaining entry to his lodgings. To rebut this defence of innocent possession, evidence was led that the accused had suggested to others that they, together, should 'do a job' with the keys. Clearly, this evidence tending to negative the defence of lawful possession was obvious, and it also gave character to an otherwise equivocal set of instruments in terms of their implemental use, on the ground that it showed that the keys were capable of use as housebreaking implements.

Another relevant case is the Canadian case of Baker and Sowash v. R\textsuperscript{2}. This is a case from the rum-running days of prohibition, in which the accused were convicted of murder during the hijacking of some rum-runners. Evidence was admitted that on two occasions, one a month before and one several years earlier, the accused had employed similar equipment (a yachtman's cap with gold braid, several revolvers, handcuffs and a flashlight) for the purpose of posing as a revenue officer so as to intercept the smuggling of contraband liquor for his own gain. Duff J. stated: "...upon the issue thus raised (as to intent) it was relevant to show a similar use of such implements\textsuperscript{2}.

\textsuperscript{1} (1957)41 Cr. App. R. 218; see also R v. Hannam (1963)49 M.P.R.262
\textsuperscript{2} (1926) S.C.R. 92
by Baker on a recent occasion - within a month; and such evidence being given it would appear that the evidence of the use of similar implements in a similar way on an earlier occasion, several years before, would be admissible as tending to establish a practice. The existence of such a design would in itself be relevant on the cardinal issue whether, when the party left Cadboro Bay, Baker having the implements with him, they left with the intention of attacking the 'Beryl G' or crossing to Anacortes direct".

In Sudan Government v. Thomas Parker Nicholl\(^2\), the exact nature of the charge against the accused is not clear, but he was apparently charged with causing injuries by despatching a bomb alleged to have been assembled by him. The bomb was sent in a wooden case within a manila envelope addressed to the victim, and exploded when the envelope was opened. The prosecution case turned on circumstantial evidence. The accused admitted a knowledge of explosives and carpentry, sufficient to have made the bomb. There was evidence of motive, and he possessed many materials shown by laboratory analysis to be identical with those used in the bomb, including envelopes, two types of sellotape, postcards, typing paper and screws. A spring in the bomb was unique to the accused’s type of Land Rover, and shot-gun cartridges owned by him comprised powder and tubes identical to those of the bomb. The defence, however, argued that all these objects were the 'common type of things available to anyone'. According to Salah Hassan J. all these items of evidence taken together 'reproduce

\(^{1}\) Ibid at 103
\(^{2}\) (1961) SLJR 59; see also Misri Gossian v. R 61 IC 647
a violent presumption that the accused designed and made this bomb in question'. All this circumstantial evidence clearly rebutted the defence of innocent purpose and showed opportunity for committing the offence. Nevertheless, Abu Rannat C.J. ultimately ruled that the prosecution case was unproven and this evidence insufficient.

If a man is charged with fraudulently uttering a forged deed, and he relies on the absence of guilty knowledge, proof that he was in possession of other forged deeds would render his defence less credible1.

(iv) Proof of Identity

Another of the common catchwords is that similar fact evidence is admissible if it is 'evidence of identity' or is 'proof of identity'. However, unlike the other catchwords such as 'evidence of system' and evidence negativing mistake, often spoken of as 'proof of guilty knowledge' which meanings are clear enough, phrases such as 'evidence of identity', or 'proof of identity' and the like, which are frequently used in relation to the cases about to be discussed, are liable to be confusing unless it is appreciated that they mean different things according to whether there is direct testimonial evidence of the accused's participation in the crime charged2. For a proper treatment of this subject - 'Proof of Identity' - the present discussion will be undertaken under three sub-headings.

(a) Evidence Concerning Testimonial Identification:- The leading case on this is Thompson v. R3, which has already been discussed in detail, and as such, just a brief mention would be made here. To

(1) R v. Mason (1914) 10 Cr. App. Rep. 169; R v. McDonald (1933) VLR 214
(2) Cross on Evidence, 5th ed. at P. 388
(3) See ante; (1918) A.C. 221
refresh our memory we will recollect that in that case, the prisoner was charged with having, on 16th March 1917, committed an act of gross indecency with certain boys. He was convicted. On appeal against his conviction, the prisoner objected that the evidence relating to the powder puffs found on him and the photographs found in his apartment had been improperly admitted. It was held in the House of Lords that the prisoner's possession of these articles was some evidence of the existence of a criminal intent in him towards the boys on 19th March; and, if so, was some evidence of his identity with the person who had committed the crime of the 16th of March. The weight, however, to be attached to the evidence was entirely a matter for the jury to consider. It is significant to note that here, the crime primarily charged involved the existence of a certain perverted intent on the 16th of March. So the fact that the prisoner, on the 19th of March, met the boys, and had then in his possession an outfit serviceable for carrying such an intent into execution, was bound to be some evidence that the suspect of the 19th of March was identical with the offender of the 16th of March.

The principle of this decision has been applied to cases in which the evidence of misconduct on other occasions consisted of the testimony of witnesses for the prosecution instead of incriminating material found in the possession of the accused. In R v. Hall, another case already discussed, the appellant was convicted of acts of gross indecency on different occasions with C, B and R. So far as

(1) (1951)35 Cr. App. R. 167
the latter was concerned, Hall's defence was that he had never seen R and it was held that evidence of C and B concerning acts done to them by the accused in circumstances similar to those narrated by R had been rightly admitted by the trial judge because: "Surely then, the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of evidence in Thompson's case, because it went to identity. The expression 'identity' means that the evidence goes to show that the witness for the prosecution is speaking the truth when he says, 'that is the man who did these indecent things to me', because the evidence of the other man shows that the prisoner is a man addicted to unnatural practices.... It was open to the jury to say that Ritchie was a liar, but the jury obviously accepted his evidence and, if they accepted his evidence, they were surely entitled to take into account the evidence which (the other two young men had given) because Ritchie...told the jury that the appellant talked to him in exactly the same way as he did to the other men... . That tends to show that he was the man whom Ritchie said performed these disgusting acts on him...."1.

Similarly in R v. Robinson2, the accused was charged with two separate robberies committed in a similar manner each effected by means of a hold-up with the same motor car. He was identified by one of the victims of the second crime, and the Court of Criminal Appeal held that the trial judge had rightly told the jury that, in deciding whether to accept this witness's evidence, they could consider the evidence identifying the accused as the perpetrator of the first

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(1) Ibid at 178-9
(2) (1953) 37 Cr. App. Rep. 95; see also R v. Salerno (1973) VR 59
robbery provided they believed it. The trial judge, in his charge to the jury stated: "It may strike you, ladies and gentlemen, that if Robinson is not a guilty man, he is a singularly unfortunate man. He is identified by different people, or said to be identified by two entirely different people, in respect of two entirely different raids". The ground of admissibility of this type of evidence was succinctly stated by Hallet J., when delivering the judgement of the Court of Criminal Appeal. He affirmed the propriety of the admission of the evidence on the basis that: "If the jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense".

The improbability was derived from the fact that two sets of witnesses independently claimed that the accused was the one who committed a crime - a crime similar to that deposed to by the other witness. That the crimes were of a similar nature made it, to a greater degree, improbable that the perpetrators were different. In R v. Robinson the same technique had been employed in each of the robberies with which the accused was charged; and it seems that the crimes with which R v. Hall was concerned had significant features in common. In fact Lord Goddard, C.J., who delivered the judgement of the Court of Criminal Appeal in R v. Hall and was the trial judge in R v. Robinson spoke, in the one case of the 'startlingly' similar...

(1) (1953)37 Cr. App. R. 95 at 106
(2) Ibid 106-7
(3) (1951)35 Cr. App. R. 167; (1952)1 K.B. 302; (1952)1 All E.R. 66
character of the facts charged, and, in the other, of the 'striking' similarities in the two hold-ups.

In R v. Giovannone¹, the appellant was convicted at quarter sessions of obtaining a motor car by false pretences. The offence was committed when a man named C went to one S who had a car for sale. Negotiations took place, and an inspection of the car was carried out by a person purporting to be a fitter. There was then a conversation as to the merits of the car and eventually C expressed himself satisfied with the condition of the car, handed over a cheque for the price and drove away. The cheque was dishonoured. At the trial S identified the appellant as the fitter, but the appellant denied that he was the man concerned. The prosecution, the court having so ruled, introduced evidence of witnesses who had been subjected to three similar incidents, and who identified the appellant as the fitter concerned. On appeal to the Court of Criminal Appeal, the Court held dismissing the appeal, that the evidence relating to similar incidents was not admissible to prove the committal of the offence charged; but such evidence was admissible to prove identity as was recognised in R v. Robinson. In the present case identity was a matter very much in issue. The similarities and course of conduct on the three occasions were marked; there had been the same conversation, the same inspection, and the discussion with the fitter. The identification on those occasions was positive and indeed, not in issue. That evidence had been rightly admitted for the purpose of showing that the evidence of identification by S was right.

(1) (1960)45 Cr. App. Rep. 31; see also R v. Adami (1959) SASR 81
In R v. Sims\(^1\), Goddard L.C.J. said: "So also where there is an issue as to the identity of the accused, we think that evidence is admissible of a series of similar acts done by him to other persons, because, while one witness to one act might be mistaken in identifying him, it is unlikely that a number of witnesses identifying the same person in relation to a series of acts with the self-same characteristics would all be mistaken"\(^2\). He also put the decision on the basis that "Sodomy is a crime in a special category", quoting Lord Sumner in Thompson v. R\(^3\). Lord Sumner's outmoded words about homosexuals are all that can be quoted by way of authority for the decision of the Court of Appeal in R v. King\(^4\). In that case K was convicted on a number of counts of indecency against two boys aged thirteen and fourteen. The boys said that they met K at a public lavatory and he took them in turn into a cubicle and behaved indecently towards them. They met him again at the lavatory by arrangement and he took them to his house and further indecent conduct took place. K denied the first alleged meeting and said that he met the boys accidentally and offered them shelter for the night, and that no indecency took place at his home; the Judge allowed the prosecution to ask K if he were a homosexual (the answer being that he was). The Judge directed the jury that if they came to the conclusion that K's denial regarding the first alleged meeting was false, they could treat that as corroborative of the boy's evidence (they being accomplices). K appealed on the grounds inter alia that the question was

\(1\) (1946) 31 Cr. App. R. 158
\(2\) Ibid at 165-166
\(3\) (1918) A.C. 221 at 235
\(4\) (1967) 2 Q.B. 338; (1967) 1 All E.R. 379; for comments see 83 L.Q.R. 186; 30 M.L.R. 441 and (1967) Crim. L.R. 633
wrongly allowed and that the direction on corroboration was wrong. The Court held, dismissing the appeal, that the question was properly allowed and came within the principle laid down in R v. Thompson. It is no different to ask a man "are you a homosexual?" than to put to him indecent photographs of a homosexual nature found in his possession and ask "Are these yours?" The principle is not one of the general application but must be limited to particular crimes, such as sexual offences. The direction on corroboration was held to be wrong. K's denial that he was at the lavatory on the first occasion could not, if rejected, be treated as corroboration; otherwise there would be no need for a doctrine of corroboration. However, it was also held that there was ample corroboration to be found in the circumstances of the case.

In Thompson v. R, the evidence seems to have been admitted on the ground that the man who committed the offence was addicted to homosexual offences and the indecent photographs, etc., tended to show that the accused was such a man. If then, evidence of the articles found in the accused's possession is merely a step in proving that he is a homosexual it must clearly be permissible to adduce direct evidence of this fact, as by an admission. Viewed as a decision on the admissibility of evidence of criminal propensity to confirm testimonial identification, R v. King goes much further than Thompson v. R for the fact that the complainants gave evidence of the appointments of the 19th March at a place which Thompson was approaching on that day was treated as crucial by some of the Law Lords.

(1) (1918) A.C. 221
(2) (1967)2 Q.B. 338; (1967)1 All E.R. 379
Lord Finlay L.C. stated: "The whole question is as to the identity of
the person who came to the spot on the 19th with the person who
committed the acts on the 16th. What was done on the 16th shows that
the person who did it was a person with abnormal propensities of this
kind. The possession of the articles tends to show that the person
who came on the 19th, the prisoner, had abnormal propensities of the
same kind. The criminal of the 16th and the prisoner had its feature
in common, and it appears to me that the evidence which is objected
to afforded some evidence tending to show the probability of the
truth of the boys' story as to identity".1

Lord Parker of Waddington, in a similar vein stated: "If the abnor-
mal propensity of the criminal of March 16, manifested by the nature
of the crime and the appointment for its repetition, can be regarded
as one of the indicia by which his identity can be established, the
evidence is admissible as showing that the accused had the same
abnormal propensity".2

Moreover, it is significant to note that the powder puffs found on
Thompson's person were treated as articles commonly used in the
course of the crimes under consideration. It is said that R v. King3
has been relegated to the class of decisions on their very special
facts so far as the defence of innocent association (raised with
regard to a second set of incidents) is concerned; however, it does
not appear to have been the subject of adverse judicial comment as a
decision on evidence of identity. Nevertheless it must be regarded

(1) (1918) A.C. 221 at 225;6
(2) Ibid at 231
(3) (1967) 2 Q.B. 338
as a somewhat dubious authority after Director of Public Prosecutions v. Boardman¹.

In some cases it is possible on an issue of identity to seek to introduce evidence of similar facts on the 'hallmark' principle. The 'hallmark' principle is invoked when reliance is placed by the prosecution upon similarity of technique. The principle can be applied to a hallmark appropriate to a group or gang as well as to a personal hallmark. This principle was applied in R v. Davies and Murphy². Two robberies which had a number of common features were committed at post offices. Each was committed just after the arrival of the morning delivery of cash, by several men, one of whom carried a gun, within seven weeks of each other and in the same area. M and D were both convicted of the first robbery and D also of the second robbery, with which M was not charged. M and D had both been visually identified by a witness in relation to the first robbery. Within a few hours of the second robbery M was seen travelling in a car with two (or, including D, three) participants in the second robbery. The court held that the evidence was admissible against M as showing an association between him and persons who had carried out a crime of a pattern exactly similar to that of the one with which he was charged, thereby greatly increasing the likelihood that one or more men were concerned in both, thereby (in conjunction with evidence of admissions by him and as told by him to the police) rendering the visual identification as more likely to be correct. The decision has been cautiously received. Cross said: "It would be interesting to know

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¹ (1974) 3 All E.R. 887; 60 Cr. App. R. 165
² (1971) 56 Cr. App. R. 249
how far this extension of the hallmark principle can be taken. If A is visually identified as the perpetrator of a burglary in which an unusual technique was employed, would evidence that he had been seen a week later talking to B, a burglar known to employ the same technique, be admissible to confirm the identification of A?"¹.

However, to be admissible the similar fact evidence need not be of such an unusual or striking nature as to make it virtually certain that the crimes were committed by one and the same person. In R v. Prickard², P was charged in successive counts of the same indictment with rape of a girl aged 12 on 1st September 1958, and attempted rape of Elaine Purdey, aged 19, on 9th June 1959. Each girl identified P as her assailant. His counsel requested that these charges should be tried separately. He conceded that if the evidence on first count was admissible on the second count it was perfectly proper to include the two charges on the same indictment, but contended that the two incidents were entirely separate and that to admit the evidence of the one incident on a trial in respect of the other would prejudice a jury against the accused out of all proportion to its possible slight relevance. Counsel for the prosecution argued that the evidence was admissible as similar facts to prove identity of the assailant in each case. There were many similarities between the two attacks; both victims were young girls; both assaults took place at about 4.30pm in broad daylight in the same locality (and near P's home); both girls were warned by their assailant that he would strangle them

¹ Cross on Evidence, 5th ed. at P. 389
² (1960) Crim. L.R. 125
if they did not stop screaming; both girls lost their shoes in the struggle; both assailants did not run away after the assault. He did not adduce it as showing a propensity on the part of P to commit such assaults. In its judgement the Court held that the evidence was admissible to prove identity which was the real issue in this case. It might be of assistance to the defence, for if an alibi were to be established for P in regard to one incident, this might defeat the probative value of the identification of P in the other incident. P was thereupon tried and convicted on both counts. It is well established that similar fact evidence is admissible to prove identity where the facts alleged in the different cases are strikingly similar. It would appear that the proper direction in such a case is that if the jury are satisfied that the accused was the assailant on the first charge, then (and only then) they are entitled to have regard to the fact as assisting them on the issue of identity in the second charge. Unlawful as rape may be, it must be confessed that it is by no means an uncommon lust. In other words the admissibility depended not on abnormal propensity but on singular similarity in the pattern of the crimes.

Another pertinent case in this respect is the Canadian case of R v. Lawson¹. In that case the accused was convicted on three counts in an indictment charging that (i) he did forcibly seize E.K., (ii) he did rape P.K. and (iii) he did unlawfully assault H.W. All three crimes were committed in a suburb of Calgary over a period of 55 days, with two of the complainants being attacked at the same inter-

section. In two of the cases the assailant threatened the girls with a knife, and in the third case he threatened her with a gun. In each case the assailant flung his arm around the neck of the girl. In two of the cases (counts (ii) and (iii)) the girls were approached by the assailant and asked for directions. In two of the cases (counts (i) and (ii)) they were forced into the assailant's car, and required to sit astraddle the console of the car. It was held by the Alberta Supreme Court that the similarity between the crimes was such that evidence in respect of each count was admissible on the other two counts. Delivering the judgement of the Court, McDermid J.A. stated: "Although the charges are different there can be no doubt that the purpose of the assailant in each case was to abduct the girl so he could rape her. Is there a sufficient similarity between the crimes, so that it is probable that they were committed by the same man? If so, the evidence on each count does not have to be considered separately. I do not think the Crown need go so far as to show that the evidence of similarity is such that it demonstrates beyond a reasonable doubt that the crimes were committed by the same man. It is sufficient if it is shown by a preponderance of evidence that they were probably so committed".

(b) Circumstantial Evidence of Identity: In some exceptional cases the disposition or propensity exhibited in the commission of the crime charged is of sufficiently uncommon a nature to render admissible similar fact evidence establishing such a propensity in the

accused. Thus where the instant crime has been committed in a pecu-
liar or unusual manner, similar fact evidence may be admissible to
show that on other occasions the accused has committed similar crimes
in the same unusual manner. The significance of the similar fact
evidence in such cases is that it establishes a certain modus operandi.
This type of evidence is often spoken of as the 'hallmark'
doctrine. Though some allusion was made to this matter earlier in
this discussion, its significance under the present head is consid-
erable, especially as it is only here and now that the salient cases
may be considered.

As pointed out above, where the crime has been committed in a
peculiar or unusual manner, evidence that the accused has committed
similar crimes with a similar modus operandi may help to identify him
as the perpetrator of the offence charged, or may indicate a greater
likelihood that the present similar acts were performed with the
present disputed intent motive, knowledge, etc, as were present in
the other similar unusually or peculiarly performed acts. Lord
Hailsham in Director of Public Prosecutions v. Boardman, succinctly
described the process as follows: "...whilst it would certainly not
be enough to identify the culprit in a series of burglaries that he
climbed in through a ground floor window, the fact that he left the
same humorous limerick on the wall of the sitting room, or an esote-
ric symbol written in lipstick on the mirror might well be
enough...whilst a repeated homosexual act by itself might be quite
insufficient to admit the evidence as confirmatory of identity or
design, the fact that it was alleged to have been performed wearing the ceremonial head-dress of an Indian chief or other eccentric garb might well in, appropriate circumstances, suffice"¹. Professor McCormick's definition of 'hallmark'² cited by the court³, is that the similarities must be "...so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature". It is not the repetition, but the presence of some special or unique features marking the other acts and the act of the offence charged as something out of the ordinary which brings an act within the principle. As one commentator remarked, "Beating someone with fists and hands...is nothing out of the ordinary as violent assaults go"⁴. An explicit illustration of the point being made is the Australian case of O'Leary v. R⁵, which has already been discussed with regard to incidents in a transaction under investigation. In the case, the accused was charged with the murder of a fellow co-worker at an isolated lumber camp. Together with other employees, they had imparted upon a full day of heavy drinking from morning to night. The accused was found guilty as charged. On appeal to the High Court of Australia, Latham C.J. was of the opinion that the similarities in the evidence adduced were minimal. They merely showed that the assaults committed by the accused were all violent, that the victims were all drunk, and that

¹ (1974)3 All E.R. 887 at 906 (H.L.)
² McCormick, Evidence, 2nd ed. (1948), p. 447
³ R v. MacDonald (1974)20 C.C.C. (2d) 144 (Ont. C.A.)
⁴ Sklar, "Similar Fact Evidence - Catchwords and Cartwheels" (1977) 23 McGill L.R. 60 at 70-1
⁵ (1946)73 C.L.R. 566 (Aus. H.C.)
one or two of the assaults were head injuries. Furthermore, Chief Justice Latham was of the opinion that the evidence was not indicative of 'a particular class of persons of abnormal characteristics'. The crime in the present case was "simply one of savage violence". There was no aspect of 'hallmark'. His Lordship stated: "It would be a dangerous extension of the rule as to evidence of similar acts to hold that the fact that a crime is savage and brutal is sufficient to justify the admission of evidence that on other occasions an accused person has been guilty of savage and brutal acts". Dixon J. expressed a similar conclusion when commenting upon the manner in which the evidence was put to the jury by the trial judge: "It was put rather that the crime, in its circumstances, was of a description which showed that it must have been committed by a man of a particular disposition, that such a disposition amounted to a specific means of connecting or identifying the culprit and that the prisoner's conduct earlier in the period might be considered to show that, for the time being, he possessed that disposition. I do not think that this is an accurate way of treating the purpose for which the conduct of the prisoner was admissible. I am unable to see in the mere brutality of the crime or the fact that the assailant concentrated his attack on the head of the deceased any such specific connection with the prior acts of the prisoner as to afford, so to speak, an identifying mark of the sort referred to in the decisions which appeared to have been in the learned judge's contemplation. However, notwithstanding the lack of 'hallmark' or 'abnormal pro-

(1) (1946)73 C.L.R. 566 at 574
(2) Ibid at 574
(3) Ibid at 578
pensity' in this case, Latham C.J. and Dixon J., members of the majority, considered that the evidence had still been properly admitted. Latham C.J. held that it was admissible "to show the probability that he would attack another man in a fit of drunken fury" and "to show the probability that he would attack some other fellow employee". This is clearly because the evidence constitutes part of the incidents in the transaction under investigation.

Basically, in cases involving the 'hallmark' principle, the reasoning process is nothing more than an application of the improbability that a person other than the accused should have the same modus operandi, or the improbability that, having performed the act of the offence charged, such act is not also of the same quality or character, or has not been performed with the same state of mind, etc., as other acts performed by the accused with similar peculiar modus operandi. The fact that a modus operandi may be classed as a 'hallmark' should not be considered a passport to admissibility, but instead, simply a recognition that due to the existence of the peculiar similarity fueling the improbability reasoning process, the evidence has obtained a very high degree of probative value. The term 'hallmark' is merely a label describing evidence which is so probative that it is capable of earmarking the offence charged as the handiwork of the accused in the same manner as if he had put his signature to it, or had attested to its character and nature. There is no magic in the term. Evidence which is of less probative value

(1) (1946)73 C.L.R. 566 at 575
than that of a 'hallmark' may also be sufficiently probative to be admissible if it increases the likelihood that it was the accused who performed the act, or that, if performed by the accused, the act paralleled in nature and character, others which were performed by him.

Unlike a physical mark or a fingerprint etc., a 'hallmark' which consists of a propensity to commit a crime in a particular manner, or a propensity to commit a particular type of offence (e.g. a particular sexual offence) is really only probative via some degree of propensity reasoning; the reference to 'hallmark' merely masks the propensity reasoning process. Such a 'hallmark' must possess an element of continuity from the time of the commission of the similar acts to that of the offence charged. With respect to identifying the accused as the perpetrator of an offence. Cowen and Carter state: "That they both had the same characteristic at the same time (i.e. the time of the commission of the crime) follows only if it is assumed that the accused's characteristic had a continuing quality, or, in other words, if it is assumed that the accused has not mended his ways. The making of this assumption is the very thing found objectionable in propensity evidence. The similar fact evidence does not demonstrate the indefinitely continuing quality of the characteristic: this has to be deduced from the characteristic itself. The existence of this quality is, as in all cases of propensity evidence, an essential link in the chain of relevance... . The accused is 'identified' with the criminal not because at different times they
possessed the same characteristic, but because the accused had the characteristic on previous occasions and he therefore is likely to have still had it on the instant occasion. This is propensity evidence\(^1\).

The possession of the common characteristic between the accused and an unknown offender can only identify the accused as being the latter if one assumes that the accused is still likely to possess that characteristic, and that, therefore, it is not merely someone else with the same characteristic who may actually be the offender. However, one can only make the assumption, or conclusion, that the accused still possesses the common characteristic via propensity reasoning, that is, the accused on the day of the offence possesses that characteristic because he has exhibited that characteristic in the past and is, on account of that disposition, ceteris paribus more likely to possess that dispositional characteristic also on the day of the commission of the offence charged.

Perhaps the clearest example of such an exceptional propensity is provided by the case of \textit{R v. Straffen}\(^2\). In that case the accused was charged with the murder by manual strangulation of two little girls at Bath. He was found unfit to plead by reason of insanity and committed to Broadmoor Institution. A year later the accused escaped, and at liberty for a period of approximately four hours. During the period the accused was at large a small girl, Linda Bowyer, was murdered by strangulation. The accused was seen near the

\footnotesize{(1) Cowen and Carter, Essays on the Law of Evidence (1956) at pp.142-43
(2) (1952)2 Q.B. 911; (1952)2 All E.R. 657; see also \textit{R v. Finlayson} (1912)14 C.L.R. 675}
place where the body was found, but there were other passers-by who might have committed the crime. When questioned by the police the accused admitted killing the two girls at Bath, but denied he was responsible for the murder of Linda Bowyer. The accused was tried for the murder of Linda Bowyer. The trial judge admitted evidence of the statements made by the accused to the police, and also evidence of the circumstances surrounding the killing of the little girls at Bath. The following points of similarity existed between the two earlier killings and the killing of Linda Bowyer. First, in each case the victim was a young girl; second, each of the children was killed by manual strangulation; third, in no case was there any attempt at sexual interference or any apparent motive for the crime. Fourth, in none of the cases was there any evidence of a struggle, and lastly, in no case was any attempt made to conceal the body, although that could easily have been done.

The accused was convicted, and appealed to the Court of Criminal Appeal. The Court dismissed the appeal, holding that the similar fact evidence had been properly admitted. Delivering the judgement of the Court, Slade J. stated: "In the opinion of the court that evidence was rightly admitted, not for the purpose of showing...that the appellant was 'a professional strangler', but to show that he strangled Linda Bowyer; in other words, for the purpose of identifying the murderer of Linda Bowyer as being the same individual as the person who had murdered the other two little girls in precisely the same way".

(1) (1952)2 Q.B. 911 at 916; (1952)2 All E.R. 657 at 662
To state possible reasons for admitting the confessions of the other murders in ascending order of relevance, the previous conduct of the accused rendered it probable that he was the culprit on the occasion in question because it showed that he was (a) a criminal, (b) a murderer, (c) a strangler and (d) someone given to strangling little girls in peculiar circumstances. The evidence was plainly too remote to be admissible for the first reasons, its relevance on the second and third grounds could hardly be disputed, but there is the ever present risk that juries will be so impressed by arguments of this nature that they will pay inadequate attention to matters which are favourable to the accused. Therefore, the confession might have been excluded if it had merely gone to show that Straffen had been guilty of murder, even if his previous victim had been strangled. The evidence was so extremely relevant for the fourth reason that it had to be received notwithstanding the risk that has been mentioned. In the words of Professor Stone: "There is a human paradox here which logical formulation cannot resolve. In a trial for an unpleasant crime, evidence must be excluded which indicates that the prisoner is more likely than most men to have committed it, but evidence must be admitted which tends to show that no man but the prisoner, who is known to have done these things before, could have committed it. There is a point in the ascending scale of probability when it is so near to certainty, that it is absurd to shy at the prejudicial evidence"1.

(1) 46 H.L.R. 983-4
The evidence was relevant solely because it went to show a disposition on Straffen's part to commit murder in a particular way, but the disposition was highly specific. In the words of Slade, J, who delivered the judgement of the Court of Criminal Appeal: "It is an abnormal propensity to murder young girls and to do so without any apparent motive, without any attempt at sexual interference, where they can be seen, and where presumably, their deaths would be detected". Slade J thought that, if the question of identity arose in a case of housebreaking and it was possible to adduce evidence of some hallmark or other peculiarity in relation to the earlier housebreakings which was also apparent in the case of the housebreaking charged, evidence that the accused committed the earlier crimes would be admissible on the same principle.

In R v. Straffen, there was abundant evidence that the accused had the opportunity of committing the murder with which he was charged as he had been seen to pass near the place where the victim's body was found near the time at which she must have been strangled, but this was also true of others. The evidence of the earlier murders committed by Straffen served to identify him, rather than any of the others, as the perpetrator of the crime under investigation.

A similar, though a less striking instance of the application of the 'hallmark' principle to circumstantial evidence of identity is R v. Morris. In that case the accused was charged with the murder in August 1968 of a girl, D, aged eight (count 1). The little girl had been enticed into a car by the killer, driven to a secluded spot and

(1) (1952)2 Q.B. 911 at 916; (1952)2 All E.R. 657 at 662
(2) Ibid
there sexually assaulted in a brutal fashion and killed by suffoca-
tion. The accused was also charged with the attempted abduction in
November 1968 of a girl, A, aged ten (count 2), and with indecent
assault in August 1968 of a girl, Y, aged five (count 3). The trial
judge refused an application to sever the indictment and try the
offences separately, holding that the evidence on the other charges
was admissible against the accused on the murder charge. The accused
pleaded guilty on count 3. He was convicted on counts 1 and 2, and
appealed unsuccessfully to the Court of Appeal.

The similarities in the offences were as follows. All three cases
involved little girls. Each of the offences were alleged to have
been committed in the same geographical locality. The murdered girl
had been enticed into a motor car, driven by the killer, and count 2
likewise involved a similar, in this case unsuccessful, attempt to
entice the little girl into a motor car driven by the accused. The
Court held that this element of similarity rendered the evidence on
count 2 of sufficient probative value to be admissible in relation to
count 1. The major focus of the Court's attention concerned count 3.
The little girl the subject of this count was a relative of the
accused's wife and had come to visit with them. Whilst she was
staying in the house, the accused took a series of grossly indecent
photographs of her. In relation to poses, arrangement of clothes,
and other details, the photographs bore a close similarity to the
position and attitude of the dead body of the little girl the subject
of count 1. The evidence of the photographs was obviously of the most extreme prejudice, and the Court of Appeal properly considered the issue before it as being whether the evidence was of such exceptional probative value as to justify admissibility. Delivering the judgement of the Court Widgery L.J. stated: "In this case to render the evidence of the photographs admissible, it is not enough for the Crown to show that they indicate a tendency on the part of the applicant to sexual deviation. The Crown, in order to make the evidence admissible, must go further and show that there is a sufficient similarity between the applicant's conduct when the photographs were taken, and the conduct of the murderer, to give a real and positive indication that they were one and the same man. It is not necessary to show that the circumstances are so similar that the same man must have been concerned in each case. The admissibility of the evidence depends on whether the similarities are sufficient to show that the applicant and the murderer have common characteristics which are so unusual that it is likely that they are one and the same man".

After a careful review of the evidence, His Lordship concluded it was properly admitted. His Lordship stated: "Looking at the similarities of the matter, the most important one, in our judgement, is the one which strikes anyone opening these two albums of photographs (the photographs of the deceased, and the photographs taken by the accused of the girl Y). Words of mine would be insufficient to convey the really quite remarkable impression which a comparison of

(1) (1969)54 Cr. App. R. 69 at 80
these photographs makes, and I shall not attempt to describe the
details, sordid as it is, further than that. The situation of the
clothing is common, the attitude of the body is common, the child is
lying on her back, and so on... When one looks at those similarities, it
becomes clear that the murderer and the applicant had this
common characteristic of lustful design on little girls and a simila-
rity in the method in which they gratified that lust, and the number
of men similarly afflicted is happily not such as to make them other
than exceptional in any community. The evidence, therefore, (when
one realises that these two incidents were geographically close
together and that the applicant himself lives in what is part of the
same relatively small community) does point to the fact that both
offences were committed by one and the same man"¹.

A Canadian case implementing the same principle as the cases above
is R v. Bird²; it is a particularly vivid example of an accused
utilising an unusual modus operandi. The accused was charged with
obtaining sexual intercourse from a woman by the use of threats,
accusations or menaces³. The victim, a Mrs Salmon, testified that a
telephone call was made to her house, and that she mistook the caller
for a family friend, one Ian MacDonald. The caller was able to
ascertain that Mrs Salmon's husband had been out drinking with Ian
MacDonald the night before. He then told her that in the course of
the evening the husband had committed an indecent act with another
woman, that someone had taken pictures and threatened to circulate

¹ (1969)54 Cr. App. Rep. 69 at 82-83; see R v. Willett (1972)10 C.C. (2d) 36
² (1970)3 C.C.C. 340; see also Griffith v. R (1937)58 C.L.R. 185
³ Criminal Code S.291 (Canada)
them unless the victim would do the same thing with him, Ian MacDonald. The caller again telephoned later in the morning. Still impersonating Ian MacDonald he stated that he could not take part in the act, but that the other woman had a friend who would visit Mrs Salmon shortly for that purpose. Shortly after a man identified by Mrs Salmon as the accused arrived impersonating the friend of the other woman. Sexual intercourse then took place between him and Mrs Salmon. The accused then left. Some time later Mrs Salmon realised she had been duped. She telephoned Ian MacDonald and ascertained that he had no part in the proceedings and that in reality nothing had happened the night before. The prosecution was permitted to lead evidence of two similar incidents involving Mrs Hutchinson and Miss Thorburn. Mrs Hutchinson testified to receiving a telephone call; she believed the caller to be a friend. He told her that the night before a woman had enticed him to her home. She had given him marijuana and the two of them went to bed. He said that the woman's brother had come and taken some pictures of the scene. He asked her if she would have intercourse with the woman's brother, in which event the brother would return the pictures to him. Subsequently, there was another call from a person who identified himself as the brother. The caller stated he was coming over. Shortly after the accused, purporting to be the brother, arrived and sexual intercourse took place.

Miss Thorburn, an 18 year old schoolgirl, gave evidence that someone called her purporting to be Dr Archer. He told her that her
mother had a venereal disease and was concerned that she might communicate it to her daughter. He wanted to come over and see her in about half an hour. She agreed. Subsequently the accused, purporting to be Dr Archer, arrived. He told her he wished to conduct some examination on her, but she refused and he left.

The accused was convicted and appealed to the British Columbia Court of Appeal. The Court held that the similar fact evidence was admissible to support Mrs Salmon's identification of the accused as the person who had duped her into having sexual intercourse. Delivering the judgement of the Court, Branca J.A. stated: "The person who committed the crime on Mrs Salmon was one who adopted a uniquely similar modus operandi with Mrs Hutchinson and Miss Thorburn. The conduct was extraordinary. The telephone conversations, in all three cases, were singularly patterned. The man in each was one who was seeking sexual gratification from a woman who was previously unknown to him, in her own home, in the middle of the day... . It was this hallmark which made his conduct in the Hutchinson and in Thorburn cases admissible evidence in reference to his identification by Mrs Salmon as the man who had had sexual intercourse with her".

However, while the similarities in circumstances of the incidents with respect to the two women could be termed a 'hallmark' of the perpetrator, the incident with respect to the 18 year old schoolgirl (Miss Thorburn) was not, it is submitted, so similar in modus operandi, to be properly termed a 'hallmark'. Evidence as to both

(1) (1970)3 C.C.C. 340 at 345
incidents (i.e. that with respect to Mrs Hutchinson and Miss Thorburn) was, however, admitted under the 'hallmark' doctrine. In any event, even if not 'hallmark', the incident with respect to Miss Thorburn - the 18 year old girl - may still have been sufficiently probative. There was the similarity of a careful plan implemented by the use of a telephone and the ploy of impersonation, all with the common objective of sexual gratification; so it could have been enough as evidence of system or design though it may not qualify to be described as 'hallmark' evidence.

There are also some pertinent illustrations from the Australian courts. For example in R v. Aiken\(^1\), the prisoner was presented, tried and convicted on two separate charges of larceny as a bailee. The two charges arose out of separate transactions which had this element in common: first the prisoner had obtained two motor cycles, one from A, the other from B; second, each was obtained on the prisoner's false representation that he wished a trial of the machine with a view to buying it; and lastly in each case having obtained possession of the machine he rode off with it and never returned it. The two charges were heard together. The prisoner's defence was one of mistaken identity. The presiding Judge in charging the jury told them that, in considering the question of the identity of the prisoner, they might take into consideration the fact that he had been identified by A and by B. The full Court in deciding that this was a wrong direction said: "The mere similarity in the means adopted in the two cases, where those means might have been adopted in either

\(^{1}\) (1925) V.L.R. 265; 46 A.L.T. 177; 31 A.L.R. 143
case by any one of an indefinite number of persons, and where no other connection, either in the mind of the accused or in fact, is shown to have existed, cannot, we think, justify, on the question of identity, the combining of the evidence in the one case with that in the other."

Later on the Court said: "We must not be taken as saying that in no case can evidence of similar offences be given on a question relating to the identity of the accused"; and later on still, the Court expressed an opinion that a similarity of circumstances sufficient to justify the reception of evidence of similar facts to prove plan or system may not be sufficient where the purpose is to prove the identity of the accused.

The principle deducible from this case seems to be that where there is evidence that the prisoner did both the main act and the similar acts, there, in order to prove identity, the similar acts must be shown to have a character which is substantially identical with that of the main act; and that the similar acts must bear some badge or stamp which clearly shows them to have been the acts of the prisoner and of no one else. This principle is illustrated in the case next to be cited.

In *R v. Johnson*¹, the prisoner was charged on presentment with having obtained money by means of a valueless cheque. He was convicted. At the trial he had earlier announced that his defence was one of mistaken identity. It appeared that the prisoner had paid for

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¹ (1937) A.L.R. 655
drinks in an hotel by means of a valueless cheque and had obtained
the change from the hotel keeper. This cheque had the following
peculiarities: so far as written, it was all in the same handwriting:
it was drawn on the Commercial Bank, by P Stacey and payable to 'J.
Brown, Wadge '. ('Wadges' was the prisoner's spelling of 'Wages');
the cheque was for a small amount. In order to prove the prisoner's
identity with the person who had passed this valueless cheque, and to
rebut the defence of mistaken identity, the Crown called six witnes-
ses, each of whom deposed that the prisoner had, for value received,
passed to him a valueless cheque, at a place near the hotel referred
to above, and within an hour and a half of the commission of the
offence. Each of the six (6) cheques had all the peculiarities
(including the reference to 'Wadges') above particularised in respect
of the main cheque. Several of these six cheques were numbered in
correct arithmetical series and appeared to have been torn out of the
same cheque book.

The prisoner appealed against his conviction on the ground that the
evidence relating to the six other dishonoured cheques had been
wrongly admitted. The Court, however, held that that evidence had
been properly admitted in proof of the prisoner's identity and to
rebut the defence of mistaken identity. The Court also considered
that the case on appeal fell within the class of case of the type of
R v. Aiken1 in which evidence of similar acts may be adduced in order
to prove identity.

It is to be observed that in this case (R v. Johnson) the similar

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(1) (1925) V.L.R. 265; 46 A.L.T. 177; 31 A.L.R. 143
acts relied on were not only similar, but almost identical, in character with those which formed the basis of the main charge made against the prisoner. In particular the spelling of 'Wadges' for 'wages' which occurred in all of the cheques (and the prisoner in his evidence admitted that he spelt 'wages' that way) was a characteristic so extraordinary as to point almost infallibly to the prisoner as the author of all the cheques. There were other indications also pointing in the same direction, so that this is a very clear case in which a substantial identity is shown to exist between the main act and the acts said to be similar, and in which the main act and the similar acts are manifestly the work of the same hand.

One cannot tell what the decision would have been if, for example, there had not been so many cheques, or if they had not been negotiated soon after the commission of the main offence, or so very close to the scene of it, or if the damning word 'wadges' had nowhere appeared, or if others of the characters connecting the similar acts with the main act had been absent. For, in order to establish the identity of the accused by means of similar acts, it is of prime importance to discover in the similar acts some link or links connecting them with the accused and the crime with which he is charged.

It has been held in Ontario, Canada, in R v. Glynn\(^1\), that, where it is plain that a murder was committed by a homosexual with certain characteristics, evidence that the accused had engaged in homosexual acts displaying them is admissible and it is not unlikely that such

\(^1\) (1972) 1 O.R. 403
evidence would be admitted in England, as Cross observed\(^1\), and indeed in other Commonwealth countries. It is quite clear from the cases cited above, that the same 'similar acts' may sometimes not only prove that the prisoner acted on a plan or system, but may also prove the identity of the prisoner himself.

\(^{1}\) Cross on Evidence (5th ed.) at P. 390
c) Identification by Possession of the Instruments of Crime:

As to the question of the admissibility of evidence of the possession of tools or materials which were used to commit the crime charged, as opposed to the possession of tools or materials which are merely capable of being used to commit an offence of such type charge, it will be apt to consider the Australian case of Thompson and Wran v. R. In that case, two safes had been blown open by explosives. The accused, naturally, were not found in possession of the explosives used to blast the safes as these had been spent. They were, however, found in possession of implements to open safes by blowing, drilling or picking locks. The evidence of the accused's possession of the implements for blowing open safes was held to be admissible. Evidence of the possession of the other implements was held to be inadmissible. Barwick C.J. and Menzies J. stated: "We do not think that evidence of the possession of tools for the commission of crime is admissible only when it appears that tools of that nature were used in carrying out the alleged crime; it is sufficient if such tools might have been used...".

In R v. Taylor the principal ground on which a conviction for shopbreaking was quashed was that evidence of the finding of a jemmy in the accused's house had been wrongly admitted because the door of the shop did not bear the marks of such an instrument, and the accused contended that they had broken the door without criminal intent while indulging in a drunken escapade. In his judgement in the case, The Lord Chief Justice said: "In this case a police officer

(1) (1968) 117 C.L.R. 313 (Aus. H.C.); (1968)42 A.L.J.R. 16
(2) (1968)42 A.L.J.R. at 17
(3) (1923)17 Cr. App. R. 109; see also Picken v. R (1938)69 C.C.C. 321 (S.C.C.)
gave evidence that at about midnight he saw appellant and another man outside a shop, heard the door forced open and saw the appellant and the other man run out. Being arrested, appellant denied any attempt to commit an offence, and said that the affair was a drunken escapade, that he and the other man had been drinking and, playing football with a cabbage stalk, had charged one another against the door and broken it open. There were no marks of any instrument on the door and nothing was stolen. It is conceded on the part of the prosecution that there were some irregularities at the trial, but it is said that these irregularities do not matter, and that under the proviso to Section 4 of the Criminal Appeal Act the conviction ought to stand. The court cannot take that view. Although appellant was arrested on the spot, and there were no marks to suggest that an instrument had been used, evidence was given of an alleged jemmy having been afterwards found in his house. He was questioned by the police about the jemmy eight days after his arrest, and evidence was given of that questioning. There are other matters also which make the trial unsatisfactory.

On the same principle it has been said that, if entry by keys is proved, the finding of the jemmy will not be admissible, and, if the entry were by means of a jemmy, evidence ought not to be received of the finding of skeleton keys in the possession of the accused.

In *R v. Manning*, the appellant was convicted of housebreaking on 9th November 1922, larceny and receiving a watch and chain, a match-

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(1) (1923)17 Cr. App. Rep. 109 at 110-111
box etc., with guilty knowledge. The two witnesses at the police court who spoke to the date fixed it as 9th November. One of them said that the housebreaking took place on a Thursday. In fact 9th November was a Thursday. The indictment put 9th November as the date of the defence. Appellant came to trial prepared with an alibi, supported by two witnesses, for 9th November. That date happened to be the Lord Mayor's Day, and the witnesses fixed the day by events referrable to the procession. At the trial, before opening the case, counsel for the prosecution requested leave from the chairman to amend the date of the offence alleged in the indictment from 9th November to 8th November. During the course of the trial the two witnesses who at the police court gave the date of the housebreaking as 9th November, swore that the date was Wednesday 8th November. At the close of prosecution, the appellant in his opening speech to the jury, said that he could prove an alibi both for 9th November and 8th November.

Further, there were other irregularities which must have influenced the jury. Evidence was given to show that on 25th and 27th November, more than two weeks after the housebreaking, there were found fifty skeleton keys, some on the prisoner, others on the premises where he lived. There was nothing to connect these keys with the housebreaking. The evidence was that the entry to the house and the opening of a cabinet were effected by a jemmy found on the prisoner, and not by keys. In a brief statement in his judgement, Slater J. said: "The gist of this case is the watch and chain, not
the tools. The watch was never identified". However, it appears reasons may exist where such evidence is admissible. It seems such reasons existed in **R v. Wurch**<sup>2</sup>, a Canadian case where evidence of articles found in the possession of the accused such as a revolver, dynamite, a black-jack, a battery and safe wrecking instruments were admitted on a charge of shop-breaking to prove identity when coupled with lies relating thereto. In **Prosko v. R**<sup>3</sup>, evidence was admitted of a mask, a moustache, a flashlight and a cap of the sort generally used by robbers, which were found in the possession of the accused.

**R v. Twiss**<sup>4</sup> may be regarded as a case in which the evidence of possession of incriminating material was received because it was of the same nature as that alleged to have been used in the commission of the crime charged; it is simply another illustration of the application of the hallmark principle. In that case the accused was charged with indecent assault upon a boy of 16. Evidence was admitted as to the contents of photographs of nude boys found upon the accused and at his premises where the alleged offence supposedly occurred. It is not clear how much of these photographs were used during the commission of the offence according to the testimony of the boy. However, Darling J. considered the evidence of the contents of the photographs admissible on the analogy that "just as possession of the tools of a burglar or the apparatus of an abortionist is evidence as showing the possession of appliances and implements used by people carrying on that particular kind of business in crime",

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(1) Ibid at 87
(2) (1932)58 C.C.C. 204 (Man. C.A.)
(3) (1922)37 C.C.C. 199 (S.C.C.)
(4) (1918)2 K.B. 853; Cf **R v. Gillingham** (1939)4 All E.R. 122; and **O'Brien v. R** (1963) W.A.R. 70
similarly in the instant case, the evidence was admissible "for the purpose of showing what the practice of the accused who had the materials about him is"\(^1\). The analogy, however, is of doubtful validity\(^2\), especially since the photographs were not conclusively used in the commission of the alleged offence. Clearly then, probative value was via propensity, although not in the same manner as in \textit{Thompson v. R}\(^3\). Darling J. stated that evidence of photographs or apparatus was not only admissible "where the defence was as to identity" but "also admissible where, as in the present case, all the facts are in dispute for the purpose of showing what the practice of the accused who had the materials about him is"\(^4\). However, considering the dethroning of the special category concerning homosexual offences\(^5\), it is questionable whether the evidence really had sufficient probative value via propensity to have been admissible. If it showed evidence of sexual disposition, it was merely that of general disposition without any nexus to the case. In addition, there was no significant "other evidence", as was available in \textit{Thompson v. R}.

The whole issue about identification by possession of the instruments of crime was well discussed in \textit{R v. Reading and others}\(^6\). In that case on 11th November 1964, a lorry carrying tinned meat worth £5,000 was 'highjacked' by three men, two of whom were later identified by the driver of the lorry and another as R. and O.: both R. and O. put forward alibis for their movements on that date. On 30th November 1964, a lorry containing shoes, boots, stockings and handbags worth £12,000 for delivery to shops was 'highjacked' by three

\(^1\) (1918)2 K.B. 853 at 858
\(^2\) See also Gooderson, "Similar Facts and Actus Reus" (1959) Camb. L.J. 210, at 222; Cowen and Carter, Essays on the Law of Evidence (1956) at 151
\(^3\) (1918) A.C. 221 (H.L.)
\(^4\) (1918)2 K.B. 853
\(^5\) See D.P.P. v. Boardman (1975) A.C. 421 (H.L.)
\(^6\) (1966)1 All E.R. 521; (1966) W.L.R. 836 (C.C.A.)
men who were identified by the driver as the applicants R., S.B. and R.B., the first two being identified by two other witnesses; all three put forward alibis for their movements on that date. On 8th December, police officers called at S.B.'s home and found there a motor car with R. and S.B. inside and also a two-way 'walkie-talkie' radio set, and O.'s car in which were O., R.B. and another two-way radio set. In the house were found two number plates, a driving licence which had expired and was in the name of Clarke, some shoes, stockings and handbags indistinguishable from those contained in the lorry load stolen on 30th November, and also a police-type uniform and ear-pieces for the radio set. All four men were convicted of robbery with aggravation.

On an application by R. for leave to appeal against conviction, on the ground, inter alia, that evidence concerning the articles found in S.B.'s house and in the cars on 8th December should not have been admitted, because there was no evidence that any of the articles had been used in relation to either of the robberies committed on 11th November or 30th November; it was held dismissing the application, that evidence of the possession of incriminating material was admissible provided there was some other feature in the case which made it relevant, and it was not necessary that the material should have been used in the crime; and that evidence in respect of what was found on 8th December by the police was of powerful probative value in relation to the vital issue as to identification of the applicants and
had been properly admitted.

The main basis of the ratio decidendi was that the scene discovered by the police on the accused's premises tended to identify the accused as the perpetrator of the crime charged. Evidence that goods similar to those taken by the culprits, and found in the possession of the accused along with articles that might have been used in the commission of the offence, tended to confirm the validity of the eyewitness identification. Was it not odd that persons who the witnesses identified as the culprits should subsequently be found in possession of such incriminating articles together with goods similar to those which were stolen?

In an effort to distinguish the case from others, Edmund David J. made the following observation: "What is submitted (by the applicant) and submitted with great clarity, is this: these articles should not have been admitted in evidence at all, for there is no evidence here that any of them were used in relation to either the 11th November or 30th November robberies, and, relying upon principally R v. Taylor\(^1\), in those circumstances the jury should not have been permitted to hear about any of those articles. Reference has also been made to the House of Lords decision in R v. Thompson\(^2\). This submission, if it is a good one, affects others besides Reading. It is therefore of considerable importance and we have reflected upon it with the care which it demands. The conclusion we have come to is that the submission is invalid. In Taylor's case the accused man with another was seen to emerge from a shop doorway. The defence was 'We were in the

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(1) (1923)17 Cr. App. Rep. 109
(2) (1918) A.C. 221
doorway for a lark and accidentally broke the door'. The defence therefore was 'We never committed a crime at all'. Evidence was admitted that some days later a jemmy was found in Taylor's possession. The evidence was that no jemmy had been used to break the door open. The conviction of Taylor on those facts was quashed by this court on the grounds that, in view of the absence of any evidence of a jemmy having been used to perpetrate a crime, testimony that a jemmy was later found upon him could have this, and only this, significance, to show that he was a man of criminal disposition and therefore likely not to have been in that doorway for an innocent purpose. There are other decisions to the same effect, R v. Manning¹, being of that ilk, but that case is wholly removed from the present case. The issue upon which what was found on 8th December was admissible evidence was that of identification. These men were all denying that they were present either on 11th or 30th November. It was, in our judgement, admissible on that issue to show what the scene was as the police found it on 8th December. There are a number of reported decisions where, despite the fact that material found on an accused person was not used in the perpetration of the crime, possession is nevertheless provable in evidence on the issue of identification. Indeed Thompson's case, relied on so strongly (by the applicant) illustrates that type of case to perfection. In Thompson the powder puffs and the indecent photographs found on the accused man had in no way been utilised by him at the time of committing

¹ (1923)17 Cr. App. Rep. 85
offences on little boys on 16 October. Nevertheless they were admitted in order to link him up with the offences committed on that date.\(^1\).

\(\text{R v. Reading} \) was followed in \(\text{R v. Mustapha}^2\). In that case the accused was convicted on two counts, each charging him with obtaining £20 worth of meat from a store by means of the use of a forged Barclaycard. The evidence of the manager of another store that he had seen the accused place £20 worth of meat on a trolley on an earlier occasion and leave it there on noticing that he was being watched, was admissible to confirm the identifications by the store managers on the occasions in question. It was also held that the discovery of a stolen Access card in a Barclaycard wrapper on the accused's premises a week after the alleged offences was admissible for the same purpose as it was an article of the kind used in the commission of the crime.

In the Australian case of \(\text{Thompson v. R}^3\), affirming the decision in \(\text{R v. Reading} \) the High Court uttered the following important warning which should always be remembered before applying the decision: "In all cases, however, where such evidence is admitted, it is to identify an accused person with the crime charged against him, and evidence that the possession of tools of crime other than those which were or might have been used to commit the crime charged or tools of such nature, is, in the absence of some special connection, inadmissible because it does no more than prove criminal disposition". In that case the issue was identity only, and evidence of the possession

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(1) (1966) W.L.R. 836 at 840 (C.C.A.)
(2) (1976) 65 Cr. App. Rep. 26
(3) (1968) 42 ALJR 16 at 17
of safebreaking implements which were not appropriate for blowing open the safe in question was not admitted. In the New Zealand case of *R v. Te One*, the court stated that "the mere fact that certain things have been found in the possession of a defendant at the time of his arrest does not automatically make evidence of that finding admissible against him". It is pertinent to draw attention to the decision in *R v. Hannam*, where on a charge of possession of burglars' tools, evidence was given of a list on accused of addresses of three other premises which had been broken into - a connecting link between the evidence can easily be made.

(d) **Directing the Jury**:

The problem of properly instructing the jury as to the use which it might make of the similar fact evidence in cases involving the proof of identity is considerable. In *R v. Sims*, Lord Goddard C.J., stated the principle on which the evidence of each accused was admissible on the charges concerning the others as follows: "The probative force of all the acts together is much greater than one alone; for, whereas the jury might think that one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming."

In *R v. Bailey*, the Court of Criminal Appeal quashed a schoolmaster's conviction for gross indecency with a number of his boys because the judge had allowed the jury to return a general verdict.

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1. Thompson v. R (1968) 42 ALJR 16
2. (1976) 2 NZLR 510, 514
3. (1964) 2 C.C.C. 340 (N.S.C.A.)
4. (1946) K.B. 531
5. Ibid at 540
6. (1924) 2 K.B. 300
without differentiating between the various counts. When speaking of the effect of the evidence on one count so far as another was concerned, Lord Hewart C.J. said: "The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory accusations - if there are enough of them, an accusation which at least appears satisfactory. It is easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing". It is submitted that of the two statements quoted above, the more realistic to the problem of properly instructing the jury is that of Lord Goddard, but Lord Hewart's remarks point to the undoubted difficulties involved in directing a jury how to act on the principle enunciated in Sims' case.

Though as we know the jury must clearly be told in every case to consider each count separately. The problem is how are the jury to be prevented from reasoning as follows: "We thought A a liar when we heard his evidence against the accused on the first count, and we did not know whether to believe B and C when we heard their evidence on the second and third counts. All the same, it is improbable that A, B and C would tell lies containing such striking similarities, therefore we are satisfied beyond reasonable doubt of the accused's guilt on all three charges". One way of avoiding this danger is exemplified in the summing up of Lord Goddard C.J. in R v. Robinson, although it may involve a departure from the global reaso-

(1) Ibid at 305; R v. Bailey was approved by the House of Lords in Harris v. DPP (1952) A.C. 694; (1952)1 All E.R. 1044, but Lord Hewart's dictum was not considered
(2) R v. Bailey (1924)2 K.B. 300
(3) (1953)2 All E.R. 334
ning of a passage in R v. Sims. It will be recollected that that case was concerned with two hold-ups. Lord Goddard said: "You will be entitled, only if you come to the conclusion that you ought to convict Robinson of the first hold-up, to use the fact as strengthening the case against Robinson with regard to the second hold-up. As I say, you must decide perfectly independently, but I advise you first, to consider The Lyons hold-up. If you are not satisfied with Mr Gilbert's identification in The Lyons hold-up, I should think you would certainly not be satisfied with Mr Wood's identification in the second hold-up. If you are convinced with Mr Gilbert's evidence, then you may find that helps you to come to a conclusion as to whether or not Mr Wood is right in his identification with regard to the second hold-up".

As earlier pointed out, this is to some extent a departure from the reasoning of R v. Sims which appears to have contemplated the jury's taking the evidence on every count into consideration when determining the accused's guilt on any one. The difficulties involved in the consideration of the evidence as a whole on each separate count are mentioned in the New Zealand case of R v. Muling. However, while in Coyle v. R, it was held that the judge could properly direct the jury to take into account their findings on other counts in considering a residuary count relating to similar merchandise; in R v. Salerno, it was stated that the jury must be told that it must be satisfied of guilt on a count before using evidence in support of

(1) (1946) K.B. 531, 540
(2) (1953) 2 All E.R. 334
(3) (1951) NZLR 1022; Cf R v. Glass (1945) NZLR 496
(4) (1972) NZLR 574
(5) (1973) V.R. 59
that count in support of another count on the issue of identification. Some guidance to trial judges on severance and on the decision to admit or reject similar fact evidence was offered by the Court of Appeal in R v. Scarrott¹.

(v) REBUTTING DEFENCE OF INNOCENT ASSOCIATION

Cross, in discussing the defence of alibi and that of innocent association, stated: "If the accused relies on alibi, he is, for practical purposes, debarred from raising the defence of innocent association, for the falsity of his denial of an opportunity to commit a sexual offence corroborates the prosecution's evidence that he committed it. If the accused relies on the defence of innocent association, he admits he has no alibi"². But, what precisely does the defence of 'innocent association' mean? The defence of 'innocent association' is where the accused although denying that any actus or actus reus ever occurred admits that he was in the company of the complainant at the material time. The defence of 'innocent association' should be distinguished from the defence of innocent intent. In the latter, the accused admits that he committed the actus, but that there has been a misrepresentation by the complainant as to the nature and character of those acts. I think it is important to make this distinction, because not only is it important by itself to know the true and correct meaning of these phrases, but they have often been mistakenly confused and their meanings somewhat distorted. Cross said of the defence of innocent association: "Sometimes the defence amounts to nothing more than an assertion that, although the

¹ (1977)3 WLR 629
² Cross, "R v. Sims in England and the Commonwealth" (1959)75 L.Q.R. 333 at 337
acts alleged against the accused were performed by him, he lacked the requisite guilty intent". With deference to the learned author I would beg to differ. In my view the definition given by him fits more with the meaning of 'innocent intent' as stated above and it is in no way a synonym for 'the defence of innocent association'. However, I do agree with the view that the problem with the defence of innocent association is that it is hard to say exactly when it is in issue.

Be that as it may, it is significant to mention that in the circumstances of the meaning attached to the defence of innocent intent, it may perhaps be rebuttable by similar fact evidence which is not 'strikingly similar' to the acts charged, or even by evidence which merely shows a general disposition to perform them. We have in the now familiar case of R v. Hall, an example of striking similarity as far as the evidence of two of the incidents is concerned. The accused was charged on an indictment containing eight counts alleging, on different occasions, acts of gross indecency with three young men, C, B and R. Three counts related to C, four to B and one to R. C alleged that he had met the accused at a certain medical institution where the accused was an instructor. The accused allegedly convinced C that the latter needed treatment for the presence of a homosexual disposition, and subsequently, on the pretext of providing medical treatment, he handled C, indecently. B testified that he also met the accused at the same medical institution, that a similar conversa-

(1) Cross on Evidence, 5th ed. at 391
(2) (1952) 1 K.B. 302; (1952) 1 All E.R. 66
tion concerning homosexuality occurred as deposed to by C, and that the accused asked him to come to his home in Bournemouth where the indecent acts allegedly occurred. R testified that he met the accused at Bournemouth where the accused was giving a lecture. A similar conversation as deposed to by C and B, allegedly occurred with R also, and subsequently, acts of indecency supposedly took place. The defence of the accused with respect to C and B was that the acts were done in the course of medical treatment and that the complainants were mistaken as to the character of the acts. With respect to R, the accused denied everything and claimed never before to have met him. The trial judge ruled that "all witnesses to be called on all accounts could have been called on any of the counts".

Only the charges with regard to C and B are however pertinent to our present discussion; the position in respect of R has to do with identity which has been discussed earlier. The Court of Criminal Appeal affirmed the ruling of the trial judge. With respect to the counts concerning C and B, inter se, Goddard L.C.J. stated, "When one gave evidence of the suggestion made to him about medical treatment, it was material to show that the intention of the appellant was criminal and that he did almost the same thing in the case of the other. While the application of the "unwarranted extension of Thompson v. R reasoning" can no longer be justified, the evidence with respect to C and B inter se, was admissible upon the reasoning that it would certainly be a coincidence for two people to make the same mistake on the question whether they were receiving bona fide

(1) (1952) 1 K.B. 302 at 305 (C.C.A.)
(2) Ibid at 307-8; The court cited R v. Sims (1946) K.B. 531, as authority
(3) (1918) A.C. 221 (H.L.)
therapeutic treatment or grossly indecent attention. As Cowen and Carter stated: "Two men are less likely to lie about (especially in almost identical terms) or to make mistakes about (especially almost identical mistakes), the complexion which the accused's acts have, than is one"¹.

Another case for consideration with regard to the defence of innocent intent is that of R v. Cole², where there was no suggestion of striking similarity. In that case a young soldier, with no place to sleep for the night "was perfectly properly invited by the appellant to sleep in the appellant's room³, and in fact occupied the same bed. The soldier testified that after the light was put out, the accused attempted to commit indecent acts with him. As a result, and coupled with the fact that he was ill from having drunk considerably more than he should have, the soldier left the bed to vomit. On his return to bed, indecent acts allegedly re-occurred. The soldier left the premises in the middle of the night and promptly proceeded to the police station. In the opinion of the Court of Appeal this would have been sufficient evidence to convict, however, "the prosecution were not content with that, but desired to introduce a further matter in evidence"⁴. Letters dated, with one or two exceptions, some fourteen years earlier and found in the room of the accused, were admitted by the trial judge into evidence. The letters indicated that the accused had been involved in a homosexual relationship with another man during those years. The evidence was admitted, apparen-

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¹ Cowen and Carter, Essays on the Law of Evidence (1956) at P.118
² (1941)165 L.T. 125; 28 Cr. App. Rep. 43 (C.C.A.)
³ 165 L.T. 125 at 126
⁴ Ibid at 127
tly, to rebut the defence of 'accident'. At the police court, prior to trial, "some questions in cross-examination had been answered by the appellant in such a way as to indicate that he might be going to raise at the trial the question of accident as distinct from design". However, in the opinion of the Court of Appeal it was "clear from the outset that the defence...was nothing of the sort and that his defence was going to be that the acts complained of never took place"; that the accused merely gave the soldier a violent push out of the bed so that the soldier would not vomit there. Counsel for the accused announced at the beginning of the trial that that was the defence of the accused and the cross-examination of the witnesses for the prosecution by counsel for the accused was consistent with that defence alone. The Court of Appeal held that the evidence had been wrongly admitted. The Court of Appeal noted that if the defence had been one of lack of mens rea, as the prosecution and trial judge had claimed, or a denial that the accused was the man, the evidence would have been admissible. Due to the form of the defence actually raised (i.e. a denial of the actus) the evidence was ruled to be inadmissible.

As earlier pointed out, the defence of innocent association may amount to an assertion that, although the opportunity of doing the acts complained of existed, advantage was not taken of it. It is to rebut this type of assertion that evidence of guilty passion between two people mentioned in a charge of adultery or sexual offence is invariably admitted. In this context, however, 'opportunity' must

(1) Ibid
(2) (1941)165 L.T. 125 at 126
(3) See e.g. Boddy v. Boddy Grover. (1860) WP & M 23
(4) R v. Ball (1911) A.C. 47; R v. Jansen (1970) SASR 531; in R v. Herbert (1916) VLR 343, the dissenting judgement of Cussen J. is to be preferred on this point
be taken to mean something more than physical possibility, there must
be something in the nature of suspicious circumstances\(^1\).

Starting with cases of adultery, in Scotland, it is known that in
order to protect the matrimonial bond against injury\(^2\), the general
rule has been relaxed in actions of divorce for adultery, and the
court has admitted evidence of attempted adultery or indecent conduct
on the part of the defender with persons other than the co-defender,
as supporting the probability of the acts of adultery founded upon\(^3\).

In *Wilson v. Wilson*\(^4\), Lord Cameron said: "It is, of course, well
established that as a general principle of law, proof of collateral
matters will not be permitted\(^5\). To this general rule there is a
limited exception in consistorial causes in that evidence of a defen-
der's adultery or of indecent conduct with persons other than the
named paramour or co-defender has been admitted in order to provide
corroboration of the main case of adultery which the pursuer seeks to
prove. That exception is one which has been recognised in practice
for many years both in England and in Scotland, but the conduct which
may be referred to must be either adulterous or at the very least
indecent in character\(^6\). In Scotland, evidence of earlier adultery,
which has been condoned, between the defender and the co-defender\(^7\),
or between him and someone other than the co-defender\(^8\), or of adul-
tery committed after the raising of the action\(^9\), although it cannot be
founded upon as a ground of judgement, may be relevant as throwing
light on the conduct founded on as proof of adultery or on the nature

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(1) Cross on Evidence, 5th ed. at P. 392; (2) *H v. P* (1905) 8 F. 232
L.P. Dunedin at 234; *A.V.B.* (1895) 22 R. 402, L.P. Robertson at 404;
(3) *Whyte v. Whyte* (1884) 11 R. 710; see also *Weatherly v. Weatherly*
(7) *Collins v. Collins* (1884) 11 R. (H.L.) 19, L. Blackburn at 29;
*Robertson v. Robertson* (1888) 15 R. 1001, L. Young at 1003-4;
S.C. 600
of the association between the defender and the co-defender. In actions of affiliation and aliment in Scotland, evidence of acts of intercourse between the parties, other than those alleged to have caused the conception of the child, is admissible, and may be relevant as throwing light on the probable relationship between the parties at the date of the conception. "An act of intercourse, which is admitted or proved to have occurred either before or after the probable date of conception, may sometimes afford sufficient corroboration of the pursuer's evidence, if opportunity at the date of conception is also proved. Whether it in fact affords this corroboration must depend upon the whole circumstances of the case, including the relationship between the parties, the nature and character of the opportunities open to them, the length of time between the act and the date of conception, and the particular circumstances in which the intercourse took place." Generally when the act of intercourse occurs before the date of conception, and meetings between the parties continue thereafter, ordinary experience is said to have shown that intercourse, once commenced, will probably be repeated when opportunity for it is afforded, and very little further corroboration will be required. In other words, in such cases the defence of innocent association will be relatively easy to rebut.

In the English case of *Wales v. Wales and Cullen*, the court held that evidence of acts of adultery subsequent to the date of the petition may be admitted for the purpose of showing what inference the court ought to draw from evidence of previous acts of familiar-

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(3) *Buchanan v. Finlayson* (1900) 3 P. 245, L. Trayner at 251


(5) (1900) P. 63
ty. In *Cantello v. Cantello*¹ the court expressed the view that in divorce cases although the specific acts on which the petitioner relies must be alleged in the petition, yet similar acts both previous and subsequent thereto between the respondent and the co-respondent, may be proved as presumptive evidence of the acts charged.

The defence of innocent association has received a lot of treatment in respect of sexual offences, especially when such involves sodomy. A good example is the controversial case of *R v. Chandor*². In that case a Croydon schoolmaster was convicted of five offences of indecent assault on three of his pupils, S, W and E, aged 13 to 15. The offences were alleged to have occurred within a two-year period and in different parts of England, namely Caterham, Croydon and the Lake District. With respect to the allegations of E, concerning the occurrence of an indecent assault in the Lake District, the accused denied that the meeting ever took place. As to the allegation of S and W, the accused admitted that he had been in the company of each separately, but denied the occurrence of the incidents to which they deposed. Basically, the defence with respect to E consisted of a categorical denial that any act or opportunity for such ever occurred, while with respect to S and W, the defence was one of innocent association. Although there may be a distinction in the form of the above two defences, it is submitted that in substance, they are the same; that is, no such acts as alleged ever occurred, regardless of

(1) *The Times*, February 1, 1896
(2) *(1959)1 Q.B. 545; (1959)1 All E.R. 702; R v. Hartley (1941)1 K.B. 5* followed after discussion in *R v. Witham* (1962) *Qd. R.49 - (homosexuality)*
whether the accused had the opportunity or not. In the words of Lord Cross of Chelsea: "If I am in charge with a sexual offence why should it make any difference to the admissibility or non-admissibility of similar fact evidence whether my case is that the meeting at which the offence is said to have been committed never took place or that I committed no offence in the course of it? In each case I am saying that my accuser is lying".

The trial judge held that the testimonial evidence of each boy with respect to his own allegations was admissible with respect to the counts concerning each of the other two boys on the basis of a supposed principle that whenever there is a series of incidents deposed to by witnesses, a succession of these incidents may help the jury to determine the truth of the matter, provided there is no collaboration between the witnesses to advance a false story. The trial judge, in his charge, specifically applied the principle to the evidence of S and W, upon the determination of the counts concerning E. In addition, the trial judge charged the jury that whenever "it can be said that the real defence" was one of "a perfectly innocent meeting" of the accused and a complainant, as opposed to one of a denial of both actus and opportunity (i.e. association), the jury was "entitled to take into account" the evidence of the other boys to rebut "the defence of innocent behaviour". The accused was convicted on all five counts. On appeal against the conviction, the Court of Criminal Appeal quashed all of the convictions. In doing so, it is not clear whether the court considered explicitly, or even subli-

(1) Director of Public Prosecutions v. Boardman (1975) A.C. 421 at 458
(2) (1959)1 Q.B. 545 at 549 (C.C.A.)
minally, the probative sufficiency of the evidence as being the basis for the ruling that the evidence of S and W, upon the counts concerning E, had been improperly admitted. If the court did so, it was not made explicit in its reasons for judgement. As to the charges against the accused concerning E, Parker L.C.J., for the court, stated: "Evidence that an offence was committed by the appellant against one boy at Croydon could not be evidence that he met another boy in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help determine the truth of any one incident, for instance, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all".\(^1\)

On face value, this dicta appears to be an apparently wide statement that similar fact evidence, generally, cannot "have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all". That, of course, would be contrary to the principle of \(R v. Ball\^2\), as earlier observed, that similar fact evidence can indeed be used, where probatively sufficient, to prove the commission of the actus. In the context of the factual circumstances of the case, the dicta of Parker L.C.J. may simply have been a conclusion as to the degree of probative force of the evidence.

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\(^{1}\) (1959) 1 Q.B. 545 at 500  
\(^{2}\) (1911) A.C. 47 (H.L.)
in the case under trial. Furthermore the report does not indicate the degree of similarity between the allegation of S, W and E. If there was nothing striking, there can be no doubt about the correctness of the decision for proof of each charge would have done no more than establish a general propensity towards indecency, but if, in each instance, it was alleged that the accused committed the offences wearing the head dress of a Red Indian Chief or other eccentric garb, it is hard to see why the evidence of W and E should not have been admissible to rebut the alibi concerning the incident involving E.

As evidenced by the dicta of Parker L.C.J., the Court of Criminal Appeal appeared to believe that the sole question was whether the alleged assaults to E, ever occurred (i.e. "whether a particular meeting or occasion for an indictment ever occurred at all"). Parker L.C.J. was right in limiting the applicability of the principle that "while a witness X, testifying that an accused assaulted him, is no confirmation of Y's evidence that he was also the victim of a similar assault, a succession of these incidents deposed to by witnesses may help determine the truth of the matter". Unlike R v. Sims, it is submitted that there was still little similarity or oddity in the method of assault or the circumstances deposed to, such that the coincidence of each boy deposing to some particular point of fact could not be explained except for the conclusion that all the boys were deposing to a true fact of lying in collaboration.

It has been suggested, and rightly so I think, that the decision in

(1) Director of Public Prosecutions v. Boardman (1975)A.C. 421 at 454; see R v. Flack (1969)2 All E.R. 784; (1969)1 W.L.R. 937 (incest with one sister inadmissible on charge of incest with another)
(2) (1946) K.B. 531; (1946)1 All E.R. 697
R v. Chandor should not be extended to setting an inflexible rule that similar fact evidence can never "have any relevance to determine whether a particular meeting or occurrence for an incident ever occurred at all". It is perhaps significant to remind ourselves that the accused never specifically said that his defence was one of 'innocent association', although considering the nature of the circumstances and the fact that he admitted his association with his pupils, one can easily attach that label to it. One writer has stated that the implication of the result in R v. Chandor is that evidence of similar facts would only be admissible if any accused specifically pleaded 'innocent association' or if the circumstances were suspicious. Gooderson states that the implication of R v. Chandor is that "a schoolmaster accused of an offence against a pupil does not have to rely upon innocent association, as there may be nothing in the circumstances that calls for explanation". A "schoolmaster who admits opportunity when charged with indecent assault upon a pupil does not need to plead innocent association" (or for that matter, any person whose association on the face appears innocent). As a result, "there is no defence which the prosecution may rebut with such evidence". Gooderson then asks whether such a person in a position of outwardly non-suspicious circumstances may "thus avoid the authority of Sims that similar fact evidence can be given to rebut the defence of innocent association?" With due respect, it is submitted that R v. Sims is not an 'authority' for

(2) Ibid at 232
(3) Ibid at 224
the proposition that, if a defence can be classified as one of 'innocent association', then similar fact evidence is admissible. As Cross observed in his book: "R v. Sims used to be treated as an authority on the rebuttal of the defence of innocent association, but we have seen that this need no longer be treated as the basis of admissibility of the similar fact evidence which was sufficiently striking to warrant its reception to confirm the testimony of each accuser. In each instance the defence was a bare denial as was the defence in Director of Public Prosecutions v. Boardman1, where time seems to have been wasted in argument on the question whether 'innocent association' was the right word for it"2.

In R v. Flack3, the Court of Criminal Appeal followed the supposed ratio of R v. Chandor, that similar fact evidence cannot be relevant to prove whether an act or an occurrence for an act ever occurred. In that case, the defendant was charged on an indictment containing three counts each charging an act of incest with a different sister at a different time, and an application for a separate trial on each count was rejected on the ground of a provisional view that the evidence of each sister might be relevant to the counts relating to the other sisters. The prosecution was conducted on the basis that there was no corroboration of any sister's evidence on any count, but evidence by one sister relating to an act of indecent practice with the defendant was admitted. The defence was a denial that the incidents occurred. The trial judge concluded that, even if his provisional view about admissibility of evidence on the counts was

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(1) (1975) A.C. 421; (1974)3 All E.R. 887
(2) Cross on Evidence, 5th ed. at 393
(3) (1969)2 All E.R. 784; (1969)1 W.L.R. 937
wrong, the offences could properly be tried together, and the jury were so directed that they would not be influenced or prejudiced in considering any one count by the evidence in respect of the others; they were directed to consider each count separately, and each count was summed up independently, but they were not told in terms that, when considering each count, they should disregard evidence relating to the other counts, and they were further directed that evidence of a defence witness might be capable of amounting to an element of corroboration of the sister whose evidence about the indecent practice was admitted. The defendant was convicted on two counts and discharged on the other count. He appealed on contentions that each count should have been tried separately, that the evidence by the sister relating to the indecent practice with her was inadmissible, and that the defence witnesses's evidence was incapable of amounting to corroboration. The Court of Appeal held that, since the defence consisted of a denial of the incidents, the evidence of an alleged offence against one sister could not be evidence of the alleged offences against the other sisters. It was observed Per Curram that in so far as the dicta in R v. Sims and R v. Campbell suggest that, whenever a man is charged with a sexual offence against A, evidence may always be adduced by the Crown in support of that charge of similar alleged offences by the defendant against B, C and D, they cannot be accepted as correctly stating the law.

Another pertinent case for discussion is that of Director of Public

(1) (1946)2 K.B. 531
(2) (1956)2 Q.B. 432; (1956)2 All E.R. 272; 40 Cr. App. R.95 (C.C.A.)
Prosecutions v. Kilbourne. In that case, the respondent was convicted of one offence of buggery, one of attempted buggery and five offences of indecent assault on two groups of boys. Counts one to four related to offences between October and November 1970, against the first group of boys, and counts five to seven related to offences against the second group of boys between October and November 1971.

The defence was one of innocent association, "coupled with a denial of these features of the evidence which were wholly incapable of such a construction". The Judge directed the jury that they would be entitled to take the uncorroborated evidence of the second group of boys, if they were satisfied that the boys were speaking the truth, as supporting the evidence given by the first group of boys. The Court of Appeal, having quashed the convictions, the Crown appealed to the House of Lords, which unanimously reversed the decision of the Court of Appeal.

The leading judgement was delivered by the Lord Chancellor, Lord Hailsham. Early in his judgement His Lordship quoted with evident approval a passage from the judgement of the Court of Criminal Appeal in Sims case: "The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is, a special feature in itself to justify the admissibility of the evidence... The probative force of all the acts together is much greater than one alone; for, whereas the jury might think that one man might be telling an untruth, three or four are hardly likely to tell the same

(1) (1973)2 W.L.R. 254
(2) (1946) K.B. 531 at 539-40
untruth unless they were conspiring together. If there is nothing to suggest a conspiracy, their evidence would seem to be overwhelming".

Lord Hailsham stated that the Court of Appeal in Kilbourne's case had been right to draw attention to the "striking features of the resemblances" which made it "more likely that J was telling the truth when he said that the appellant had behaved in the same way to him". "With the exception of one incident, each accusation bears a striking resemblance to the other and shows not merely that the appellant (Kilbourne) was a homosexual which would not have been enough to make the evidence admissible, but that he was one whose proclivities in that regard took a particular form". His Lordship also agreed with the Court of Appeal in saying that the evidence of each child went to contradict any possibility of innocent association. Lord Hailsham summed up his view as follows: "When a small boy relates a sexual incident implicating a given man he may be indulging in fantasy. If another small boy relates such an incident it may be a coincidence if the detail is insufficient. If a large number of small boys related similar incidents in enough details about the same person, if it is not conspiracy, it may well be that the stories are true. Once there is a sufficient nexus it must be for the jury to say what weight is given to the combined testimony of a number of witnesses". In the instant case he considered that there were sufficient points of similarity in the several pieces of testimony of the boys to provide the underlying unity to make their

(1) (1973) 2 W.L.R. 254 at 269
evidence mutually probative in accordance with Sim's case.

Lord Reid said: "Each count must, of course, be considered separately and in cases of this kind the first question must be whether evidence of acts charged under counts can be taken into consideration. That is only permissible when the evidence as a whole discloses what has been loosely called a system. In the present case it has been admitted, and I think that it is clearly established, that the requirement is fulfilled. So, as the question was not argued, I shall say no more than this may often be a difficult question and that in addition to the English authorities, valuable guidance may be obtained from the Scottish case of Moorov v. Lord Advocate"1 - (in Moorov's case, it was held that the evidence of each woman complainant was corroborative of that of the others, which involved that it was both admissible on and relevant to the other charges).

Lord Simon pointed out that in the instant case (Kilbourne's case) it was not disputed that the evidence of the other boys was admissible on each count of the indictment. "It was plainly" he said "admissible to rebut the defence of innocent association... . But was it admissible for (i.e. relevant to, logically probative of) any other matter, in particular to reinforce the case for the prosecution? ... counsel for the respondent did not contend to the contrary"2. "Circumstantial evidence", Lord Simon said, "works by cumulatively, in geometrical progression, eliminating other possibilities. Why should evidence of assault on other women in Moorov be

(1) Ibid at 271; Moorov v. Lord Advocate (1930) J.C. 68
(2) (1973)2 W.L.R. 254
evidence from which it was a reasonable inference that the accused
had committed the particular assault? The answer was given in the
passages cited by my noble and learned friend on the Woolsack; there
was such a striking similarity between the various offences as to
show an underlying unity, to provide a connecting link between them,
so that each confirmed another, rendered the other more probable.\(^1\)

Evidence of the relationship between parties is admissible to rebut
the defence of innocent association and resolve the issue of 'oppor-
tunity' in a number of sexual offences particularly in cases of
incest\(^2\), unlawful carnal knowledge and cases of indecent assault. In
The People (Attorney-General) v. Dempsey\(^3\), the applicant was indicted
on two counts, charging him with having unlawfully had carnal knowl-
dge of a girl between the ages of fifteen and seventeen years, on
two specified occasions. At the trial, the girl, whose evidence was
uncorroborated, swore that the applicant had also had carnal knowl-
dge of her on other occasions prior to, between and subsequent to the
dates specified in the indictment. The applicant did not dispute
having kept company with the girl or having been in her company on
the occasions on which she alleged that sexual intercourse took
place, but contended that his relationship with her was completely
innocent, and denied having had sexual intercourse with her on any
occasion. The applicant was convicted on both counts and sentenced.
The Court of Criminal Appeal held that the evidence of the other acts
of carnal knowledge was admissible, as tending to show the true

(1) (1973)2 W.L.R. 254; see also R v. Young (1923) SASR 35; R v.
Thompson (1945)2 O.C.R. 410; Evans v. R (1964) SASR 130 — (indecent
exposure)

Bloodworth (1913)9 Cr. App. R. 80; R v. Cooper (1914)10 Cr. App. R. 195
R v. Rata Hui Hui (1947) NZLR 581 CF R v. Hare (1952) NZLR 588

(3) (1961)I.R. 288; see also R v. Frank Marsh (1949)33 Cr. App. R.
158; R v. Shellaker (1914)1 K.B. 414; see also R v. Hewitt (1925)19
Cr. App. R. 64
relationship between the parties and hence tending to rebut the defence set up by the applicant that such relationship was a mere innocent courtship. It further held that there is no distinction, with regard to the admissibility of evidence of other similar offences, in order to show the relationship between the parties, between charges of natural, and charges of unnatural sexual offences.

In Director of Public Prosecutions v. Boardman\(^1\), Lord Wilberforce said: "It is sometimes said that evidence of 'similar facts' may be called to rebut a defence of innocent association, a proposition which I regard with suspicion since it seems a specious manner of outflanking the exclusionary rule"\(^2\). Cross in his book opined that: "It may be we shall not hear much of the defence in the future if only because it is difficult to say when it arises and more difficult to say when, if ever, similar fact evidence is admissible to rebut it, though inadmissible to rebut a simple denial"\(^3\).

However, the recent decision of the Supreme Court of Canada in Guay v. R\(^4\), by admitting the evidence of prior alleged sexual misconduct "to rebut a defence of legitimate association for honest purposes"\(^5\), would seem to detract from the bleak future predicted for the defence.

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(1) (1975) A.C. 421
(2) Ibid at 443
(3) Cross on Evidence, 5th ed. at P. 391
(4) (1979)6 C.R. (3d) 130 (S.C.C.)
(5) Ibid at 143
A number of points that call for consideration are: the position when the accused volunteers evidence of, or asks questions about, his misconduct on other occasions, or gives evidence against a co-accused; the way in which the judge's discretion to exclude prejudicial evidence operates in conjunction with the rule we have been considering; the position in civil cases; and the position with regard to some statutory provisions and previous convictions of the parties.

(i) Evidence of Misconduct on other Occasions given by the Accused:

In the days before the accused was allowed to give evidence on his own behalf or, in the case of a charge of felony, to be represented by counsel, the court occasionally prevented him in his own interest from tendering incriminating documents. Cross pointed out that: "It may have been a misguided desire to protect the accused from the revelation of his own misdeeds which led to the rejection of a line of questioning of the prosecution witnesses which would almost certainly have established the innocence of Adolf Beck. Beck was prosecuted for obtaining by false pretences on the assumption that he was the same man as John Smith, and counsel for the prosecution successfully prevented Beck's counsel from questioning witnesses with a view to establishing that John Smith was in prison at a particular time. Had he been allowed to put these questions, it would then have been possible for him to establish that his client was abroad at that time.

(1) R v. Horne Took (1794) 25 Tr. 1
Whatever may have been the cause of this unfortunate occurrence at Beck's first trial, there can be little doubt that the accused may, at any rate when it is clear that he is fully cognisant of the danger which he runs, give evidence of his own misconduct on other occasions, or ask questions with regard to it, without being in any way concerned with the rule which we have been discussing. The judge will, in practice, warn an unrepresented accused of the danger that he may be running by this course of action. The terms of the direction which he should give the jury must depend on the facts of the particular case. Thus the accused is entitled to have evidence of other acts admitted if it shows the nature of the relationship between the parties at the time of the alleged offence, and is relevant for that reason. In R v. McCready the defence to a charge of rape was that the girl consented to intercourse. It was held that the trial judge had wrongly disallowed questions put to her in cross-examination with a view to showing that about a fortnight after the alleged offence she had voluntarily participated in a further act of intercourse with him.

Most of the problems in this area have been raised by evidence which is designed to affect adversely the case for a co-defendant, or which has that effect. The rule is that a defendant is not entitled, any more than is the prosecution, to adduce evidence which goes only to show disposition or character unless either he has become entitled to investigate the character of the co-defendant by the operation of

(1) Cross on Evidence, 5th ed. at P. 393; see also R v. Donnini (1973) V.R. 67
(2) (1967) V.R. 325
the Criminal Evidence Act 1898, Section 1 (proviso f), or the evidence sought to be adduced has probative value in relation to the guilt of the co-defendant on the offence charged.

Thus in R v. Nightingale (1977) Crim. L.R. 744, where the defendant was charged with affray and wounding with intent, and said that he found the weapon used, a knife, on the ground during the fight and used it in self-defence, the trial judge was held to have erred in permitting a co-defendant to elicit evidence that the defendant had on two previous occasions been convicted of having an offensive weapon. In one of the previous cases, the offensive weapon was a knife, in the other a broken bottle. Presumably, evidence that the defendant habitually carried a knife might have been admitted in rebuttal of any evidence given by him that he had not been carrying a knife on this particular occasion, but it is clear that the evidence adduced bore no special features.

In Lowery v. R (1974) A.C. 85; see also R v. Bracewell (1978) 68 Cr. App. R. 44, the appellant and K were charged with the murder of a young girl. It was a sadistic killing and the only explanation put forward for it was that they had wanted to see what it was to 'kill a chick'. The Crown's case was that they had been acting in concert but both the appellant's and K's defence was that the other had killed the girl. The appellant gave evidence of his good character, stressed the unlikelihood of his behaving in such a manner and said that, because of his fear of K, he had been unable to prevent the murder. K alleged that he had been unable to appreciate what was happening and had been powerless to prevent the appellant killing the
girl as he had been under the influence of drugs. Despite the appellant's objection, the defence for K was allowed to call the evidence of a psychologist as to their respective personalities and, on that evidence, the jury were invited to conclude that the appellant was the more likely of the two to have killed the girl. They were both convicted and the appellant unsuccessfully appealed to the Full Court on the ground inter alia, that the psychologist's evidence was inadmissible. On appeal by the appellant to the judicial committee, the appeal was dismissed. It was held that the evidence of the psychologist was relevant in support of K's case to show that his version of the facts was more probable than that put forward by the appellant, and the whole substance of the appellant's case placed its admissibility beyond doubt as necessary to negative the appellant's evidence.

In the course of his opinion in favour of dismissing the appeal, a matter on which the Judicial Committee was unanimous, Lord Morris of Borth-Y-Gest cited with approval the following statement of the Court of Criminal Appeal of Victoria: "It is, we think, one thing to say that such evidence is excluded when tendered by the Crown as proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt. We see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person"¹.

A similar decision was reached in R v. Miller and Others². During the course of the trial of A, B and C on a charge of conspiracy to

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¹ (1974) A.C. 85 at 102
² (1952) 2 All E.R. 667
evade duties of customs payable on the importation of stockings, the
defence of B was that he was not concerned in the illegal acts, but
that C masqueraded as him (B) and used his (B's) office for their
commission. In furtherance of that defence B's counsel asked a
witness for the prosecution whether C was not in prison during a
period when no illegal importations had taken place. Counsel for C
objected to the question and applied for a new trial. The Court
held that, in the circumstances, the question was relevant; there was
prima facie evidence that B and C were fellow conspirators; and the
application was as such refused. Devlin J observed that "The prin-
ciple that a question as to the character of an accused person is only
admissible if it is relevant applies equally to questions put by
counsel for a co-defendant as to those put by the prosecution. If in
any case such a question is relevant and is put by counsel for a co-
defendant that counsel ought to show, so far as is possible, the same
restraint as would the prosecution and should confine his question
strictly to those required for the purpose of this case. Moreover,
counsel should first inform counsel for the other accused person that
he proposes to put the question".

Where evidence of similar fact is irrelevant to the defence of the
defendant who adduces it even though it may bear on the guilt of the
co-defendant, it will also be rejected. In _R v. Neale_¹, the appli-
cant was charged with one B with arson and manslaughter. A fire had
occurred at a youth hostel where both lived, which had been started
deliberately and had caused loss of life. The appellant's defence

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¹ (1977) 65 Cr. App. Rep. 304
was that at the time of the fire he had been asleep at the hostel. Later he confessed to being with B, but said that it was B who had started the fire. At the end of the evidence-in-chief of the hostel warden, counsel for the applicant sought a ruling from the trial judge which would enable him either by cross-examination from prosecution witness or, if necessary, by adducing evidence in the course of the development of the defence case, to elicit that B had admitted on five different occasions he had started fires by himself. The trial judge came to the conclusion that that evidence was not relevant - it was evidence of propensity disposition only and contained nothing which bore upon the defence which was that the applicant was elsewhere and, therefore, did not do it. The applicant was convicted and applied for leave to appeal, the question being whether the above evidence sought to be adduced was or was not relevant. It was held that the fact that B had a propensity to commit wanton and unaided arson was a non-sequitur to the defence of the applicant that the latter was not present at or participated in the fire; thus there was no positive probative link between the evidence sought to be adduced and the issue to which it was said to be relevant - the trial judge had rightly ruled as he did, and the application was refused.

(ii) Judicial Discretion:

A discretion to exclude, by definition of the concepts 'exclude' and 'discretion', necessarily presupposes that the evidence is other-
wise admissible. The possibility of exclusion via discretion is really a last hurdle that must be leaped to attain ultimate admissibility or receivability into the cause. There must then, of necessity, be initial admissibility for the evidence to have first been 'otherwise admissible'. Initial admissibility is determined by logical probative value (i.e. relevance to an issue) or by the trial judge falsely believing the evidence to possess such a quality. However, even where evidence fulfils the requirements of relevance, materiality and admissibility, it is recognised, as Lord Parker pointed out in Callis v. Gunn\(^1\) that: "In every... case the judge has a discretion to disallow the evidence even if in law relevant, and therefore, admissible if admissibility would operate unfairly...". This statement is as true in England as it is in other Commonwealth countries. Similarly in the United States, admissible evidence may yet be the subject of discretionary exclusion where it is found by the judge that: "...its probative value is substantially outweighed by one or more 'counterfactors', identified...as the risk that the admission of the evidence will (a) take too much time or (b) will create danger of undue prejudice or of confusing the issues or of misleading the jury or (c) will unfairly and harmfully surprise the opponent"\(^2\).

Perhaps one may say without any exaggeration that in any trial the final guarantee of justice is the personality of the trial judge, and I would think that is probably why the common law has been built around the discretion of the trial court. Whenever a trial judge

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(1) (1964)1 Q.B. 495, at 501; see also R v. Devenish (1969) V.R. 737
(2) Falknor "Extrinsic Policies Affecting Admissibility" (1956) 10 Rutgers Law Rev. 574 at 576
exercises his discretion, an appeal court is always reluctant to interfere with that discretion unless the judge has erred in principle. As Lord Salmon said in *Director of Public Prosecutions v. Boardman*:\(^2\): "Once (the judge) lets in evidence that is in law admissible it is only in a very clear case that an appellate tribunal would interfere with the exercise of his discretion". The discretion is given to a judge to be used in the interests of the administration of justice. McKay, J in *R v. Bohozuk*\(^3\), brought this concept to focus when he said: "It must be remembered that in the exercise of this discretion, the duty of the Court is to see that all rights of the accused are safeguarded. Counsel for the applicant referred to the interest of the accused; the interest of the accused is not a matter with which the court should be concerned; the interest of justice and that alone, is and should remain the motivating factor in such applications. It is well to remember that in seeing to the interests of justice it is the duty of the Court to see that all rights of the accused are safeguarded, but in considering the interests of the accused, the interests of justice must not be overlooked - they are the interests of the proper administration of justice, and justice must be and remain paramount.\(^4\)

What is overlooked so often is that while counsel have a right to ask a question of a witness, it is in the ultimate discretion of the trial judge to compel the answer. Lord Widgery, C.J., not long ago, had occasion to comment on this, in *Hunter v. Mann*\(^5\), he said: "The (1) See *R v. Doughty* (1965) 49 Cr. App. R. 110; see also *R v. Bartlett* (1959) Crim. L.R. 285  
(2) (1975) A.C. 421 at 462  
(3) (1947) 87 C.C.C. 125  
(4) Ibid at 126  
(5) (1974) 2 All E.R. 414
judge, by virtue of the overriding discretion to control his court which all English judges have, can, if he thinks fit, tell the doctor that he need not answer the question. Whether or not the judge would take that line, of course, depends largely on the importance of the potential answer to the issues being tried. The foregoing case involved the matter of a doctor being asked about confidential matters disclosed by a patient, but the concept, in my opinion applies to every witness. There are many cases supporting this principle; for example in Attorney-General v. Mulholland, where Lord Justice Donovan dealt with confidential communications of a journalist and said: "The judge should always keep an ultimate discretion". The Court of Criminal Appeal has decided in R v. Herron that where evidence as tendered of a previous conviction under Section 43(1)(b) of the Larceny Act 1916 to prove guilty knowledge against a receiver of stolen property, the judge has a discretion to exclude that evidence if its prejudicial effect would make it impossible for the jury to take a dispassionate view of the crucial facts of the case.

McElroy in discussing the application of and justification for the exclusion of otherwise admissible evidence, said: "If the reception of (an) evidence would be a pure waste of time, or would inject deadly poison into a party, or unfairly surprise him, or bewilder or mislead the jury, good sense dictates that it be rejected... (For example), if a photograph of a corpse or of the deceased person named in an indictment for murder has no probative value except as tending to prove that the person is dead, and there is no dispute

(2) (1966) 50 Cr. App. R. 132
(3) S.43(1)(b) is now replaced by S.27(3)(b) of the Theft Act 1968
about his death, nothing but harm - the harm of upset emotions in the jury - could come from receiving the photograph in evidence... . Nobody is in a better position to understand when a trial will be snarled or botched in one of these ways than the judge presiding at the trial"1.

These then are the general rules for admissibility of evidence in the criminal case: evidence must be relevant and material - and even where admissible may yet be subject to discretionary exclusion.

It has been said that in civil cases, even where similar fact evidence is technically admissible, the court has a discretion, and should refuse to admit it unless, if accepted, it would not merely "afford a reasonable presumption as to the matter in dispute, but would be reasonably conclusive, and would not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine"2. "On principle the court should exercise the same discretion in a criminal case, whether the evidence is tendered by the Crown or a defendant. It is submitted that the court will be inclined to exercise its discretion in favour of a defendant who tenders such evidence, unless the evidence adversely affects the case of a co-defendant3. Where the evidence is tendered by the Crown it is also subject to the over-riding discretion of the court to reject such evidence where its prejudicial effect outweighs its evidential value"4.

Now that jury trial is comparatively rare in civil cases, the judge

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(2) Managers of Metropolitan Asylum District v. Hull and Others (Appeal No. 1) (H.L.) (1882) 47 L.T. 29 at 35 per Lord Watson; see also Att-Gen. v. Nottingham Corporation (1904) 1 Ch. 673
(4) Phipson On Evidence (12th ed.) at Para. 442
has ample power to reject evidence which will not assist him in the determination of the pleaded issues, and can deal with the likelihood of prejudice in the same way. However, jury trial is commonly used in criminal cases and Judicial discretion cautiously exercised, because in criminal trials there is a possibility that injustice may be done to the accused by the admission of relevant evidence which is more prejudicial than cogent; and the courts have evolved various means of attempting to prevent undue prejudice. This judicial discretion has been asserted for many years in relation to similar facts; and perhaps the most significant thing is that, in determining whether similar fact evidence is admissible or not, the courts do not generally see themselves as balancing probative value against the risk of prejudice. Rather they merely see themselves as applying the rule laid down in Makin v. Attorney General for New South Wales¹, and in general this means determining whether the evidence fits within a recognised category of admissibility. If the evidence can be treated as fitting within such a category it will generally, subject to the judicial discretion to exclude, be held admissible. One must not confuse admissibility in law with that of the exercise of a discretion to exclude evidence². In the determination of whether a reasonable jury could, on logical probative grounds, believe that the proffered evidence makes it more or less apparently probable that the fact or proposition in issue exists, there is an element of discretion in the function of the trial Judge. There is some subjective component in the determination of whether evidence is logically

(1) (1894) A.C. 57
(2) E.g., see R v. Robinson (1953) 37 Cr.App.R. 95
probative, and "of more than trifling probative force". Turcott\(^1\), expresses concern about this result because, according to him, everything is left "up to the trial judge himself according to his own personal dictates of fairness and expediency" as there are no "objective referentials whatsoever". However, it is submitted, that the process is no more than what a judge does with respect to determining the probative value of any item of evidence, whether it be similar fact evidence or other types or forms.

The existence of a general judicial discretion to exclude similar fact evidence legally admissible is well recognised in England. In *Noor Mohammed v. R*, Lord du Parcq stated: "...in all such cases the judge ought to consider whether the evidence which is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. If so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character, gravely prejudicial to the accused, even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge"\(^2\).

In *Harris v. Director of Public Prosecutions*, Viscount stated\(^3\): "This ... proposition flows from the duty of the judge when trying a

\(^{1}\) Turcott, "Similar Fact Evidence: The Boardman Legacy" (1978) 21 Cr. L.Q. 43 at 64

\(^{2}\) (1949) A.C. 182 at 192; see also *Kuruma v. R* A.1955 A.C.197,203

\(^{3}\) (1952) A.C. 694 at 707
charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect 'would be out of proportion to its true evidential value'.

Such an intimation rests entirely within the discretion of the judge. Although judicial doubts about this type of discretion, arising from the judge's duty to ensure a fair trial in a criminal case, are a thing of the past, concrete illustrations of its application are very much of a rarity so far as reported cases are concerned.

Cross raised some issues with regard to exercising of judicial discretion; he said: "If Crown witnesses confirm each other's testimony in a strikingly similar manner so as to render similar fact evidence admissible irrespective of the defence raised by the accused, can there really be a distinction to exclude such evidence? No doubt it has some prejudicial propensity in the sense that here is a risk that the jury might treat the evidence as possessing even greater probative value than is in fact the case, but the grounds for admitting it are very far from tenuous. It is possible that, when the similar fact evidence takes this form, there is no such exclusionary discretion as that which Lord du Parq (in Noor Mohammed's case) had in mind, but it is also possible that, even here, regard must be had to the position relating to defences although it has no bearing

(1) Per Lord Moulton in D.P.P. v. Christie (1944) A.C. 545; see also The Trial of F.E. Steiner (1971) SLJR 147 at 163;
(2) Cross on Evidence (5th ed.) at P. 395
on admissibility as a matter of law".

Even so, there may be cases in which it is impossible to say the evidence in question lacks the requisite degree of relevance, and yet it might be unfair to admit it, having regard to its probative value as contrasted with its prejudicial propensity. Perkins v. Jeffery\(^1\) may be regarded as just such a case. The accused was charged with indecent exposure to Miss Tin July. Evidence of similar conduct towards the same woman in the previous May was held to have been rightly received because the defence was that the police had arrested the wrong man, but it was also held that, until it became clear that a plea of innocent intent was to be raised, evidence of exposure to other women ought not to be received. Clearly it had probative value on the issue of identity and tended to confirm Miss T's testimony in every aspect; but its primary relevance lay in its tendency to negative a suggestion that the exposure took place without any criminal intent.

In the New Zealand case of R v. Cooper\(^2\), it was held that "evidence must, in the first instance, be led to establish the manner in which the crime charged was committed, or the circumstances attending its commission so as to indicate the standard of similarity for the other acts and enable the jury to appraise the similarity when the other facts are given in evidence". Hosking J. continued: "But that a prima facie case against the accused must first be established before the evidence as to other acts is let in cannot be laid down as a

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\(^1\) (1915) 2 K.B. 702

\(^2\) (1923) NZLR 1237, 1243; Cf Salmond J at 1246 and in R v. Smythe (1923) NZLR 314, 327
positive rule"¹. A positive rule to that effect would, it is submit-
ted, be anomalous since a complete prima facie case against the
accused would in theory need no support from similar fact evidence;
and, on the other hand, the accused would often be able to argue that
no such case had been made out and so avoid any reference to his past
misconduct which, if admissible, would have the effect of removing
any reasonable doubt harboured by the jury about his guilt.

In some cases a court might find that there was a nexus sufficient
in law to justify the admissibility of evidence concerning one of two
incidents on a charge concerning the other, and yet think it so
tenuous that the similar fact evidence should be excluded. In R v.
Fitzpatrick², F was convicted of indecent assault and exposing his
person. He indecently assaulted a boy in a block of flats. Fifteen
minutes later he was seen in the street exposing himself to children.
At the trial it was submitted that the counts were improperly joined
not being joined in accordance with rule 3 of schedule 1 of the
Indictments Act 1915; alternatively that the evidence on one count
was not admissible on the other, in the further alternative that the
prejudicial effect of the evidence on one count outweighed its proba-
tive value on the other; and that there ought to be separate trials.
The submissions were overruled. On appeal the last two submissions
were renewed. The Court of Appeal held that the principle regarding
admissibility of evidence as between counts was plain³, but the
application of the principle was not easy. It was observed that in
the present case if, as appeared on the depositions, the interval

(1) R v. Crutchley (1950) NZLR 497, 510 assumes that a prima facie
case is required before similar facts can be let in, but it is
respectfully submitted that this is erroneous. Cf also R v.
Dean (1895)14 NZLR 272
(2) (1962)3 All E.R. 840; (1963)1 W.L.R.7
(3) R v. Rodley (1913)3 K.B. 468
between the offences might be only three minutes, it could be strongly urged that the two counts were based on one episode of sexual excitement disclosing unnatural tendencies and that the evidence on one count was fifteen minutes or more, the position was not so plain. However, the court did not find it necessary to come to any final decision on that part of the case because it was clear that if the counts were heard together, the prejudicial effect of the evidence was bound to be great and to exceed its probative value. The trial judge had a discretion and should, by parity of reasoning with R v. Hall¹, have ruled that the better course was to order separate trials. It was observed that the court should not lightly interfere with the discretion of the trial judge, but in the present case he did deal with this aspect, perhaps inferentially. The court was thus in a position to exercise its own discretion and was satisfied that there should have been separate trials. In the circumstances, it was held that the only safe course was for the ensuing conviction to be quashed. It is thought that, had this case come up in Scotland, the two offences of indecent assault and indecent exposure (by the same person within a short period of interval) would have been tried together; this is more so especially as the conduct is a sort of common denominator between the two offences.

Another case for consideration is R v. Doughty²; there the defendant was charged with indecent assaults on two young girls. 'Similar fact' evidence was admitted of his behaviour with various other

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(1) (1952)1 K.B. 302; (1952)1 All E.R. 66
(2) (1965)1 All E.R. 560; (1965)1 WLR 331; (1965)49 Cr. App. R.110; see also R v. Geiringer (1976)2 NZLR 398
children on different occasions. As evidence of indecency, the Court of Criminal Appeal held it to be tenuous to a degree, and also a different form of indecency from that complained of in the indictment. The convictions were quashed, Lord Parker C.J. saying that in the circumstances "the court can only exercise its discretion in one way, by excluding that evidence, the reason being that its prejudicial value is overwhelming".

In Canada, any discussion of judicial discretion must now centre upon the decision of the Supreme Court of Canada in R v. Wray. The accused was charged with non-capital murder. He made a confession to the police which was clearly involuntary, and therefore inadmissible. The accused told the police that he had thrown the murder weapon into a swamp, and led them to a spot where the rifle which had killed the deceased was discovered. The trial judge refused to allow the prosecution to adduce evidence of the part played by the accused in the discovery of the murder weapon. The accused was acquitted, and the prosecution appealed. The Ontario Court of Appeal upheld the decision of the trial judge. The judgement of the Court was delivered by Aylesworth J.A., who stated: "In our view, a trial judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, has to depend upon the particular facts before him. Cases where to admit certain evidence would be calculated to bring the administration of justice into

dispute will be rare, but we think the discretion of a trial judge extends to such cases".1

The prosecution then appealed to the Supreme Court of Canada. By a majority the Court allowed the appeal and directed a new trial. Both the majority and the minority were of the view that, as a matter of law, the finding of the gun and the part played by the accused in its discovery were admissible. The case turned on the scope of the trial judge's discretion to disallow legally admissible evidence.

The leading judgment of the minority was delivered by Cartwright C.J.C. Adopting the reasoning of the Ontario Court of Appeal, His Honour stated: "The confession of the accused was improperly obtained and was rightly excluded as being involuntary. In spite of this, evidence of the fact that the accused told the police where the murder weapon could be found was legally admissible under the rule in R v. St. Lawrence, but because the manner in which he was induced to indicate the location of the weapon was as objectionable as that in which he was induced to make the confession, it was open to the learned trial judge to hold that the admission of evidence of that fact would be so unjust and unfair to the accused and so calculated to bring the administration of justice into disrepute as to warrant his rejecting the evidence in the exercise of his discretion; and, finally, there being evidence on which it was open to the learned trial judge to exercise his discretion in the way he did, the propriety of that exercise is not open to review on an appeal by the

(1) (1970) 3 C.C.C. 122 at 123
Crown" 1.

The leading judgement of the majority was delivered by Martland J. His Honour stated: "The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly 2.

Referring to two cases in which the English Court of Appeal held that improperly obtained evidence ought to have been rejected by the trial judge 3, His Honour stated: "In cases such as R v. Court and R v. Payne, I think confusion has arisen between 'unfairness' in the method of obtaining evidence, and 'unfairness' in the actual trial of the accused by reason of its admission... . The view which they express would replace the Noor Mohammed test, based on the duty of a trial judge to ensure that the minds of the jury be not prejudiced by the evidence of little probative value, but of great prejudicial effect, by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by methods which the trial judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing whatever to do with the duty of a trial judge to secure a fair trial for the accused" 4. His Honour concluded: "In my opinion, the recognition of a discretion to exclude admissible evidence, beyond the limited scope recognised in Noor.

(3) R v. Court (1962) Crim. L.R. 697
Mohammed's case, is not warranted by authority, and would be undesirable. The admission of relevant admissible evidence of probative value should not be prevented, except within the very limited sphere recognised in that case. My view is that the trial judge's discretion does not extend beyond these limits, and, accordingly I think, with respect, that the definition of that discretion by the Court of Appeal in this case was wrong in law1.

The decision in R v. Wray has been the subject of a great deal of controversy; however, this is not the appropriate opportunity to enter into the debate over the conflicting philosophies expressed by the Ontario Court of Appeal and the Supreme Court of Canada. It is submitted, however, that the decision of the Supreme Court in no way affects the discretion of the trial judge to reject legally admissible similar fact evidence.

It is important to emphasise that there is a clear distinction between the exercise of a discretion with respect to evidence which was obtained improperly before the trial, and the exercise of a discretion with respect to evidence which, although obtained in an entirely proper manner, would be extremely prejudicial to the accused if admitted during the course of trial2. Indeed, this distinction formed a cornerstone of the reasoning of the majority in R v. Wray. R v. Wray is authority for the proposition that the trial judge is not entitled to reject evidence of the former class on the grounds that to admit it would "bring the administration of justice into

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1. R v. Wray
2. Cross on Evidence (5th ed.) at pp. 29-37
disrepute". Nothing in R v. Wray appears to me to curtail the
discretion of the trial judge to reject prejudicial evidence where to
do so is necessary in order to ensure that the accused receives a
fair trial. It is therefore submitted that on proper analysis, R v.
Wray leaves untouched the discretion of the trial judge to reject
legally admissible similar fact evidence where the prejudicial poten-
tial of such evidence is out of proportion to its probative value.

However, in subsequent cases, the view has been expressed that R
v. Wray involves a significant narrowing of the trial judge's discre-
tion to reject similar fact evidence. In R v. MacDonald the accused
was charged with the murder of his mistress. She had been found
beaten to death. The accused's defence was that she had been killed
by someone else. The victim's son gave evidence that during the time
the accused had lived with him and his mother, the accused had fought
with and severely beaten his mother over a hundred times, usually
when one or both of them were intoxicated. The accused was convicted
of manslaughter and appealed unsuccessfully to the Ontario Court of
Appeal. The judgement of the Court was delivered by Arnup J.A., who
said: "As I have indicated, counsel suggested that the evidence was
so obviously prejudicial that the trial judge had a discretion to
exclude it. It is clear from the English cases that such discretion
has a much wider ambit in England than it now has in Canada since the
judgement of the Supreme Court of Canada in R v. Wray. The admiss-
bility of this evidence was not 'tenuous', nor was its probative
value 'slight' (both terms being those used by Maitland J. in Wray).

(1) (1970) 3 C.C.C. 122 at 123
(2) (1974) 20 C.C.C. (2d) 144; see also R v. Glynn (1971) 5 S.C.C.
(2d) 364; (1972)1 O.R. 403
Accordingly, the trial judge was right in not exercising the discretion it is said that he had to exclude it.

Clearly the evidence was admissible as bearing on the relationship between the accused and the victim. Equally, since the evidence was of high probative value the trial judge was correct in not exercising his discretion to exclude it. It is unfortunate, however, that the Court saw fit to suggest that R v. Wray has led to a narrowing of the trial judge's discretion to reject similar fact evidence. It is submitted that on the facts of R v. MacDonald an English Court would have reached the same result as did the Ontario Court of Appeal.

(1) (1974) 20 C.C.C. (2d) 144 at 154
(iii) **SIMILAR FACTS EVIDENCE IN CIVIL CASES**

**Principle of Admissibility and Exclusion:** The principles of the admissibility of 'similar facts' evidence are the same in civil as in criminal cases, provided that the admission of such evidence would not be "oppressive or unfair to the other side...and that the other side has fair notice of it and is able to deal with it".

Dissimilar facts are admissible to disprove the main fact, for example, skill on other occasions to disprove negligence; the provision of good beer on other occasions to disprove the allegation of bad beer sold, or specific acts of bravery to disprove specific acts of cowardice, but to rebut evidence of authority, the forgery of a prior authority is inadmissible. As subsequent discussion will show, the ordinary requirement of a reasonable degree of relevancy, free from the danger of undue consumption of the court's time with side issues, is sufficient to explain such rulings as there are in civil cases. Unlike criminal trials which are very properly dominated by the need to guard against prejudice to the accused, civil trials are not. And it is the fear of such prejudice which has produced not merely an exclusionary discretion, applicable, it seems, so far as similar fact evidence is concerned, solely to criminal cases, but also an exclusionary rule of law based on degrees of relevance, concerning conduct showing bad disposition, and it may well be confined to the prosecution's evidence at a criminal trial. Lord Denning, when delivering the judgement of the Court of Appeal in Mood Music Publishing Co Ltd v. De Wolfe Ltd, recognised the distinction

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turning on degree of relevance, by holding evidence of other infringements similar to that alleged by the plaintiff admissible in an action for breach of copyright. The plaintiffs in the case were the owners of the copyright in a musical work called 'Sogno Nostalgico'. They alleged that the defendants had infringed such copyright by supplying for broadcasting (in a television play) a work entitled 'Girl in the Dark'. It was not disputed that the works were similar, but the defendants contended that the similarity was accidental, and denied copying even though 'Sogno Nostalgico' was composed prior to 'Girl in the Dark'. It was held that evidence was admissible to show that on other occasions the defendants had reproduced works subject to copyright; one of the three relevant occasions being a reproduction by the defendants as a result of an 'entrapment' set up by the plaintiffs for the express purpose of obtaining evidence against the defendants. Lord Denning M.R. said: "The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice; and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal
with it"1.

There are other examples of the same principles as applied in the above case, the rule of admissibility being the same. For example to prove that a given transaction was fraudulent, similar frauds by the same party either prior2 or subsequent thereto may be shown. In Sattin v. National Union Bank3, for instance, a plaintiff who claimed in respect of the loss by the defendant bank of a diamond which he deposited with them as security for an overdraft, was held to be entitled to adduce evidence of another occasion when jewellery so deposited had been found to be missing. The Court of Appeal’s decision was based on the entitlement of the plaintiff to rebut the defence that the defendants had used reasonable safeguards.

However, in another Scottish case - William Inglis v. The National Bank of Scotland4 - in an action against a bank to recover a sum of money which the pursuer averred he had been induced to pay on a bill in the erroneous belief that it was still outstanding, induced thereto by the acts or omissions of the defenders or their bank agents, the pursuer averred that the bank agent had been guilty of similar misrepresentations to customers in other cases, one of which he specified in detail. The court held that these averments as to similar misrepresentations were irrelevant and proof thereof refused5. The reason for this decision is probably because the evidence is not particularly useful in determining the doing or not doing the act under investigation where intent is certainly a matter for consideration; if the defence of mistake was raised by the defen-

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(1) (C.A.) (1976) Ch. 119 at 127
(2) Blake v. Albion Society, 4 C.P.D. 94
(3) (1978) 122 S.J. 367; see also Oswald v. Frairs (1911) S.C. 257
(4) (1909) S.C. 1038
(5) Aub (1895) 22 R. 402 (followed)
dants the evidence might have been admissible.

In *Barnes v. Merritt*\(^1\), A sued B, a wine merchant, for the price of advertisements; the defence raised at the trial (though not apparently on the pleadings) was twofold, i.e. that the order was obtained by misrepresentation, and that this was made with fraudulent intent. Having given evidence of the making of the misrepresentation, B, to show A's intent, tendered evidence that other wine merchants had previously been defrauded by him in the same way. A's counsel admits that if the misrepresentation was made fraudulently, then A cannot recover; and therefore claims that as the only issue for the jury is whether it was made or not, evidence of intent is inadmissible. This contention having prevailed, the jury found that A did not make the misrepresentation. It was held by the Court of Appeal that both issues having been raised by B at the trial, evidence on the second could not by such an admission be shut out or postponed until the jury had decided the first.

In another case of fraud - *Blake v. Albion Society*\(^2\) - the question being whether an insurance company acted fraudulently in obtaining a premium from A, through their agent, B, who had represented to A that if he would insure, B would procure him a loan from the company, the fact that premiums had previously been obtained by the same agent and means from other persons, to the knowledge and for the benefit of the company, without loans being made, was held admissible as showing the fraudulent nature of the transaction in question.

\(^1\) 15 T.L.R. 419  
\(^2\) 4 C.P.D. 94
However, in the Irish case of Edinburgh Life Assurance v. Y\(^1\), A (an insurance company) sues B to set aside a policy of which B had fraudulently obtained an assignment to himself. Evidence that B had fraudulently procured other policies to be assigned to him was held inadmissible, as the other frauds were not pleaded in the statement of claim, nor was the defendant given any notice thereof.

In another Irish case—Hewson v. Cleeve\(^2\), where A sues B for libel which charged A with fraudulently obtaining goods on credit in Limerick, the defence was of justification of which, however no particulars had been given or required. A, on cross-examination, admits that he obtained goods for which he still owes, both Limerick and Cork. It was held by the Court that witnesses might be called to prove the Cork frauds, as no particulars had been given confining the acts to Limerick.

When an action is based on allegations of fraudulent misrepresentations made by the defendant, the British Columbia Court of Appeal has held that evidence that the defendant made similar misrepresentations to other persons in other transactions is admissible if it is relevant as tending to prove that he made the misrepresentations alleged by the plaintiff\(^3\). The question may be asked here whether this postulates a lesser standard of relevance than Boardman's case requires in criminal cases. However that may be, the guiding star is relevance\(^4\). Perhaps a clearer example of the application of the rule of relevance is to be found in H.R. Lancy Shipping Co Property Ltd v. Robson\(^5\); the plaintiff was injured when struck by a block from a

\(^{1}\) (1911) 1 I.R. 306
\(^{2}\) (1904) 2 I.R. 536
\(^{5}\) (1938) ALR 429; see also Reynold v. Mayor... of The City of Hawthorn (1887) 13 VLR 23
crane in April 1936. He sought to prove negligence against his employers by adducing evidence of unexplained damage to the hoisting apparatus which occurred in December 1937. The High Court after an examination of the issues between the parties held that the evidence ought to have been rejected as it was not relevant.

Cross\(^1\) did make a useful suggestion as to the rule of similar fact evidence in civil cases, and his opinion should be considered. He said: "Reference has been made to a few civil cases in the course of the discussion of the admissibility of similar fact evidence in criminal proceedings\(^2\). It is often said that the law is the same in each instance. If this is so, the statement (of the rule)\(^3\) should be amended by the addition of the words in square bracket to read as follows: 'evidence of the misconduct of (a party) on other occasions (including his possession of incriminating material) must not be given unless it goes beyond showing a general disposition towards wrongdoing, or the commission of a particular kind of crime (or civil wrong), and has specific probative value in relation to the charge before the court, due regard being paid to the other evidence in the case and to defences which may reasonably be supposed to call for rebuttal". He, however, went on to say: "But perhaps it is wiser to be non-committal about the complete applicability of the rule to civil proceedings"\(^4\).

As a matter of fact some reservation has been voiced about the full application of the rule to civil proceedings by Lord Reid in

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1. Cross on Evidence (5th ed) at p. 397
2. E.g. Hales v. Kerr (1908) 2 K.B. 601; Blake v. Albion Life Assurance Society (1878) 4 CPD 94
3. Cross at 355
4. Cross at 397
McWilliams v. Sir William Arrol and Co Ltd\(^1\); his Lordship stated: "It was argued that the law does not permit... an inference to be drawn because what a man did on a previous occasion is no evidence of what he would have done on a later similar occasion. This argument was based on the rule that you cannot infer that a man committed a particular crime or delict from the fact that he has previously committed other crimes or delicts. But even that is not an unqualified rule (see e.g. Moorov v. H.M. Advocate\(^2\)) and there are reasons for that rule which would not apply to a case like the present. It would not be right to draw such an inference too readily because people do sometimes change their minds unexpectedly. But the facts of this case appear to me to be overwhelming".

In Ireland it has been held that evidence of system is in civil cases only admissible if pleaded\(^3\). It is also noteworthy that usually it is only the acts of the party whose intent is in question that are relevant. But this is not always so. Thus, where a principal is chargeable with his agent's act, the intent may be shown by other acts of the same agent\(^4\).

(iv) **EXISTENCE OR OCCURRENCE OF THE MAIN FACT**

In civil cases, evidence of similar facts is usually admitted to show the existence or occurrence of a fact in issue. This category of cases may be considered under a number of sub-heads.

(a) **Animals : conduct and propensities:** It has been held that the owner of a wild animal, not shown to be harmless by nature or domestication\(^5\), or the owner of a dog in proceedings for injuries done by

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(1) (1962)1 All E.R. 623 at 630  
(2) (1930) S.C. (J) 68  
(3) Edinburgh Life Assurance v. Y (1911)1 I.R. 306  
(4) Barnes v. Merritt, 15 T.L.R. 419; Blake v. Albion Society 4 C.P.D. 94  
(5) Filburn v. People's Palace, 25 QBD 258
it to cattle, sheep, swine or poultry\(^1\), is liable for its acts, without proof either of the animal's mischievous propensities, or the owner's knowledge thereof. In \textit{Lewis v. Jones}\(^2\) it was held admissible in order to prove that A's dog had killed certain sheep belonging to B, evidence of the fact that the same dog had been seen to kill one of B's sheep on a mountain on a Saturday morning, and that other sheep of B's were found dead on the same mountain in the evening. However, in the case of domestic animals, including dogs in proceedings other than in the above, proof of its mischievous propensities\(^3\) or the owner's knowledge thereof must be given, in order to render the owner liable. For instance in \textit{Osborne v. Chocquel}\(^4\), the court was of the opinion that where it is relevant to prove the behaviour of an animal, in addition to the conduct of the animal on the relevant occasion, its conduct of a similar nature on other occasions may be admitted, if it is such as to have probative value in relation to the matters alleged. In this case the court held that in order to support an action for damages for the bite of a dog it is necessary to show that the dog had to the defendant's knowledge bitten or attempted to bite some person before it bit the plaintiff, it is not sufficient to show that it had, to the defendant's knowledge, attacked or bitten a goat.

So, too, evidence of propensity to bite other horses is inadmissible to prove that a horse had a tendency to bite mankind\(^5\).

\textbf{(b) State of Mind : Malice:—} Generally evidence of similar facts

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\((1)\) The Dogs Acts 1906-1928  
\((2)\) \textit{49 J.P. 198; 1 T.L.R. 153}  
\((3)\) See \textit{Adham v. United Dairies} (1940)\textit{1 K.B. 507}  
\((4)\) \textit{(D.C.) (1896)2 Q.B. 109}  
\((5)\) \textit{Glanville v. Sutton} (1928)\textit{1 K.B. 571}
not only prior but subsequent to that in question may be given as well as of the party's conduct and demeanour connected therewith, and of any surrounding facts showing their motive or intention, e.g. that they were not subject to the same excuse as that alleged as the main fact. In rebuttal, the party may disprove or explain them, for example where other libels are proved against him to show malice, he may prove such libels were untrue. In order to prove malice, as in the case of fraud, similar malice or frauds, by the same party either prior or subsequent may be shown. Thus in cases of libel, as shown in Barrett v. Long, prior libels written by the defendant of the plaintiff several years before or subsequent ones written after issue of the writ, as also the circumstances attending their publication, are admissible to show actual malice or deliberate publication. It is not necessary that such libels should be connected with or refer to, the libel in question, provided they tend to establish malice at the date of the latter's publication. It is immaterial whether they were addressed to the plaintiff or to others, were equivocal or not, or were themselves actionable or not; the jury should, however, be warned not to give damages in respect of such libels, although the omission of such a caution is not a misdirection. The defendant may in rebuttal prove the truth of such libel, since as they are not set out on the record, he could not plead justification. Moreover, when the meaning of libel is ambiguous, or other libels contained in the same, but not in other, publications may, it has been said, be referred to in order to

(1) Blake v. Albion Society 4 C.P.D. 94,98
(3) (1856)3 H.L. Cas. 395; (4) Barrett v. Long, 3 H.L.C. 395;
Pearson v. Lemaitre, 5 M. & G. 700; see also Anderson v. Calvert
24 T.L.R. 399; (5) Pearson v. Lemaitre, see Infra; (6) Darby
v. Ouseley, 1 H.& N. 1; Anderson v. Calvert, see Infra;
construe the libel in question - that was the decision in Bolton v. O'Brien¹. The defendant published in a newspaper, of which he was editor and publisher, several libels of the plaintiff, who brought an action setting out in the statement of claim, which consisted of eight paragraphs, three libels on which he relied. In the second, third and fourth paragraphs the innuendoes put on the same libels were that the defendant intended to charge the plaintiff with being guilty of an indictable offence of an unnatural kind; and in the eighth paragraph, the libel set out was the same as in the third and sixth paragraphs, but with an innuendo that the defendant intended to charge the plaintiff with being guilty of felony. The libel set out in the fourth and seventh paragraphs was in the same words, and was in each paragraph preceded by certain prefatory averments; and it appeared at the trial that the libel set out in the fourth and seventh paragraphs were taken from two different issues of the defendant's newspaper. The defendant by his defence to the first seven paragraphs, denied that he published the words complained of in the defamatory senses alleged, but did not traverse the publication nor plead justification; and his defence to the eighth paragraph were justification and payment of nominal damages into Court. At the trial other passages in the same newspapers, besides those containing the libels complained of, were shown to the witnesses. The defendant failed to prove his plea of justification. The jury found a verdict against the defendant and he later obtained a conditional order for a

(1) 16 L.R. Ir. 97
new trial, in which it was held inter alia that other passages of the same newspaper might be adduced in evidence to illustrate the meaning of the passages charged to be libellous.

When, however, the libel is founded on information received from others, the fact that the informants were actuated by malice is not admissible to prove the defendant's malice.

(c) Physical Agencies and Mechanical Agents and Instruments:— Generally, the action of physical and natural agencies may be inferred from their action, under similar conditions, at other times and places; while, if the similarity of conditions is not sufficiently established, the evidence will be rejected. In *Tennant v. Hamilton*², the question being whether A's land was injured by noxious discharge from B's works; proof that B's works had, or had not, injuriously affected neighbouring lands similarly situated to A's is admissible. In *Metropolitan Asylum District v. Hill*³, the question being whether a smallpox hospital, managed by a certain corporation, had communicated disease to residents in the neighbourhood; evidence that other smallpox hospitals, not managed by the corporation, had, or had not, communicated disease to residents in their respective neighbourhoods is admissible, and of more or less weight according as the management of the others is, or is not, shown to have been similar to that of the corporation.

The action of locomotives and other mechanical agents may generally be inferred from their working at other times. The working accuracy of scientific instruments like watches, thermometers, ane-

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(1) Folks v. Chadd, 3 Doug. 157
(2) 7 C. & F. 122
(3) 47 L.T. 29 see Att-Gen. v. Nottingham Corpzn. (1904) 1 Ch. 673
(4) Aldridge v. G.W. Ry. (1841) 3 Man. & G. 515
roids, etc. may be presumed.

(v) EVIDENCE OF SIMILAR HAPPENINGS AND TRANSACTIONS

A number of civil cases involving issues of similar fact evidence can be classified as coming under the head of 'similar happenings and transactions'. The discussion of the category of cases here can be better considered under some further sub-heads. It is hoped that this categorisation and sub-divisions will help towards a thorough understanding of the issues to be considered.

(a) Similar Previous Claims, Suits or Defences of a Present Party

One problem in this area is that the need for the exposure of fraudulent claims comes in conflict with the need for the protection of innocent litigants from unfair prejudice. It appears the practice is fairly well agreed on at two extremes; thus when it is sought to be shown merely that the plaintiff is a chronic litigant, or a chronic personal injury litigant, the courts consider that the slight probative value is overborne by the danger of prejudice, and they exclude the evidence. For example, in Palmer v. Manhattan R., where the claim was for slander and false imprisonment, it was held that evidence that the plaintiff was "an habitual litigant" was properly excluded. At the other extreme, if it is proved not merely that the party has made previous claims or brought suits but that the former claims were similar to the present claim and were false and fraudulent, then the strong relevance of these facts to evidence the falsity of the present claim is apparent and most courts admit them.

(1) See Wigmore, Evidence § 963
(2) 133 N.Y. 261, 30 N.E. 1001 (1892)
In Sessner v. Commonwealth\(^1\), which was a case involving disbarment by asserting fictitious claims, evidence of other unfounded claims were allowed by the court to show system and plan.

The difficult one here is similar to the problems involved in the "doctrine of chances or coincidence", i.e. negativing the defence of accident earlier discussed. Usually here, the evidence offered is that the present party now suing for a loss claimed to be accidental such as a loss of property by fire, or personal injury in a collision, has made repeated previous claims of similar losses. Here, the relevance is based on the premise that under the doctrine of chances repeated injuries of the same kind are unlikely to happen to one person by accident. In Mintz v. Premier Cab Association\(^2\), where plaintiff sued for injury in a taxi cab collision, it was held proper to allow cross-examination of plaintiff about two claims for personal injury within two years before this one, and to allow counsel to argue that this showed she was 'claim minded'. The court observed as follows: "Fortuitous events of a given sort are less likely to happen repeatedly than once... . Negligent injury is not unusual, but it is unusual for one person, not engaged in hazardous activities, to suffer it repeatedly within a short period and at the hands of different persons. The court's rulings were therefore right. That all three of appellant's stories may have been true affects the weight of the evidence; not its admissibility. It was for the jury to decide from all the evidence, and from its observation of appellant on the stand, whether she was merely unlucky or was 'claim minded'.

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\(^1\) 268 Ky. 127, 103 S.W. 2d 647 (1937)
\(^2\) 127 F. 2d 744 (1942)
In San Antonio Traction Co v. Cox\(^1\), the court conceded the force of the argument from probabilities, but held the evidence inadmissible. There the plaintiff sued for injury due to the sudden start of the car from which he was alighting. The defendant offered evidence that seventeen claims for similar injuries in alighting from cars had been made by other members of the plaintiff’s family. The court held that this was rightly rejected and said: "The evidence fails to connect plaintiff with the other claims, except in one instance in which he was with a cousin when he had his fall, and also witnessed the release executed by him to the Company. We fail to find in the testimony given or excluded that evidence of concerted action such as is required to constitute a conspiracy. It is just as probative, if not more so, that each incident stood alone as that a company existed, and it is mere guesswork to say that any of the parties conspired together". This decision I think can also be explained on R v. Ball’s\(^2\) rationale; in other words, if all the seventeen prior claims including this one had been against the same car owner, even though by different members of the plaintiff’s family, or all the prior claims had been by the same plaintiff as it is in this case, then evidence of such prior claims would most likely have been held admissible.

It should be pointed out that the relevancy premise is not itself free of difficulties; this is because the low probability that a series of similar injuries will happen to the same person does not of

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\(^{1}\) 184 S.W. 722 (Tex. Civ. App.1916)

\(^{2}\) (1911) A.C. 47, 22 Cox C.C. 366
itself lower the probability that a particular one occurred.

One severe problem though is that sometimes, this kind of evidence is prejudice-arousing against some genuine claims. This is especially so where standing alone such evidence would seldom be sufficient to support, for example, a finding of fraud. It seems that the solution here resides with the judge exercising his discretion properly. It is suggested that the judge while balancing in his discretion probative value against prejudice should admit the evidence only when the proponent has produced or will produce other evidence of fraud. In Concordia Fire Insurance Co v. Wise, which was an action on fire policy, evidence of frequent previous fires and collection of insurance was excluded, especially since it did not appear that any of the properties were over-insured.

(b) Evidence of Other Contracts: Evidence of other contractual transactions between the same parties is readily received when relevant to show the probable meaning to be attached to the terms of the contract in litigation. For example, in Bourne v. Gatliff, it was held by the court that to ascertain the meaning of bill of lading provision as to delivery of goods to owner, previous transactions may be looked into. Likewise, when the authority of an agent is in question, other similar transactions carried on by him on behalf of the alleged principal are freely admitted. In Parker v. Jones, prior instances of treating A as agent was held admissible to show authority of A to make a timber contract. However, no multiplication of acts by a special agent will turn him into a general one. The

(1) 114 Okla. 254, 246 Pac. 595, 46 A.L.R. 456 (1926)
(2) Wigmore Vol 2 § 377
(3) 11 C. & F. 45, 49, 70; 8 Eng. Rep. 1019 (H.L.1844)
(4) 221 Ark. 378, 253 S.W. 2d 342 (1952)
(5) Barrett v. Irvine (1907)2 I.R. 462
fact that on other occasions when he purported to have authority he had none is not admissible.\(^1\)

However, when evidence of other contracts is offered as evidence on the issue of the terms or making of the contract in suit, the courts have shown a surprisingly stiff attitude, beguiled perhaps by the mystical influence of the res inter alios acta phrase or misled by a confusion of the requirements of sufficiency and relevancy. When the evidence offered is of other contracts between the same parties, they have been willing to acknowledge that other similar contracts showing a custom, habit or continuing course of dealing between the same parties, may be received as evidence of the terms of the present bargain. For example, in Conderback Inc. v. Standard Oil Co\(^2\), where the issue was whether a contract was firm-price or open-evidence, the court said- "Evidence of other similar contacts between the same parties establishing a custom, habit or continuous course of business dealing is admissible as showing that on a particular occasion the thing was done as usual". But an isolated previous instance, unaccompanied by any offer to prove additional instances going to show a continued course of dealing would presumably be rejected\(^3\). Many courts, however, draw a line here and hold that a party's other contracts with third persons offered as evidence of the terms of the disputed contract are inadmissible. In Turpin v. Branaman\(^4\), where the issue was whether the defendant bought apples from plaintiffs on oral contract or was acting as broker, evidence offered by the defen-

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(1) Prescott v. Flinn, 9 Bing. 19
(2) 239 Cal. App. 2d 664, 48 Cal. Rptr. 901 (1966)
(4) (190) Va. 818, 58 S.E. 2d 63 (1950)
dant to show his practice was to execute written contracts when buying for himself, and oral ones when acting as broker; held properly rejected as irrelevant. The reason behind this decision is simply that evidence that a party has entered into a particular contract on other occasions does not make it more likely that he entered into a similar contract on the occasion in question. However, it would be admissible if he testified that he made the same contract with all. In Carter v. Pryke, it was held that to show the terms on which A let land to B, the terms on which A let land to other tenants are not receivable, but they might be if all the lands were subject to the same custom. Where the question is whether A made a contract with B subject to special terms; the fact that he made contracts with other persons subject to the same terms is inadmissible.

It is thought that the approach in the above cases is too inflexible and bars out information valuable to the trier. It is well reasoned that contracts of a party with third persons may show the party's customary practice and course of dealing and thus be highly probative as bearing on the terms of his present agreement. In Joseph v. Krull Wholesale Drug Co., where the issue was whether officer's contract was for definite term; corporation's offer to show practice of making officers' contracts terminable at will was held to have been properly received. In Moody v. Peirano, the suit was for breach of warranty of wheat sold as 'white Australian'. The defendant denied warranty; it was held proper for the judge in discretion to permit plaintiff

(2) 1 Peake 130
(3) See Doe v. Sisson 12 East 62, 63
(4) Rollingham v. Head, 4 C.B. (N.S.) 388
(6) 4 Cal. App. 411, 88 Pac. 380 (1907)
to prove that defendant had sold other wheat from the same shipment to third persons as 'white Australian'. It is thought that even short of such extensive acts when a businessman has once adopted a particular mode of handling a bargain topic, such as warranty, discount or the like, in a certain kind of transaction, it is often easier for him to follow the same solution in respect to the same feature of a new contract, than it is to work out a new one. It is thought that no strict rules or limit of admissibility are appropriate, because it is argued that there is no danger of unfair prejudice here. Seemingly, the courts should admit the evidence of other contracts in all cases where the testimony as to the terms of the present bargain is conflicting, and where the judge in his discretion finds that the probative value of the other transactions outweighs the risk of waste of time and confusion of issues. In the earlier cited case of Moody v. Peirano, the court said: "The number and frequency of the sales in which the warranty had been made and their proximity in time to the sale made to the plaintiff would be circumstances addressed to the discretion of the court in determining the relevancy of the testimony; and, unless it should clearly appear therefrom that the court had abused its discretion, its action in admitting the evidence could not be regarded as error. These circumstances would also be addressed to the jury in determining the inference to be drawn from the testimony, or the strength to be drawn from the testimony, or the strength of the probability in support of

(1) 4 Cal. App. 411, 88 Pac. 380 (1907)
which it was introduced. The weight or conclusiveness to be given by the jury is entirely distinct from the question of relevancy of the testimony". Also in Wilkinson v. Dilenbeck\(^1\), where the trial judge's action in excluding testimony as to the defendant's promises to other persons was sustained, the court said: "There is some force in the suggestion that such testimony had a tendency to corroborate the claims of the various plaintiffs and that some latitude along that line could have been permitted. Some discretion, however, must be permitted to the trial court as to how far it will permit a digression from the main issue to collateral ones which bear only on the question of corroboration".

Another case that exemplifies similar reasoning is The Advertising Concessions (Parent) Company Limited v. Paterson, Sons' Co\(^2\). This was an action of damages by an advertising company for breach of a contract whereby they had undertaken to expose advertisements for the defenders in certain frames to be hung in hotels. The defenders pleaded inter alia that the defenders, having signed the alleged order of 19 August 1907 under essential error, induced by the misrepresentations of the pursuer's agent, there is no contract which they can be called upon to implement, and they should be absolved, with expenses. The alleged misrepresentations of the pursuers' agent were three in number. The first two were misrepresentations as to what the pursuers would do in the future. These, his Lordship held, could not form a ground for rescission of the contract; the third alleged misrepresentation was one of fact, but his Lordship held that

\(1\) 184 Iowa 81, 168 N.W. 115, 116 (1918)
\(2\) (O.H.)1908 16 S.L.T. 654
the defenders had failed to establish it. In the course of the proof on the latter point, a question of evidence arose. The defenders had cited two witnesses, Murray and Young, to prove the representations alleged to have been made by the pursuers' agent. They proposed to corroborate this by evidence of similar misrepresentations made by the same agent to other customers of his employers in similar contracts. The arguments of parties and authorities cited appears sufficiently from the Lord Ordinary's note. His Lordship held that it was competent to ask the agent whether he did not make these representations; but that it was not competent to lead evidence to contradict him. His Lordship held, on the merits of the case, that the defenders having unjustifiably repudiated the contract, were liable in damages.

(c) Evidence of other Accidents and Injuries in Negligence and Products Liability Cases\(^1\):- Proof of other similar accidents and injuries, offered for various purposes in negligence and products liability cases, is another kind of evidence which may present for consideration the counterpulls of the probative value of and need for the evidence on the one hand, and on the other the danger of unfair prejudice, undue consumption of time and distraction of the jury's attention from the issues. In this connection previous accidents, though admissible to show that a particular act or place was dangerous, are not, as will be seen, evidence of the defendant's negligence\(^2\); and conversely, long immunity from accident does not

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(1) 2 Wigmore, Evidence §§ 252, 457, 458; Morris, Proof of Safety History in Negligence Cases, 61 Harv. L.Rev.205 (1948)
(2) See Phipson, 12th ed. at § 315
necessarily prove absence of carelessness\(^1\), though such immunity, whatever its weight, is usually allowed to be proved in his favour\(^2\). In America, apart from a few courts, influenced by an early Massachusetts' decision\(^3\) which adopted a more or less inflexible rule of exclusion\(^4\), most courts, however wisely, confide in the trial judge's discretion\(^5\), reviewable only for abuse, the responsibility for determining the balance of advantage and of admitting or excluding the evidence. Even in this liberal jurisdictions, most trial judges will scrutinise cautiously, offers of evidence of other accidents, and counsel for proponent must be prepared to overcome opposition and to convince the judge of the preponderant value and need for the proof. The prospects for success will be much affected by the purpose for which the evidence is offered, which in turn determines whether, and how strictly, the requirement of proof of similarity of conditions will be applied.

It will be pertinent to discuss some of the purposes for which the evidence may be offered and it is interesting to note that many English decisions as well as commonwealth decisions are along similar lines and will be simultaneously discussed.

Among the purposes for which the evidence may be tendered is to prove the existence of a particular physical condition, situation or defect. In Gulf, C. & S.F. Ry. Co. v. Brooks\(^6\), a fireman injured by coal falling from tender, alleged that this was due to the fact that a bolt was missing from a hinge on the gate. To show this fact, he was allowed to prove a later collapse of the gate and the replacement

\(^{1}\) Thomas v. G.W. Colliery Co., 10 T.L.R. 244 (C.A.) per Lindley L.J.
\(^{2}\) Longmore v. G.W. Ry. 19 C.B. (N.S.)183; Crafter v. Metropolitan Ry.L.R. 1 C.P. 300
\(^{3}\) Collins v. Inhabitants of Dorchester, 60 Mass. (6 Cush.)396 (1858)
\(^{4}\) See e.g. Fox v. Tucson Theatres Corp. v. Lindsay, 47 Ariz.388, 56 P. 2d 183 (1936); (5) See Jones & Laughlin Steel Corp. v. Matherne 348 F.2d 394 (5th Cir. 1965)
\(^{5}\) 73 S.W. 571 (Tex. Civ. App. 1903); Parker v. Bamberger 100 Utah 361, 116 P. 2d 425 (1941)
of the bolt. In *Ogden v. Gas Co.*¹, where A sued B for damages for injury by an explosion of gas under a street, evidence that escapes of gas and explosions had occurred at the same and adjacent places on former occasions was held admissible. Similarly in *Paston v. Clarkson Construction Co.*², in which there was blast damage to houses situated similarly to plaintiff's, it was held admissible to show that blast was the cause of plaintiff's damage. It was further observed that the other accident may also help to show notice. In *Gearhardt v. American Reinforced Paper Co.*³, in which the issue was the cause of fire damage to plaintiff's building, evidence of results of defendant's prior burning of debris under same conditions was held admissible. It appears that many of the products liability cases fit into this category. For example in *Gober v. Revlon, Inco.*⁴, allergic reactions of others than plaintiff to defendant's nail polish was held admissible to show nature of produce and to negative the defence of 'unusualness of plaintiff'. In *Carter v. Yardley & Co.*⁵, in an action to recover for a burn sustained as a result of using perfume manufactured by defendant, testimony of other witnesses that the same perfume irritated their skin was competent to show probability that injury to plaintiff was caused by some harmful ingredient in perfume other than by her own peculiar susceptibility and to authorise inference that skin of plaintiff and the witnesses was normal. Similarly in *Albers Mill Co. v. Carney*⁶, where the issue was an alleged illness of turkeys due to mouldy feed, the receipt of mouldy feed by others

(1) *The Times*, March 16, 1905
(2) 401 S.W. 2d 522 (M.O. App. 1966)
(3) 244 F. 2d 920 (7th Ct. 1957)
(4) 317 F. 2d 47 (5th Ct. 1963)
(5) 319 Mass. 92, 64 N.E. 2d 693, 164 ALR 559 (1946)
(6) 341 S.W. 2d 117 (MO. 1960)
from same lot and illness of their turkeys was held admissible to show mouldiness and causation. This is generally thought to be a sensational way of proving negligence or accident, and unless the fact is substantially disputed, the judge might not find sufficient need for the evidence.

Another purpose for which the evidence of other accidents and injuries in negligence cases may be tendered is to show that the plaintiff's injury was caused by the alleged defective or dangerous condition or situation. In Hales v. Kerr\(^1\), A sues B, a barber for injury from ringworm caused by B's negligence in using unsterilised razors. Evidence that C and D had previously contracted the same complaint after being shaved by B was held admissible, not to show B's negligence as a barber, but that the use of unsterilised razors was dangerous. It is essential to point out for this purpose, that the other accidents may have occurred after, as well as before, the injury sued for\(^2\).

The next two theories to be discussed are generally the most frequently invoked; the first being to show that the situation as of the time of the accident sued for was dangerous\(^3\). Generally, the condition or character of a place or thing may sometimes be proved by showing its condition or character at other times. Thus, in actions of negligence, to show that a particular spot was dangerous, previous accidents thereof, or even the condition of other similar places may be proved. This points to a quality of the objective situation, namely its capacity to produce or cause harm. This is considered to

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\(^1\) (1908) 2 K.B. 601
\(^2\) Ringelheim v. Fidelity Trust Co. 330 Pa. 69, 198 Atl. 628 (1938)
be the chief battle-ground over the admissibility of other accidents. It is significant to mention that other accidents after, as well as before, may be relevant for this purpose.

It is thought to be common sense that if it is material to establish that the situation was hazardous, the fact that it has produced harm on other occasions is a natural and convincing way of showing it. For example, in Moore v. Ransome\(^2\), the question being whether A's death by drowning was due to the defendant's negligence in keeping his dock in a dangerous condition; evidence that other drownings had occurred thereat and complaints been made, is relevant to show that the dock was dangerous. In Brown v. E. & M. Ry.\(^3\), A sues a railway company for injury caused by his horse shying at an obstruction on the road. Evidence that other horses had shied at the same obstruction was held admissible to prove that the obstruction was likely to cause horses to shy; and that A's horse in fact shied thereat (which was denied). Similarly in Gorman v. County of Sacramento\(^4\), evidence of prior accidents was held admissible to show that a boy rode his bicycle off the bridge by reason of absence of guard rails. The essence of the evidence cited in the cases above is to show that the situation as of the time of the accident sued for was dangerous. Other methods that could be employed for the same purpose such as expert testimony as to danger, is likely to evoke an objection as being an impermissible opinion; or reliance on a description of the situation plus the jury's general knowledge of its

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(2) 14 T.L.R. 539 (C.A.)
(3) (1889)22 Q.B.D. 391
(4) 92 Cal. App. 656, 268 Pac. 1083 (1928)
dangerous quality may be inadequate in particular cases\(^1\). Where the situation clearly speaks for itself, evidence of other accidents has been held unnecessary and inadmissible\(^2\).

The other frequently invoked theory is to prove that the defendant knew of the danger, or ought in the exercise of reasonable care to have learned of it. For example in *Hecht Co. v. Jacobsen*\(^3\), a case involving accident to a child on an escalator, evidence of accident to another child seven years before in a similar model escalator but on a different floor was held admissible. In *Slow Development Co. v. Coulter*\(^4\), a suit brought after a fall on an hotel floor; it was held that prior falls at other locations but with the same floor condition is admissible. The rationale of the above decisions is that the defendant knew or ought to have known of the danger, moreover such evidence is relevant to the fact in issue. Instances of similar acts which are relevant to a fact in issue include that as occurred in *Bebee v. Sales*\(^5\), where A was sued for damage caused by his child's air gun; evidence that the child had previously broken a window with the gun and that A had promised to destroy the gun is admissible to show A's knowledge of the danger; and the evidence could also have been admissible to show that A has not exercised a reasonable care, since learning of the danger that the air gun could pose. Similarly, knowledge that boys habitually trespass, and are reckless, imposes a special duty to take precautions\(^6\).

However, if the defendant's duty to maintain a safe place were absolute this theory would not be available; usually, this liability

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1. *Rexall Drug Co. v. Nihill*, 276 F.2d 637 (9th Cir.1960)
2. *City of Birmingham v. McKinnon*, 200 Ala.11, 75 So.487 (1917)
4. 88 Ariz. 122, 353 P.2d 990 (1960)
5. 32 T.L.R. 413 Cf Chilvers v. L.C.C. 32 T.L.R., where to rebut negligence, evidence was admitted that the toy used was similar to those generally played with by children
is restricted to a duty merely to use reasonable care to maintain safe conditions including the duty to inspect when due care so requires. When possible, the plaintiff may be allowed to prove directly that the defendant had knowledge of the other accidents, but more often than not, the nature, frequency, or notoriety of the happenings will afford circumstantial evidence that the defendant was apprised of them, or that the danger had existed so long that the defendant by due inspection should have learned of it. Since all that is required here is that the previous injury should be such as to attract the defendant's attention to the dangerous situation which resulted in the litigated accident, the strictness of the requirement of similarity of conditions imposed when the purpose is to show causation or danger is here much relaxed. For instance in McCormick v. Great Western Power Co. where the plaintiff sued for shocks received from defendant's high tension wires while installing iron work on the fifth floor of a building under construction; evidence that other workmen had been injured by defendant's wires during construction of a nearby building was received. In Taylor v. Stafford, in which the plaintiff claimed injuries from stumbling on a stable protruding between the planks of a sidewalk; the court held that evidence that there were other stakes protruding along the same block was properly received, "not to prove negligence", but to show a general unsafe condition of the sidewalk "from which notice may fairly be inferred". However, it should be pointed out that an

(3) 214 Cal. 658, 8 P. 2d 145 (1932)
(4) 196 Ill. 288, 63 N.E. 624 (1902)
injury occurring from a newly arising peril before the owner has learned of it or had a reasonable opportunity to appreciate the danger, would not be actionable.

Evidence of other accidents and injuries in negligence and products liability cases are admissible when the defendant by pleading or by the testimony of his witnesses has asserted that the injury sued for could not have been caused by the defendant's conduct as alleged. There are a few cases to illustrate that in such situations the plaintiff may show other similar happenings to rebut the claim of impossibility; for example in Texas and N.O. Ry. Co. v. Glass\(^1\), which was a suit for destruction of barn by sparks from locomotive; testimony by defendant's expert that the defendant's oil-burning locomotives are so constructed as not to emit sparks, was held rebuttable by plaintiff's evidence as to other fires set by such locomotives. An analogous problem is presented in such cases as Auzene v. Gulf Public Service Co.\(^2\), the plaintiff sued for injury from the explosion of a coca cola bottle. The defendant's witnesses testified that its method of bottling was such that explosions could not occur. The plaintiff offered evidence of other instances of explosions, and it was held that the evidence was competent. In product liability cases, it should be noted that the plaintiff is often rebutting a claim that he became ill from another cause or is supersensitive.

Logically, it would seem that if other accidents and injuries are admissible where circumstances are similar, in the judge's discre-

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(1) 107 S.W. 2d 924 (Tex. Civ. App. 1937)
(2) 188 So. 512 (La. App. 1939)
tion, to show such matter as the existence of a particular defendant or condition, or that the injury sued for was caused in a certain way, or that a situation is dangerous, or that defendant knew or should have known of the danger, then it should follow that proof of the absence of accident during a period of similar exposure and experience, would generally be receivable to show the non-existence of these facts. Though this logic has been followed in some cases, some others have somehow rejected the reasoning. The reasoning was invoked in Hart v. Lancashire and Yorkshire Ry\(^1\), the question being whether a railway company was negligent in not employing more than one man to manage a coal engine. It was held that the fact that for twenty years it has been usual only to employ one man, and that no accident had happened, is admissible as tending to rebut negligence. In Manning v. L. & N.W. Ry.\(^2\), to show that a drop of twenty-two inches from the footboard of a railway carriage to the platform was not dangerous, evidence that a similar drop existed at other stations and had caused no accidents was held admissible. Similarly, in Ajum v. Union Insurance Co.\(^3\), the question being whether a ship was seaworthy when starting on a certain voyage, evidence that she had made previous voyages safely under similar conditions as to cargo, etc. was held relevant.

It is, however, true that frequently the proof of absence of accidents does not have as much persuasive force, to show a sole situation, as the proof of another accident may in establishing

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(1) 21 L.T. 261
(2) (1907) 23 T.L.R. 222 (C.A.)
(3) (1901) A.C. 362
danger, but that, it seems is merely a matter of weight. Particular decisions excluding evidence of this kind of "safety history" may sometimes be justified on the ground that the persons passing in safety do not appear to have been exposed to the same test and use as occurred at the time of the injury sued for. For example in Taylor v. Town of Monroe\(^1\), in an action for injury to plaintiff, who was driving buggy, when horse ran away and overturned buggy at bridge; the plaintiff charged that highway was unduly raised and that the railing was defective. The court held that it was no error to exclude evidence that in the ordinary use of this highway there had been no accidents: absence of accidents would be relevant only if similar experience with runaway horses had been shown. However, specific proof to that effect should not be required when the experience sought to be proved is so extensive as to justify the inference that it included an adequate number of situations like the one in suit. In Erickson v. Walgree Drug Co.\(^2\), a suit for injury from fall on terrazzo floor in entranceway, rendered slippery by rain, the court considered it an error to exclude evidence that no complaint or report about anyone slipping had been received during fifteen years, though four thousand to five thousand persons entered the store every day. In Stein v. Trans World Airlines\(^3\), also a case of a fall but on an air terminal, it was held to be an error to exclude evidence that many thousands had used same area without tripping.

There are still, nevertheless, a considerable number of decisions

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(1) 43 Conn. 36 (1875)
(2) 120 Utah 31, 232 P. 2d 210 (1951)
laying down a general rule against proof of absence of other accidents. However, it is believed that no justification for that line of decisions can be sustained especially as there is here no danger of arousing the prejudice of the jury, as the proof of another accident may do. Moreover, the danger of spending undue time and incurring confusion by raising 'collateral issues', conjured up in some of the opinions seems not at all borne out by experience in jurisdictions where the evidence is allowed. It is thought that the defendant will seldom open this door if there is any practical possibility that the plaintiff may dispute the fact. The trend of recent decisions seems to favour admissibility, and it is believed that evidence of absence of other accidents may be relevant to show for example the non-existence of the defect. In *Birmingham Union Ry. Co. v. Alexander*\(^2\), an action against street railway for injury due to insufficient surfacing and ballasting of its track, the court said: "It would therefore have been competent for the plaintiff to prove that other similar casualties had happened at that crossing as tending to show a defective condition of the track. On like considerations the defendant should be allowed the benefit or proof that the track, as it was at the time, was constantly crossed by other persons, under similar conditions, without inconvenience, hinderance, or peril, as evidence tending to show the absence of the alleged defect, or that it was not the cause to which the injury complained of be imputed. The negative proof in the one case, equally with affirm-

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(1) See e.g. *Sanitary Grocery Co., Inc. v. Steinbrecher*, 183 Va. 495, 32 S.E. 2d 685 (1945)
(2) 93 Ala. 133, 9 So. 525, 527 (1891)
tive proof in the other, serves to furnish the means of applying to
the matter the practical test of common experience".

Evidence of absence of other accidents may also be relevant to show
that the injury was not caused by the defect or condition charged.
In Lawler v. Skelton\(^1\), a case involving illness from aerial spraying
of insecticide, evidence of non-injury from such spraying on other
persons is held admissible to show lack of causation. In order to
show that the situation was not dangerous evidence of absence of
other accidents was adduced in Nubbe v. Hardy Continental Hotel
System\(^2\) in which the action was for injury due to fall on stairs. It
was held to be error to exclude evidence of defendant's manager that
he had not had any reports of other accidents. The absence of such
reports was held to show that the stairs were not dangerous and that
the defendant was not chargeable with knowledge, or of ground to
realise the danger.

(1) 241 Miss. 274, 130 So. 2d 565 (1961)
(2) 225 Minn. 496, 31 N.W. 2d 332 (1948)
(vi) Habit and Custom or Routine Practice

The questions of custom and habit are usually discussed with and in relation to both character and similar facts evidence. As subsequent discussion will reveal, there is a correlation between character, trait, customs, habit and similar facts evidence. This, I think, is largely due to the overlapping of the definition of each of these words. It is no doubt true to say that evidence of character is not parallel to similar facts evidence, though it is usual to devote separate chapters to their discussion, but usually such discussion occurs next to the other and to some extent this indicates that it is difficult to draw a clear line between the two. This is probably because of the dual nature of character evidence; on the one hand, character is sometimes an issue at the trial, on the other, proof of character sometimes serves as circumstantial evidence showing what a person having the alleged character did or thought.

Similarly the definitions of custom and habit are so close that it is hard to draw a line, and in fact grammatically they are often used as synonyms, but that position is not totally acquiesced in by legal drafters. For instance, the American Model Code of Evidence, Rule 307, states as follows: "(1) Habit means a course of behaviour of a person regularly repeated in like circumstances. Custom means a course of behaviour of a group of persons regularly repeated in like circumstances". However, it must be said that more often than not this distinction is not made ordinarily. It is also interesting to note that character is usually or sometimes confused with habit,
while some definition of habit is given in a way that it can be taken for similar facts evidence, especially when such definition of habit is made by using a word like 'propensity' which is closely associated with similar facts evidence. All these explain the correlation between the words.

Although, as pointed out above, the words character and habit are sometimes confused with the other, it must be said that they are not synonymous and as such it is important to distinguish them from the other. McCormick¹ provides a short though comprehensive distinction; he said: "Character and habit are close akin; character is a generalised description of one's disposition in respect of a general trait, such as honesty, temperance or peacefulness. Habit in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. Therefore, evidence of habit is admissible as tending to prove that a person's behaviour on a specific occasion conformed to habit". Professor Stout's² explanation of habit confirms the definition given by McCormick though the last part of his explanation is couched in a manner that relates habit with similar fact evidence. He said "One necessary and omnipresent condition of the formation of habit is the tendency of any mental process with its connected movements to repeat itself simply because it has occurred before - a tendency which grows stronger the more frequently the process recurs. When we say that the tendency grows stronger we mean: (1) that the process is capable

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(1) McCormick, Evidence, pp. 340-1; see also Wigmore, Evidence, Vol. 1 §§ 92-97; Model Code, Rule 307 (2); Uniform Rules, 49

(2) Professor Stout; Analytical Psychology, Vol. 1 P. 263
of being set in action by a slighter cue,...; (2) that it becomes less liable to disturbance from accompanying circumstances; (3) that it becomes stronger as a propensity, i.e. if its course is interrupted or arrested greater impatience is felt. This principle of repetition seems in certain exceptional cases to be of itself sufficient to account for the growth of habit". This third element of habit as stated here brings it closely into the realm of similar fact evidence. It is as a matter of fact submitted that it is difficult to see the difference, otherwise than connotatively, between the concepts of 'propensity' or 'habit'.

Random House International Dictionary¹ in explaining 'habit' says: "(A) particular practice or usage: the habit of shaking hands...an acquired behaviour pattern regularly followed until it has become almost involuntary: the habit of looking both ways before crossing the street". The Encyclopedia Brittanica² has this to say about 'habit': "In psychology, a custom or automatic way of acting usually as a result of frequent usage rather than of inborn origin"; which reminds one of the words of Darwin³: "there seems even to exist some relation between a low degree of intelligence and strong tendency to the formation of fixed, though not inherited habits; for as a sagacious physician remarked to me, persons who are slightly imbecile tend to act in everything by routine or habit; and they are rendered much happier if this is encouraged". Thus, modern day biologists like psychologists explain the origin of the characters of living organisms exclusively by natural selection, saying that it is a form

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(2) 10 Encyclopedia Brittanica, Habit, 1092 (1968)
(3) Darwin, Descent of Man, Edn. 181, Vol. 1 P. 103
of mental tendency which later becomes automatic. The significance of this scientific approach is that, it seems to have gained some legal recognition; this is deducible by way of analogy with regards to the courts' approach to the conduct and propensities of animals. For instance, when the doings of animals are in question, it is admissible to prove, not only the general habits and propensities of the species, or of the particular animal, but the doings of the same animal on other occasions, or even those of other animals of the same species. Though, however, a propensity to bite animals of one species is evidence of a propensity to bite those of another, it is no evidence of its propensity to bite human beings, nor vice versa.

As earlier discussed, there has been confusion between the words 'habit' and 'character'; there have also been problems with regard to the admissibility of habit - the cases have not been uniform and sometimes the rationales behind the decisions are difficult to fathom. First, regarding the confusion between the words 'habit' and 'character', this may be a problem of usage or explanation. As earlier pointed out, McCormick distinguished habit and character on the ground that 'habit' refers to conduct of a specific kind, whereas 'character' relates to general attributes. Confusion may arise here from terminology. When one says that a man is 'habitually careful' one is really speaking of his general character rather than of any specific habit. It is thought that the use of such expression

(1) McQuaker v. Goddard (1940) 1 K.B. 687
(2) Joy v. Phillips, 85 L.J.K.B. 770; Adham Dairies (1940) 1 K.B. 507
(3) Osborne v. Chocqueel (1896) 2 Q.B. 109
(4) Brown v. E & M Ry. (1899) 22 Q.B.D. 391
(5) Quinn v. Quinn, 39 Ir. L.T.R. 163
(6) Glanville v. Sutton (1928) 1 K.B. 571; Hartley v. Harriman 1 B. & Ald. 620
(7) McCormick, Evidence pp. 340-341
has served to obscure the distinction between character and specific habit, so that some judges have occasionally treated evidence of a particular habit to show a particular act in accord, as if it had no greater relevance than general character for care\(^1\). The use of a phrase like 'habits of intemperance' may denote a general disposition for excessive drinking, or may amount to a specific habit of drinking a certain number of glasses of whisky every day on going home from work, and according to medical beliefs such addiction may amount to a specific abnormality or disease. The probative force of such 'habits' to prove drunkenness on a particular occasion would, however, depend on the degree of regularity of the practice and its coincidence with the occasion. On the other hand, habits of sobriety may well point to unvarying temperance or abstention, and would seem to be highly probative on the question of sobriety on the particular occasion.

It has been suggested that some of the dubious decisions may be attributed to a lack of clear understanding of the distinction that exists between character and habit, which has been contributed to by the popular practice of describing character in terms of habits as indicated above - 'habitually careful' or 'habits of care'; 'habits of intemperance' etc. In consequence these courts mistakenly apply to evidence of specific habit, the restrictions developed for the less probative and more prejudicial evidence of character.

The disagreement in the cases with respect to the admissibility of habit evidence probably arises from uncertainty as to how often the

\(^{1}\) Fenton v. Aleshire, 238 Ore. 24, 393 P.2d 217 (1964)
conduct must be repeated and the degree to which it must be consistent in order to qualify as habit. Generally, habit describes one's regular response to a repeated specific situation, and this can be distinguished from character by the following illustration. For example, if one speaks of character for care, one thinks of the person's tendency to act prudently in all the varying situations of life, in business, family life, in walking across the street, in driving etc. A habit, on the other hand is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or looking left and right and left again before crossing the road, or crossing a particular road at a particular spot, or of alighting or boarding railway cars while they are still in motion, etc. The doing of such habitual acts may become semi-automatic and so it can be assumed that such conduct must have been repeated on a good number of occasions though it is reasonable to think that the required number of repetitions will differ from case to case or rather conduct to conduct.

Perhaps one way of tackling the problem is by considering this hypothetical situation: suppose the question of fact in issue is whether the deceased stopped, looked and listened before driving on to a railroad crossing. The following evidence is offered: (1) that deceased was a careful, cautious man; and (2) that he regularly (habitually) stopped, looked and listened before entering the
crossing. Character for care implies dispositional trait. Habit designates an essentially mechanical course of action. It is known that while there is relatively little authority for admitting character for care or negligence as evidence of what the conduct was on a prior occasion; there is much authority for the use of habit evidence to show what the conduct was. Hence the first piece of evidence would generally be rejected and the second generally admitted. The Model Code of Evidence of the American Law Institute takes cognizance of this distinction. It renders character for care inadmissible and habit evidence admissible. The reason for this difference of treatment is that habit is much more cogent than character on such an issue. Similarly the Uniform Rules of Evidence in America, states that: "Evidence of habit or custom is relevant to an issue of behaviour on a specified occasion, but is admissible on that issue only as tending to prove that the behaviour on such occasion conformed to the habit or custom... . Testimony in the form of opinion is admissible on the issue of habit or custom if the evidence is of a sufficient number of instances to warrant a finding of such habit or custom." As pointed out above the probable reason for the acceptance of a rule allowing evidence of habit is the belief that the probative value of habitual conduct is great. When compared against the background of some early decisions, the American position is explicitly radical and I must say I back it. The reason being that, things that have become habit are often done unconsciously; as we know, the chief value of habit is that it enables us to do so much

(1) See Model Code of Evidence, rule 304
(2) Ibid rule 307
(6) Uniform Rules 49, 50
mechanically and without thought and so liberates mental power for other things. For example, a habitual drunkard or an alcoholic; a cigarette or drug addict, exhibits such conduct without any time to reflect since it is part of him. In this sense, I think that habit has a very great bearing on the issue of state of mind. So the fact that somebody is a habitual drunkard, or a drug addict etc, would be logically probative of the state of his mind at a particular time. In that sense I suppose that habit could be said to be of a close utility to the issue of someone's disposition, especially when used in the usual sense of denoting a tendency to act, think or feel in a particular way.

However, character is always logically relevant to prove conduct which accords with such character. Evidence of a relevant trait of defendant's character is always admissible for such purpose when offered by the defendant in a criminal case. By the weight of authority, evidence of the character of a party to a civil action is not admissible for such a purpose. This rule is arbitrary and unsound. When 'character' is 'in issue', evidence of it is necessarily admissible. It is in issue when it is an operative fact.

It should be mentioned that the practice of some of the courts in the United States is that evidence of habit will be received only when there are no eye-witnesses. The tendency then is to accept evidence of habit only, when no other evidence is available "especially...where from death of every person who could (testify)" it is

(1) Cross on Evidence, 5th ed. at P. 354
impossible to bring any direct evidence as to the behaviour of the deceased\(^1\). McCormick suggests that such evidence should be admitted even where these eye-witnesses are available but their evidence is conflicting\(^2\). However, one is inclined to think that where a habit of specific conduct is concerned, the requirement that there be no eye-witnesses seems unwise and the tendency has been to remove it. For example, the Federal Rules of Evidence requires neither corroboration nor lack of eye-witnesses as conditions precedent to admissibility of habit evidence. Rule 406 states: "Evidence of the habit of a person or of the routine practice of an organisation, whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person or organisation on a particular occasion was in conformity with the habit or routine practice". It should be remembered that whatever defects or dangers one might think such a radical proposition would pose can always be minimised and as a matter of fact eradicated during the process of cross-examination. As originally submitted to congress, Rule 406, contained a sub-division (b) which stated that the method of proof for habit or routine practice could be "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine". Reputation was not included because it was thought extremely unlikely that a person would have a reputation for a specific habit. Congress deleted sub-division (b) believing that the method of proof should be left to the discretion of the trial

\(^1\) Toledo St. L & K Ry. Co. v. Bailey 145 I11. 159, 33 N.E. 1089 Syl. 3 (1893)

\(^2\) McCormick, Evidence at P.325
judge. Though one major difficulty in accepting evidence of habit involves the determination of the degree of proof necessary to establish its existence, such determination must ultimately have to be made by the trial judge in his discretion.

A case exemplifying the above issue is Zucker v. Whitridge; this was a case involving a fatal crossing accident, with several eyewitnesses; the plaintiff on the issue of contributory negligence, introduced testimony that deceased when about to cross railway tracks "usually looked right and left of him and put a restraining hand on my arm before crossing". This evidence was rejected; the court being of the view that the probative value does not outweigh danger of 'collateral issues', expenditure of time and confusion; "we are not now called upon to decide whether (such) evidence... is competent when there is no eye-witness...". There is no doubt that if this case was to re-occur today the evidence of the habit will be received and the requirement of no eye-witness overlooked.

It is pertinent to make allusion to some other case with the aim of showing the previous uncertainty that existed in admitting evidence of habit. In Toledo st. L & k.c. Ry. Co v. Bailey, evidence was admitted that an engineer killed in a locomotive engine boiler explosion was a competent and careful engineer and, therefore, the accident did not occur because of his carelessness. In Smith v. Boston & M.R. Co, the uniform habit of the victim of slackening the speed of his riding when arriving at a train crossing was accepted

(1) 205 N.Y. 62, 98 N.E. 209 (1912)
(2) 145 Ill. 159, 33 N.E. 1089 Syl. 3 (1893)
(3) 70 N.H. 53, 47 Atl. 290 Syl. 1 (1900)
as proof that he acted in the same way on his fatal ride. Also in Eichstadt v. Lahrs, the plaintiff was allowed to call witnesses to prove that it was the plaintiff's habit to wheel his bicycle instead of riding it at the point where the accident took place. Thus, it appears the courts are readier to accept evidence of 'semi-automatic habits', the reason being that, unquestionably, the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it. It is on this account that one cannot accept such judicial pronouncements as that of Stephen J. in Brown v. Eastern and Midlands Railway Co., he said: "You must not prove...that a particular engine driver is a careless man in order to prove that a particular accident was caused by his negligence on a particular occasion". Similarly in Commonwealth v. Nagle, Knowlton J. said: "For the purpose of proving that one has or has not done a particular act, it is not competent to show that he has or has not been in the habit of doing other similar acts". In Cincinnati, N.O. & T.P.R. v. Hare's Adm'r, the court observed that "...evidence of practices or customs in relation to similar instances is not admissible. Likewise, of his habits generally in that relation. It is immaterial what the person may have done upon previous occasions or under like circumstances".

(1) (1961) Q.R. 457
(2) 22 Ö.B.D. 391 at 393
(3) 157 Mass. 554, 32 N.E. 861 (1893)
(4) 297 ky. 5, 178 S.W. 2d 835 (1944)
In Manenti's case, in support of an issue of contributory negligence evidence was tendered that the tram driver, during a period of a month or two previously, had twice seen the plaintiff board a moving tram, and had seen a boy he believed to be the plaintiff do so on a number of occasions. Objection that this evidence was inadmissible was upheld. The trial judge said: "I am of opinion that I cannot say that the conclusion that the boy on this occasion boarded a moving tram would be rendered more probable than not". It is, however, not clear whether His Honour is saying that two isolated acts are insufficient for any reasonable man to draw any inference as to the probabilities (in which case it would be a perfectly understandable ruling) or on the other hand he is saying that no matter how often it had happened in the past no jury would be entitled reasonably to draw a conclusion about its having probably happened on this occasion. If Manenti's case is to be construed as saying that evidence as to past habit is not admissible, it is submitted that it will then be inconsistent with Eichstadt v. Lahrs and as such it is wrong by way of precedence. It is also thought to be wrong in principle because as a matter of common experience, a jury made of reasonable men and women would be helped in performing their duties by being allowed to examine the habits of the parties. Surely if one has an habit, expediency and sound reason should allow evidence of that habit to be adduced — i.e., that an act was habitually done by X under like circumstances should be received as evidence that it was

(1) (1954) VLR 115; (1954) Argus L.R. 283
(2) (1961) Q.R. 457
most likely done by X on the particular occasion. In addition to earlier cited cases supporting the admission of such evidence, more cases can still be supplied. For instance in Glatt v. Feist, plaintiff's habit of crossing outside cross walk at particular place, was held to be admissible to show where she crossed on the occasion in question; and in another case, plaintiff's habit of using defendant's buses to return from work was held admissible to show that he was a passenger on the night in question. Also in Southern Traction Co. v. Kirksey, the plaintiff's husband was killed while driving an automobile, in a collision with the defendant's car. An eye-witness testified as to the circumstances of the accident. The defendant offered evidence that the deceased had, by reputation, a habit of becoming intoxicated and driving his automobile recklessly while in such condition. The court held that the deceased was guilty of contributory negligence, and that the evidence offered was admissible on that issue. However, it may be said that habit would seem to be of a very slight probative value in determining the conduct of the deceased on this particular occasion, especially when direct evidence showed what that conduct was.

Evidence of a habit of intoxication or of negligence sufficiently constant to show probative value is difficult to distinguish from evidence of character. The pertinent question here is how often such conduct should have been done or repeated to make it admissible. One is inclined for example to think that three separate occasions of drunkenness would not be enough to prove a habit of drunkenness.

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(1) State v. Wadsworth, 210 So. 2d 4 (Fla. 1968); Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, 151 P. 2d 670 (1944)
(2) 156 N.W. 2d 819, 28 A.L.R. 3d 1278 (N.D. 1968)
(4) 225 S.W. 702 (1920) (Tex. Civ. App.)
(5) 1 Wigmore, Evidence §§ 96, 97 (1st ed. 1904)
necessary to support the inference of drunkenness on a probable footing; it is thought that such state of drunkenness should have occurred on a greater number of occasions. It is good in any case that generally in matters of this kind, the judges possess the discretion usual in this field of circumstantial evidence to exclude, if the habit is not sufficiently regular and uniform or the circumstances sufficiently similar to outweigh the danger, if any, of prejudice or confusion.

It is interesting to note that, evidence of the 'custom' of a business organisation or establishment if reasonably regular and uniform, is generally received much more readily by the courts. In Commonwealth v. Torrealba, the custom of a shop to give a sales slip with each purchase was accepted as evidence that it would have done so also on the specified occasion when the defendant was caught with goods with no sales slip. However, whether the inference should or should not be drawn depends largely on the circumstances of each case. For instance, there is a good deal of difference between the manner in which business is conducted every day in a railway office or in a big mercantile establishment or bank or solicitor's office, and in an ordinary landlord's office or a petty grocer's shop. Much also depends on the personal habits of regularity of the individual through whom the business passed. As Wigmore said: "There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If

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(1) Russel v. Pitts, 105 Ga. App. 147, 123 S.E. 2d 708 (1961); Lunquist v. Jennison, 66 Mont. 516, 214 Pac. 67 (1923); see Wigmore, Evidence Vol. 2 §§ 177, 252, 301-304, 321, 458
(2) 316 Mass. 24, 54 N.E. 2d 939 (1944)
(3) Wigmore, Evidence, § 92
we conceive it as involving an invariable regularity of action, there
can be no doubt that this fixed sequence of acts tends strongly to
show the occurrence of a given instance. But in the ordinary affairs
of life, a habit or custom seldom has such an invariable regularity.
Hence, it is easy to see why in a given instance something that may
be loosely called habit or custom should be rejected, because it may
not in fact have sufficient regularity to make it probable that it
would be carried out in every instance or in most instances. Whether
or not such sufficient regularity exists depends largely on the
circumstances of each case”.

Very often, evidence is offered of facts having no connection with
or bearing upon the fact in question, just to lay the foundation for
an inference by the court that because a fact similar to the one
under enquiry has taken place, it may be presumed that the fact in
question has also happened. But evidence of such other facts is
clearly inadmissible and no such inference is permissible, unless
there exists a general course of business. Thus, to show the terms
on which a landlord leased a land to a particular tenant, the terms
on which he leased lands to other tenants would be inadmissible.

So, in order to prove the terms of a contract with one person,
evidence of the terms of similar contracts with other persons is not
admissible. But when the doing of an act depends on the existence
of a custom or usage, evidence of the custom may be given. Usage is
admissible to prove unexpressed incidents of a contract.

At this point it will be pertinent to make reference to Section 18

(1) Carter v. Pryke, Peake 95
(2) Hollingham v. Head (1858) 4 C.B. (N.S.) 388; 27 L.J.C.P. 241; 4
Jur. 379; 4 L.T. 406
of the Nigeria Evidence Act which provides as follows: "When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done is a relevant fact".

This section includes the course of business both in public and private offices. Clearly this section lays down that whenever it is necessary to prove that an act was done, the existence of a general course of business or office (public or private) according to which it naturally would have been done, is a relevant fact and proof of it is admissible. In well-established offices or firms, books are kept or business is conducted on such settled lines and principles that when the doing of a particular act comes in question, it may be reasonably inferred that the uniformity of the general course was followed in the particular case. When the course of business usually followed is proved the probability is that there was no departure from the common course of business in the particular transaction. In the case of public offices like the post office, where work is carried on with almost mechanical regularity, the probability becomes stronger that the letter was despatched in due course or reached destination. The reason for the rule was stated by Sherwood J. in the American case of Mathias v. O'Neill; "These things being proved (evidence being given of a book keeper's custom of handing over collateral notes to the teller as indicating that it was done in this instance), the presumption arises therefrom that the usual course of

(1) See also S.16, Indian Evidence Act
(2) 94 M O 527 (Cited at Wigmore, § 92)
business was pursued in this particular instance. Everyone is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagement and duty... Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one fact from the existence of another".

It can be said that the subject matter of present discussion partly comes under the head of 'presumption'. For example, courts universally presume receipt of a letter by the addressee upon a showing that the letter, properly stamped and addressed, was posted in the mail. Therefore, it often becomes necessary in the preparation of a case involving this point to determine what will amount to sufficient evidence of posting to sustain a verdict received.

In Lieb v. Webster, plaintiff agreed to purchase land from defendant by a contract in which it was stipulated that the performance of the mechanics of purchase would be completed through a third party, Webster. Plaintiff deposited the purchase money with Webster with instructions to deliver it to defendant only after he (Webster) had, inter alia, procured a policy of title insurance. Webster absconded with the funds. In a suit to determine the incidence of loss, plaintiff sought to prove that Webster had procured the policy before he absconded and therefore held the purchase money as agent for defendant. The proof that plaintiff relied upon to establish that Webster had received such a policy was: (1) that X Insurance Company

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(2) 30 Wash. 2d 43, 190 P.2d 701 (1948)
had received an application from Webster for insurance and that the policy had been properly filled out; and (2) that it was the office custom of X Insurance Company to mail such policies when completed. Defendant claimed there had been insufficient proof of mailing. The lower court rendered judgement for defendant, and this judgement was affirmed on appeal. It was held that proof of an office custom with respect to mailing is insufficient to prove without establishing compliance with that custom in the specific instance.

The above decision in Lieb v. Webster, in stating that mere proof of a business custom of the sender's office to post mail which has been deposited in a particular location is insufficient to raise the presumption of receipt, undoubtedly expresses the majority view. After establishing the existence of such a custom the proof must go farther and show that the custom was complied with on the particular occasion in question. The practical effect of this additional requirement is to compel the sender to produce the testimony of one whose duty it was to collect outgoing letters from the office and to deposit them in the mail. It is not required that this person should remember posting the particular letter in question, but only that it was his custom invariably to mail all letters of the office and that he did so on this occasion. Frequently, the person whose duty it is to post the office mail is, due to the nature of his position, a transient employee. Therefore, once he has left the sender's employ it may become impossible to locate him and thus

(1) Brailsford v. Williams, 15 Md. 150 (1859); Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N.W. 881 (1920); Cook v. Phillips, 109 N.J.L. 371, 162 Atl. 732 (1922)
(2) Bell v. Hagerstown Bank, 7 Gill 216 (Md.1848); Hughes v. Pacific Wharf and Storage Co., 188 Cal.210, 205 Pac.105 (1922)
(3) Brailsford v. Williams, 15 Md. 150 (1859)
procure the required testimony of compliance. On the other hand, a few courts have held that the mere existence of an office custom, without more, is sufficient to warrant a finding by a jury that the particular letter was posted\(^1\). For these courts the custom may be established by proving the existence of a system of mailing and introducing testimony that it was the invariable office practice to comply with such system. The testimony need not be by the employee whose duty it was to post the letters but may be by an officer of the firm\(^2\), thus removing the practical obstacle of the majority view. It is inescapable that this is the sounder result, for the majority allows the outcome of the case to depend upon testimony of one person to the effect that he complied with the system on a certain day - testimony that is more likely to be based upon inference than upon recollection of fact. It is difficult to perceive how the majority of courts can allow mere habit to prove the preparation of a document for mailing\(^3\), or to prove that notice of dishonour was given\(^4\), and yet disallow it in establishing the fact of mailing\(^5\). It must however be pointed out that Uniform R.50 and Federal Rule of Evidence (R.D.1970) 406, provide that proof of the existence of the person's habit or of the custom of the business may be made by testimony of a witness to his conclusion that there was such a habit or practice. It may also be made by evidence of specific instances\(^6\), though this would be subject to the judge's discretion to require that the instances be not too few or too many and that the time be near and the circumstances be sufficiently similar\(^7\).

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\(^{1}\) Lawrence Bank v. Raney & Berger Iron Co., 77 Md. 321, 26 Atl. 119 (1893); In re Wiltse, 5 Misc.105,25 N.Y.Supp,733 (County Court 1893); (2) Myers v. Moore-Kile Co., 279 F. 233 (5th Cir.1922)

\(^{2}\) Hitz v. Ohio Fuel & Gas Co., 43 Ohio App.484,183 N.E. 768 (1932)

\(^{3}\) Trabue v. Sayre, 64 Ky.(1 Bush)129 (1867)

\(^{4}\) Hitz v. Ohio Fuel & Gas Co., 43 Ohio App.484,183 N.E.768 (1932)

\(^{5}\) Uniform Rule 50; Fed.R.Evid.(R.D.1971)406; see also Wigmore, Evidence § 93 and § 375; (7) Petricevich v. Salmon River Canal Co.,92 Idaho 865, 452 P.2d 362
There seems little doubt that habit, once determined, should have probative value to establish the occurrence of related specific acts\(^1\). It is submitted that the holding of the court in Lieb v. Webster\(^2\) is unsound in that it tends to require evidence which is only cumulative and fails to recognise the force of modern office procedure. In Myers v. Moore-kile Co.\(^3\), the court expressed the view that: "If the writer of the letter knows what that course of business was, and testifies accordingly, testimony to the same effect by another person connected with the business would be merely cumulative".

The Judicial Committee once decided that if a letter properly directed is proved to have been posted, "it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office; and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register\(^4\).

Several other presumptions are frequently made from the regular course of business. For example, if a man deals in a particular market, he will be taken to act according to the custom of that market\(^5\). In a suit by a banking firm against another firm for the recovery of the balance of an account between them, it was held that it was reasonable to presume that that which was the ordinary course was pursued in this case. In Lucas v. Novosilieski\(^7\), the question

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(1) State v. Manchester & L.R.R., 52 N.H.528,530 (1873)
(2) 30 Wash. 2d 43,190 P.2d 70I (1948)
(3) 279 F.233 (5th Cr.1923)
(4) Harihar v. Ramsashi, 23 C.W.N.77,90; 45 IA 222; 46 C.458; see Kamakhya v. Khalig, A1927 P.305
(5) Bayliffe v. Butterworth, 17 LJ Ex.78
(6) Dwarka v. Baboo Jankee, 6 MIA 88,90
(7) (1795)1 Esp.296; 170 E.R. 363
was whether D had paid his workman, P, his wages. The proof that it was D's practice to pay his servants' wages every Saturday, that P was seen going with other workmen to the place where D usually paid his workmen on a Saturday when payments were usually made and that P was not heard to complain afterwards, was held relevant and admissible.

In *Woodward v. Buchanan*¹, on a trial of an action by the plaintiff against the defendant for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he was the owner of the houses or the real principal, evidence was held admissible that other persons had received orders from the defendant to do work at the same houses, without showing that the plaintiff knew of these orders at the time he did his work.

Similarly the working of scientific instruments is akin to the above presumptions. For example, in the absence of evidence to the contrary, a jury would be advised to rely on the correctness of a watch or clock which had been consulted for fixing the time of an event. So, thermometer would be regarded as a sufficiently safe indication of the heat of any liquid in which it has been immersed². Other instances would be the correct transmission of communication by telephone or wireless apparatus.

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¹ (1870) L.R. 5 Q.B. 285; 30 L.J.Q.B. 71; 22 L.T. 123
² Taylor, Evidence, § 183
(vii) **STATUTORY PROVISIONS**

There are various statutes rendering similar facts evidence admissible in specific circumstances, and for limited purposes as proof. Examples are the Official Secrets Act 1911, S.1(2), the Prevention of Crimes Act, S.15 (referring to and amending Section 4 of the Vagrancy Act 1824), and the Theft Act 1968, S.27(3) which substantially reproduces S.43(1) of the Larceny Act 1916. These statutes have been enacted in most if not all Commonwealth countries word for word and in a place like Australia, these statutes vary from state to state.

As we know it is often very difficult for the prosecution to prove intent in certain crimes, so provisions are sometimes inserted in statutes enabling the proof of character to show the required intent or purpose. A good example of this is to be found in S.15 of the Prevention of Crimes Act 1871 which refers to S.4 of the Vagrancy Act 1824, under which a suspected person or reputed thief may be treated as a rogue and vagabond if he frequents or loiters in any street or public place with intent to commit an arrestable offence. In order to prove this intent, the Statute of 1871 provides that it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if, from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit an arrestable offence. It has been said
that this allows: "Something to be given in evidence which would otherwise, according to the common-law of England, not be admissible, that is, laying before the tribunal of fact evidence of the previous bad character of the accused person although he had not put his character in issue". Thus, evidence may, irrespective of rebuttal, be given before verdict that he has been previously convicted of theft, is an associate of thieves and on arrest gave a false name, address and account of the property (not proved to have been stolen) found in his possession. In *R v. Fairbairn*, the court held that evidence of a previous conviction is admissible to establish that a person who is arrested under Section 4 of the Vagrancy Act 1824, on a charge of loitering with intent to commit a felony is a 'suspected person' within the meaning of the section at the time of his arrest. The appellant had been charged on an indictment with being in possession of a firearm contrary to Section 23, Subsection 2 of the Firearms Act, 1937. By that subsection "If any person, at the time of his committing, or at the time of his apprehension for, any offence specified in the third schedule to this Act, has in his possession any firearm, he shall...be guilty of an offence under this subsection, and on conviction thereof on indictment he shall be liable to penal servitude...". Among the offences specified in Schedule III to the Act, are included "offences under such of the provisions of Section 4 of the Vagrancy Act 1824 (as are referred to in and amended by Section 15 of the Prevention of Crime Act 1871): "Every suspected person or reputed thief, frequenting...any highway or any place

(1) *R v. Harris* (1951) 1 K.B. 107 at P.113; (1950)2 All E.R.816 at P.618
(2) *Clark v. R* (1884)14 Q.B.D.92; *Hartley v. Ellnor*, 81 J.P. 201
(3) (1949)2 K.B.690
adjacent to a street or highway with intent to commit felony...shall be deemed a rogue and vagabond". Section 15 of the Prevention of Crime Act 1871 also provides that "in proving the intent to commit a felony it shall not be necessary to show his purpose or intent, and that he may be convicted if from the circumstances of the case and from his known character as proved to the court before...which he was brought, it appears...that his intent was to commit a felony...". It was alleged that on 30th November 1948, at the time of his apprehension as a suspected person loitering with intent to commit a felony in Merrion Street, in the city of Leeds, the appellant unlawfully had in his possession a certain firearm, namely a .22 revolver. Evidence was given that at 4.25pm on the day in question two police officers were on duty in King Street, Leeds, and saw three men who they knew to be suspected persons, one of whom was the appellant, and kept them under observation. In different streets the officers watched the men stop and look into several stationary and unattended motor cars. In Merrion Street, they saw the appellant try the doors of a car, which he found locked. The men saw the police officers and ran away. The officers chased the appellant and caught him and in the pocket of his overcoat, the revolver was found. At the trial of the appellant before Stratfield, J. evidence was tendered that on 17th June 1948, the appellant was sentenced to six months' imprisonment on a charge of taking away a motor car without the consent of the owner. Stratfield, J. admitted the evidence of the previous conviction on the
ground that it was relevant to the issue whether the appellant was a suspected person at the time of his arrest. The jury convicted the appellant. Lord Goddard, C.J.\(^1\), on appeal, after stating the provisions of the Act\(^2\), said: "There is no doubt that under the words of that section, if strictly construed, the character of the defendant can be given in evidence and therefore previous convictions can be proved on the question whether he intended to commit a felony". He continued\(^3\): "I notice that Scott L.J.\(^4\) in the course of a very comprehensive and full statement said: 'There was some discussion before us on the meaning of the phrase 'suspected person' in Section 4, it being contended, as I understood, that it covered not only the case of a person who had already become on his previous record reasonably suspected by the police so as to bring him into a definite and quasi-objective category - on the analogy of the phrase 'reputed thief'; but also a case where on the very occasion of arrest the arresting constable observes the person doing something which arouses his suspicion'. The Learned Lord Justice in that case obviously had in mind the fact that it would be possible to prove that a person was a suspected person by proving his previous record and character, and as a matter of common sense that must be so. If a man is found loitering in the street and acting in a suspicious manner and it is also found that he has had a dozen previous convictions, obviously he can be regarded as a suspected person by reason of his previous conviction. Those previous convictions supply evidence of his intention to commit a felony". Lord Goddard continued: "In the particular case

\(^1\) (1949)2 K.B. 690 at 693
\(^2\) See ante.
\(^3\) (1949)2 K.B. at Pp. 694-695
\(^4\) (1937)1 K.B. 232,264
before us, the evidence of the police officers was that they saw the appellant and two other men, all of whom they knew to be suspected persons, and the reason why the police knew that the appellant was a suspected person was because he had been previously convicted. He came, therefore, within the category of a suspected person. That, however, would not of itself be enough because a man with previous convictions cannot be arrested for dishonesty merely because he is walking down a street. That, of course, would be absurd. It is necessary to show that a man with bad character, and known to the police as a person with a bad character, is acting in such a way as to justify an arrest. There was ample evidence in this case, if the jury accepted it, because the evidence of the police officer was that they had seen these men peering into motor cars and trying the doors; in otherwords, seeing if they could find a motor car with an open door, and if they did, it would be a reasonable inference that they intend to take the car and drive it away, or, if not that, to lay their hands on any portable property in the car. That is why they were arrested. A similar decision as in Fairbairn's case was given in the earlier decision of Clark v. R1, where the court held the view that in practice, the 'known character' of the accused is generally proved by his previous convictions, but such other matters as his association with criminals, or his misconduct on other occasions, may be urged in support of the conclusion that he intended to commit an arrestable offence on the occasion into which the court is inquir-

(1) (1884) 14 Q.B.D. 92 at P.100
One important thing to note about the above cases is that the police were aware of the accused as being a 'suspected person' within the meaning of S.4 of the Vagrancy Act, as explained above, at the time of his arrest. It is interesting to add that by the decision of *R v. Clarke*, a person can properly be described as a 'suspected person' within the meaning of Section 4 of the Vagrancy Act 1824, by reason of his previous convictions, although the police officers who arrested him are unaware of them doing so. This was an appeal against conviction; the appellant was convicted at Middlesex Quarter Sessions of being in possession of an imitation firearm, contrary to Section 23, Subsection 2 of the Firearm Act, 1937. The facts are as follows: at about 2am on 6th November 1949, two police officers observed the appellant in different parts of the Great West Road for some twenty minutes, and saw him loitering about various streets in circumstances which, as the jury found, satisfied them that he was loitering with intent to commit a felony. They arrested him and found an imitation firearm on him. In order to establish that he was a 'suspected person' it was proposed to prove against him at the trial two previous convictions for larceny and shop breaking; but at the time of his arrest the police officers had been unaware of the previous convictions. Objection was taken to this course on behalf of the appellant, and the question of the admissibility of proof of the previous convictions was argued before any evidence was called and in the absence of the jury. The deputy chairman ruled that it

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(1) *R v. Fairbairn* (1949) 2 K.B. 690
(2) *R v. Clarke* (1950) 1 K.B. 523
(3) See ante.
was admissible. The prosecution did not rely on any evidence by the police of antecedent acts, and the case went to the jury on the footing that the appellant was a 'suspected person' because of his previous convictions. The appellant sought to have his conviction set aside on the ground that he could not be described as a 'suspected person' since the police who gave evidence of his loitering were unaware of his previous convictions at the time of his arrest. Counsel on either side put forward some very fascinating arguments worth looking into. Counsel for the appellant spared no time in stating that the appeal turns on the meaning which the court gives to the words 'suspected person' in Section 4 of the Vagrancy Act 1824, and the question is whether a person, whose antecedent conduct does not make him a 'suspected person', can be arrested by reason of his previous convictions which were unknown to the police when they arrested him. They argued that a person comes within the category of a 'suspected person' in two ways: by his antecedent conduct, which may take place on the same day as, but must be separate and distinct from the act giving rise to the arrest; and by his previous bad character which it is submitted, must be known to the police at the time when they arrest him. Here, they argued, the prosecution did not rely on evidence of antecedent conduct, and the case in the court below proceeded solely on evidence of his previous conviction, of which the police arresting him were unaware at that time. They continued by pointing out that in R v. Fairbairn¹, the police offi-

(1) (1949)2 K.B. 690
cers making the arrest knew at the time of the accused person's previous convictions, and that the present case is distinguishable on that ground. However, they argued further, saying that, the following observations of Lord Goddard C.J. in that case\(^1\) support the appellant's contention that it is not enough for a man to have a bad character, but that it must be a bad character known to the police when they arrest him: "In the particular case before us, the evidence of the police officers was that they saw the appellant and two other men, all of whom they knew to be suspected persons, and the reason why the police knew that the appellant was a suspected person was because he had been previously convicted. He came, therefore, within the category of a suspected person. That, however, would not of itself be enough because a man with previous convictions cannot be arrested for dishonesty merely because he is walking down a street. That, of course, would be absurd. It is necessary to show that a man with a bad character, and known to the police as a person with a bad character, is acting in such a way as to justify an arrest". The appellant's counsel observed that the powers of arrest without warrant conferred by the Vagrancy Act, which imposes a penalty on police officers who fail to perform their duty of arrest, are wide, and would be dangerous if they enabled the police to arrest persons about whom they know nothing. They observed further that their power (the police power) is confined to the arrest of any person whom they honestly and reasonably suspect to have committed or to be about to commit a felony and who at the time of arrest fairly comes within the

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\(^1\) Ibid at 694
class of 'suspected persons'. The counsel cited a number of cases\(^1\) including *Ledwith v. Roberts*\(^2\) in which Greer L.J. said: "The phrase 'a suspected person'... is apt to describe and to describe only a person who, quite apart from the particular occasion and antecedently thereto has become the subject of suspicion". Also cited is the case of *Rawlings v. Smith*\(^3\), in which the defendant's previous convictions were unknown to the police until after the arrest, but unfortunately the point was never decided by the Divisional Court as neither side relied on it, and its only relevance is on the point of antecedent acts of the defendant. The counsel for the appellant concluded by saying that unless there is something which before the arrest excites the suspicion of the police officers, whether it be previous convictions or antecedent acts, a person is not a 'suspected person' and cannot lawfully be arrested or convicted. To this argument, the prosecutor (J.M.G. Griffith-Jones) put forward a formidable reply. He opened by pointing out that, if the argument advanced on the appellant's behalf were to succeed, the liability of a person to be arrested would depend on which police officer happened to see him loitering. An old lag, he argued, loitering in the West End and known to the police there could be going to the country loiter with impunity; even in the West End he could protect himself by choosing an area frequented by young and inexperienced police. He observed that although the legislature is zealous to guard the subject's freedom from arrest, it also tries to protect the community from the

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(2) (1937)1 K.B. 254
(3) (1938)1 K.B. 675
depradations of thieves; and that it cannot have been intended that a guilty man loitering with evil intent should be free if the police officer watching him does not happen to know of his previous convictions. He argued further, that as Section 15 of the Prevention of Crimes Act, 1871, allows evidence of previous convictions to prove the guilty intent, the result would be that evidence of previous convictions would be admissible for that purpose but must be discarded when deciding whether the appellant was a 'suspected person'. He cited a couple of cases as authority; about Rawlings v. Smith¹, he argued that if Lord Hewart C.J. had thought material the fact that the police did not know of the accused person's previous convictions until after they had arrested him, he would surely have remarked on it. The prosecutor also cited the passage from Lord Goddard C.J.'s judgement in R v. Fairbairn², relied on by the defendant, which he (the prosecutor) argued must be read in the light of Lord Goddard's remarks in the preceding paragraphs. He pointed out that Lord Goddard, while referring to Scott L.J.'s observations in Ledwith v. Roberts³, where the Lord Justice obviously had it in mind that it would be possible to prove that a person was a 'suspected person' by proving his previous record and character, (Lord Goddard) said⁴: "...as a matter of common sense that must be so. If a man is found loitering in the street and acting in a suspicious manner and it is also found that he has had half a dozen previous convictions, obviously he can rightly be regarded as a suspected person by reason of his previous convictions".

(1) (1938) 1 K.B. 675
(2) (1949) 2 K.B. 690
(3) (1937) 1 K.B. 232, 264
(4) (1949) 2 K.B. 690, 694
Dismissing the appeal, Humphreys J., reading the judgement of the court, gave a detailed and well reasoned decision. He started by correctly outlining "the sole point raised by this case, as, whether a person who loiters in a place specified in Section 4 of the Vagrancy Act, 1824, with intent to commit a felony can be properly described as a 'suspected person' because he has been previously convicted of theft or dishonesty, although the police officers who gave evidence of his loitering with that intent are unaware of those previous convictions". And to that, he gave a firm and unhesitating answer that: "The evidence objected to at the trial was plainly admissible upon the charge as evidence of intent to commit a felony, it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and that he may be convicted if from the circumstances of the case, and from his known character as proved, it appears that his intent was to commit a felony". After reminding us of the argument on the appellant's behalf, with respect to that point, he then continued by saying that: "The words 'suspected person' in Section 4 of the Vagrancy Act, 1824 and their meaning have been discussed in many cases. No case has apparently been reported raising this particular point, but in our opinion there is nothing in the Act or in any of the authorities to which we were referred to suggest that the previous convictions must be known to the arresting officers in order to prove that as the result of those convictions the person convicted

(1) (1950)1 K.B. 523 at 527
(2) Ibid at 528
became a "Suspected person". Any such decision would in our view tend to make the provisions of Section 4 useless, since a thief might change his venue and the places where he chose to loiter with sufficient frequency to make it unlikely that the local police officers would recognize him or know anything about him";¹ this shows a clear agreement with the prosecutor's argument with which I identify as well.

It should be mentioned that for this purpose, evidence of a conviction may be given even if the accused was conditionally discharged, though by Section 12 of the Criminal Justice Act 1948 it is not treated as a conviction for any other purpose. A certificate of conviction cannot be used but the facts may be proved by a witness who was present at the proceedings. The authority to support that is the case of R v. Harris², in which the court held that where an accused has been conditionally discharged under Section 12 of the Criminal Justice Act 1948, his conviction is not to be deemed a conviction for any purpose other than the purposes of the proceedings in which the order was made; and it therefore cannot be relied on as proof of his known character on a subsequent charge of being a suspected person loitering with intent to commit a felony. Evidence may, however, be given by a person who was present in court when the accused person was conditionally discharged that he heard him admit that he was guilty of the offence in question or had heard a jury find him guilty, and such evidence is properly admissible as proof of the known character of the person concerned.

¹ (1950)1 K.B. 523 at Pp. 528-529
² (1951)1 K.B. 107
The position in Scotland does not appear to me to be any different from England; though different statutory provisions apply, I would think that, basically the approach is similar, and I would imagine that judges on either side of the border would give very much similar decisions on the cases arising under this topic; a look at some of the Scottish cases would demostrate this better. In Moir v Mitchell\(^1\), an accused person was convicted on a charge that, being a known thief, he was found in possession of a silk scarf without being able to give a satisfactory account of his possession thereof. The only evidence adduced of his being a known thief was an extract of a single previous conviction of petty theft committed six years previously. The accused was charged under the Burgh Police (Scotland) Act, 1892, Section 409\(^2\) which enacts that: "Every known or reputed thief, or associate of known or reputed thieves, .... who is found in possession of any money or artcile without being able to give a satisfactory account of his possession thereof, may be apprehended," and on conviction may be imprisoned. In its ruling the court held that to justify the conviction of being a known thief an established character as a thief must be proved; and that proof of a single act of petty theft committed six years previously was insufficient; and the conviction was quashed. The judgement of the court was delivered by Lord Justice-Generall (Normand) who observed as follows\(^3\): "I think that to produce that single conviction is not to establish that the appellant was a known or reputed thief, or the associate of known or reputed

\(^1\) (1939) J.C. 81 \(^2\) 55 and 56 Vict. Cap. 55 \(^3\) (1939) J.C. at 81 and 82
thieves. The argument was that, having committed one theft, he was a
known thief, but I think you have to take the phrase 'known or
reputed thief, or associate of known or reputed thieves' as a whole,
and to justify a conviction as a known thief there must be something
in the nature of an established character, as a man who commits
thefts, and not merely proof of a single act of petty theft occurring
six years ago." I have no doubt in my mind that English judges would
have decided in any other way; and in fact any judge for that matter.

Another case to consider is McGregor and others v MacDonald¹; this
case was however decided on a different statute and a separate
ground. The statute involved in the case was the Criminal Justice
(Scotland) Act, 1949, Section 46, which contains provisions designed
to prevent, in summary proceedings, the disclosure of previous convi-
cctions before the Judge is satisfied that the charge in the complaint
is proved. Subsection 6, however, enacts: "Nothing herein contained
shall prevent evidence of previous convictions being led in any case
where such evidence is competent in support of a substantive charge."
In McGregor and others v MacDonald², three men were charged on a
complaint which set forth (1) a charge of theft, and (2) a charge
that "being known thieves, having each been convicted as shown in the
list annexed," they had been found in a Glasgow street with intent to
commit theft by pocket-picking, contrary to a local Act. No
preliminary objection to the complaint was stated on their behalf,
and, after trial, they were convicted on the first charge and acquit-
ted on the second. Thereafter they appealed by bill of suspension

¹ (1952) J.C. 4  ² (1952) J.C. 4
against their conviction on the ground that, because of the annexation to the complaint of lists of their previous convictions, the whole proceedings which followed on the complaint were 'funditus null'. The court held that, under The Act of 1949, two charges should not have been included in the same complaint; that the procedure had prejudiced the accused in their defence on the merits of the first charge by disclosing their previous convictions; and that a miscarriage of justice had resulted; and as such the convictions quashed. The judgement of the court was given by Lord Justice-General Cooper. He said: "This bill of suspension relates to a complaint against three men who were charged with (first) theft, and (second) contravention of a local Act which makes it an offence for known thieves to be found in certain places with intent to commit the crime of theft by pocket-picking. In support of the second charge the complaint libelled several previous convictions against each of the accused. As it happened, the proceedings took an unfortunate turn, for the accused was acquitted on the second charge, to which the previous convictions were relevant and competent, and were convicted on the first charge, to which the previous convictions were neither relevant nor competent as part of the substantive charge."

He continued by stating that: "The purpose of Section 46 of the Criminal Justice (Scotland) Act, 1949, is to exclude risk of prejudice to the accused through the disclosure of the fact, if it be a fact, that he has been previously convicted, until the offence char-

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1) Criminal Justice (Scotland) Act (12, 13 and 14 Geo. VI, Cap 94) Section 46(2) 2) (1952) J.C. 4 at Pp. 7-8
ged has first been proved. An exception to this new principle is admitted by Subsection 6, which saves the case where evidence of previous convictions is competent in support of the substantive charge, and a charge such as the second charge before us is a typical case for that exception. Now it seems to me plain that the purpose of the new Act, which in this respect alters our previous practice, would be needlessly nullified if we were to countenance a practice by which accused persons would be charged in the same complaint with an offence falling under the exception and with another offence or offences not covered by the exception, since, before applying his mind to the charges not covered by the exception, the Judge would have laid before him the details of the previous convictions to be relied upon in support of remaining charge. In my view this should not be done and must not be done. No difficulty from an administrative standpoint is to be anticipated by laying it down that, in every such case as the present, the new Act can only be complied with if other charges are not coupled up in the same complaint with a charge to which subsection 6 of the section applies. The other judges in the case concurred and remarked that it is satisfactory that for cases similar to the present the appropriate method of compliance with Section 46 of the Criminal Justice (Scotland) Act of 1949, is now formulated by the decision.

In Nigeria, under Section 250 (i) of the Nigeria Criminal Code, if a person is charged with the offence of being a rogue and vagabond, he can only be convicted of the offence on proof that he

1) (1952) J.C. at 8  2) Cap. 42, Laws of the Federation of Nigeria
has been previously convicted of being an idle and disorderly person under Section 249 of the Nigeria Criminal Code. Thus, such a previous conviction under Section 249 of the Nigeria Criminal Code is an essential element of the ingredients of an offence of being a rogue and vagabond under Section 250 (1) and must be strictly proved in order to secure a conviction for an offence under that Section. Also, under Section 407 of the Northern Region of Nigeria Penal Code, whoever is convicted as being a vagabond shall be punished with imprisonment which may be extended to one year or with a fine or with both. Section 405 (2) (a) of the same Penal Code, defines "vagabond" as "any person who, after being convicted as an idle person, commits any of the offences which would render him liable to be convicted as such again". Thus, once a person has been convicted of being an idle person, if he commits another act which can make him liable for an offence of being an idle person, he will be charged instead with the offence of being a vagabond; and to secure a conviction for this latter offence, proof of the previous conviction for being an idle person under Section 405 (1) is a necessary ingredient. Similarly, under Section 408 of the Northern Nigeria Penal Code, whoever is convicted as being an incorrigible vagabond shall be punished with imprisonment which may extend to two years or with a fine or with both. "Incorrigible vagabond" is defined by Section 405 (3) of the Penal Code as "any person who, after being convicted as a vagabond, commits any of the offences which would

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1) Northern Region of Nigeria, No 18 of 1959
render him liable to be convicted as such again". Thus, here again, once a person has been convicted of an offence of being a vagabond, if he commits an act which could render him liable to be charged again with the same offence of being a vagabond, he will be charged instead with the same offence of being an incorrigible vagabond; and to succeed in this new charge, the prosecution must prove a previous conviction for an offence of being a vagabond under Section 405 (2) of the Penal Code against the accused.

There are similar provisions in India, making the position largely the same, though it appears to me that the position in India is more complex. For instance for the purpose of Section 117 of the Criminal Procedure Code of India, the fact that the person is a habitual offender may be proved by evidence of general reputation and otherwise. Hearsay amounting to evidence of general repute is admissible for the purpose of the proceedings under Chapter 8 of the Criminal Procedure Code of India. Thus as the court held in R v Kumera, a witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him"; this is admissible.

The case of R v Kurwa, decided that a person may be allowed to depose that the accused has a general reputation as a habitual thief or robber, but he should not be allowed to state that the accused is a "bad character" or has the reputation of being a "bad character". But when the statement that he is a "bad character" is immediately followed by saying that he habitually commits theft, it becomes

1) See Section 117 (3), Criminal Procedure Code of India, (1898)
2) R v Raoji Ful, 6 Bom. L.R. 34 3) A 1929, A.650: 51 A.275
4) A. 1928, A. 357
admissible as evidence of general repute. A witness can say that he himself suspects an accused person of having committed a certain offence, although evidence cannot be given that the accused has been suspected by other persons.¹

In Sudan, under Section 82 of the Code of Criminal Procedure, security for good behaviour may be demanded from a habitual offender when the court has received information that this person: (a) Habitually commits an offence relating to kidnapping, abduction or forced labour; or (b) is by habit a robber, house breaker or thief; or (c) is often a receiver of stolen property knowing the same to have been stolen or (d) frequently protects or harbours thieves, or aids in the concealment or disposal of stolen property or (e) habitually commits mischief, extortion, or cheating or counterfeiting of coin, notes or revenue stamps, or attempts to do so; or (f) habitually commits or attempts to commit or abets the commission of offences involving a breach of the peace. Such a provision may be considered antiquated but the fact of a person being a habitual offender within the meaning of Section 82 may be proved through evidence of his general repute.² Furthermore in Sudan, the previous convictions of an accused are admissible to prove that he is a vagabond within Section 446 of the Sudan Penal Code. They are relevant if they show that he has previously been convicted as an "idle person", and has committed any of the offences which would render him liable to be convicted as such again;³ or if they establish that as a "suspected person or reputed

¹) R v Kumera A. 1929, A. 650; 51 A. 275  2) S. 85 (3) Code of Criminal Procedure (Sudan)  3) S. 446 (2) (a), Sudan Penal Code; see Sudan Govt. v Mubarak Fadi El Mola (1949) HC NP CR APP 24, 29 unrep.
thief" he was found frequenting or loitering about with intent to commit an offence against the human body, or an offence against property. ¹

There are still some other statutes ² which allow the prosecution to prove at first instance the bad character of the accused, in the circumstances to which they apply, without the accused having necessarily adduced evidence of his good character before. Section 1 (1) of the Official Secrets Act 1911 (as amended by the Official Secrets Act 1920), punishes various forms of spying if the accused's purpose was prejudicial to the state. Section 1 (2) ⁴ provides that it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the state and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the state. The wording of this subsection, it has been observed, shows even more clearly than does that of Section 15 of the Prevention of Crimes Act 1871, that evidence of the accused's misconduct may be given although it is only relevant because it shows that he is the kind of man whose purpose in doing certain acts might be of the type proscribed by the statute.

In other instances, limited evidence of character is expressly made admissible by statute, not as being itself in issue, but as being directly relevant to one element of the offence, that of the state of

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¹) S. 446 (2) (c) Sudan Penal Code  ²) See S.14 Perjury Act 1911; see also S. 116 Larceny Act, 1861  ³) See S. 3 (1) of the Official Secrets Act 1951 (New Zealand)  ⁴) See S.7 Ibid
mind of the defendant. Usually in such cases the prosecution is required to prove that the accused had a certain knowledge, such as on a charge of receiving, a knowledge that goods in his possession were stolen. Section 27 (3) of the Theft Act 1968\(^1\), reads as follows: "where a person is being proceeded against for handling stolen goods (but not for any offence other than handling stolen goods), then at any stage of the proceedings, if evidence has been given of his having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in or arranging in or arranging to undertake or assist in, their retention, removal, disposal or realisation, the following evidence shall be admissible for the purpose of proving that he knew or believed the goods to be stolen goods:

(a) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realisation of, stolen goods from any theft taking place not earlier than twelve months before the offence charged; and

(b) (Provided that seven days notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of theft or handling stolen goods."

The subsection re-enacts with some significant differences\(^2\), section 43 (1) of the Larceny Act 1916, which, in its turn, re-enacted Section 19 of the Prevention of Crimes Act 1871. Section 19 abro-

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gated the effect of the decision in *R v Oddy*\(^1\). In that case, the third count of the indictment charged the accused with knowingly receiving stolen cloth which was found in his possession shortly after the theft, and the trial judge admitted evidence of the fact that other cloth which had been stolen three months previously was also found in the accused’s house. The court for Crown Cases Reserved held that he ought not to have done so, as the evidence merely went to show that the accused was in the habit of receiving stolen cloth. It would have been different if there had been some further connecting link between the two items of evidence. For example, if the cloth had been stolen by the same person the fact of the discovery of both pieces in the accused’s house would have been relevant as suggesting the existence of some arrangement for its disposal between the thief and the receiver\(^2\). A pertinent case to consider in this respect is the Scottish case of *Watson v H. M. Advocate*\(^3\), which was squarely decided on the Prevention of Crimes Act, 1871\(^4\), Section 19.

Richard Watson, was tried in the Sheriff Court, Glasgow, on a libel at the instance of the Lord Advocate charging the accused with reset of theft; the procurator-fiscal tendered evidence of a previous conviction of reset against the accused, by virtue of the provisions of Section 19 of the Prevention of Crimes Act, 1871. Counsel for the accused objected on the ground "first that no evidence had been given that the stolen property had been found in the pursuer’s possession at the time when proceedings were taken against him; second, alternatively, the property had never been proved to be at any time

\(^{1}\) (1851) 2 Den. 264; See Cross on Evidence 5th edition at p.400


\(^{3}\) 34 and 35 Vict. Cap 112
actually in his possession, but only constructively. The objection was repelled first, because the possession required under the Act did not need to continue till the date of proceedings; second, that constructive must be held as equivalent for the purposes of the Act to actual possession" - (as stated in the Sheriff-substitute's notes.) The accused was found guilty, and sentenced to four month's imprisonment; he brought a bill of suspension and liberation against the Lord Advocate. Giving his judgement, Lord Justice-Clerk said:

"This appears to me to be a very clear case. I take the second branch of Section 19 of the Prevention of Crimes Act to mean this, that if the Judge who tries the case is satisfied that the prosecutor has adduced evidence to go to jury to show that the stolen property has been in the possession of the accused at any time after it has been stolen, then it is competent for the Judge to admit evidence of previous convictions for the purpose of proving guilty knowledge. That is what happened here, and accordingly I think that the Sheriff-substitute acted quite competently, and that the suspension ought to be refused." Lord Rutherford Clark concurred, and said: "Under the statute the previous conviction may be given in evidence in order to prove guilty knowledge, and it may be used for that purpose at any stage of the proceedings, provided only that evidence has been given that the stolen property has been found in the possession of the accused, or, in other words, that evidence has been given to show that he had been in possession of the stolen property. It is immate-
trial at what time the stolen property shall have been traced to his possession, if his possession, when coupled with guilty knowledge, is sufficient to support the charge of reset, and the possession may be either actual or constructive. As the conviction must be tendered in course of the trial, it is for the Judge to say whether the conditions of the statute have been satisfied. He has to decide whether 'evidence has been given' of possession, and if, in his possession, such evidence has been given, he is bound to admit the conviction."

In New South Wales Crimes Act 1900, Section 420, and South Australia Criminal Law Consolidation Act 1935-75, Section 200, it is permissible for the prosecution to give in proof of knowledge evidence of certain prior convictions within a given period preceeding the date of the alleged offence, and in New South Wales it may lead in evidence proof of the finding of certain other stolen property on the premises of the accused. These provisions are similar to the English Prevention of Crimes Act 1871, Section 19, which abrogated the effect of the decision in R v Oddy, already discussed.

And in Canada, Section 312, and 314 (1) (b) of the Criminal Code may, depending on the factual circumstances, render admissible, evidence in the nature of similar facts, in addition to any other means of proof of knowledge, that the property being the subject-matter of the charge of unlawful possession was obtained by crime. For instance, if the accused was both thief and subsequent possessor, evidence of the act of theft would be probative as to the knowledge

of the accused that the property in his possession was obtained illegally with respect to the present charge of possession of property obtained by crime. However, these sections of the Criminal Code, permitting such admissibility, are probably redundant because such evidence would in all likelihood be admissible on common law principles.

However, Section 317 and 318, which refer to Sections 312 and 314 (1) (b), will, in some circumstances, render similar fact evidence admissible, where on common law principles the evidence is of less than trifling probative value. Sections 317 and 318 of the Code provide as follows: S. 317 - "Where an accused is charged with an offence under S.312 or paragraph 314 (1) (b), evidence is admissible at any stage of the proceedings to show that property other than the property that is the subject-matter of the proceedings (a) was found in the possession of the accused, and
(b) was stolen within twelve months before the proceedings were commenced, and that evidence may be considered for the purpose of proving that the accused knew that the property forming the subject-matter of the proceedings was stolen property.

(2) Subsection (1) does not apply unless
(a) at least three days notice in writing is given to the accused that in the proceedings it is intended to prove that property other than the property that is the subject-matter of the proceedings was found in his possession, and
(b) the notice sets out the nature or description of the property and
describes the person from whom it is alleged to have been stolen."

S.318 (1) - "Where an accused is charged with an offence under Section 312 or paragraph 314 (1) (b) and evidence is adduced that the subject-matter of the proceedings was found in his possession, evidence that the accused was, within five years before the proceedings were commenced, convicted of an offence involving theft or an offence under Section 312 is admissible at any stage of the proceedings and may be taken into consideration for the purpose of proving that the accused knew that the property that forms the subject-matter of the proceedings was unlawfully obtained.

(2) Subsection (1) does not apply unless at least three days notice in writing is given to the accused that in the proceedings it is intended to prove the previous conviction".

At common law if an accused is found in possession of property other than the property that is the subject-matter of the proceedings, but both are from a common source, proof of knowledge of the origin of the former would be probative as to his state of knowledge with respect to the latter. To this, there is nothing untoward with respect to the ambit of the sections. However, if the property other than the property that is the subject-matter of the proceedings had no connection with the latter property, in origin, source etc., the evidence would clearly brand the accused as a person of bad character, and no more (i.e., he has a dispositional capacity to possess stolen goods, and indeed, has done so). It would establish no more than dispositional capacity. However according to the terms of
these sections, such evidence would be admissible. Furthermore, S. 318 is so broad in scope that unrelated prior acts of the theft or possession as long ago as five years would be admissible for the purpose of proving that the accused knew that the property that formed the subject-matter of the proceedings was unlawfully obtained.

The Indian Evidence Act S.14, illustration (a) says: A is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the same time, he was in possession of any other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession, to be stolen. Evidence may therefore be given of possession anytime, though the property belonged to persons other than the complainant and the court must judge on its merits as a matter of fact. In R v Pabhudas, West J., said: "The possession of an accused of several other articles deposed to have been stolen, would, no doubt, have some probative force on the issue whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which be denied altogether, yet in the first illustration to S.14, it is set forth as a preliminary to the admission of testimony as to the other articles that 'it is proved that he was in possession of (the) particular stolen articles'. The receipt and possession are not allowed to be proved by any other apparently similar instances."

1) See Indian Evidence Act, S.21, 111 (d) & S.114, 111 (a); R v Cassey 3 W.R.G. 10; R v Narain 5 W.R.G. 3; R v Mottee 5 W.R. Cr. 66; R v Samiruddin 18 W.R.Cr.25 2) 11 B.H.C.R. 90
The position in Nigeria is covered by Section 46 of the Nigeria Evidence Act which provides as follows: "Whenever any person is being proceeded against for receiving any property knowing it to have been stolen, or for having in his possession stolen property for the purpose of proving guilty knowledge, there may be given in evidence at any stage of the proceedings - (a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession; (b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last mentioned fact may not be proved unless: (i) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given, and, (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession."

It is merely stating the obvious to say that this is more or less the same as S.27 (3) of the 1968, Theft Act, short only of the fact that they are couched in different words. There are some observations or comments to make about the provisions of S.46 of the Nigeria Evidence Act, and quite applicable to S.27 (3) of the Theft Act of 1968. The first observation to make is that the "right" to look back to the previous bad character of an accused person in determining his guilt in the present charge is a supplementary right for use when there is no other fact or means of proving the guilty knowledge of the accused in the particular case. If, for example,

1) See Criminal Code, S. 427 (Cap. 42, Laws of the Federation of Nigeria); and also Penal Code, S.317 (Northern Region of Nigeria No 18 of 1959)
there is sufficient evidence from which the trial court can infer the guilty knowledge of the accused without recourse to the exercise of his right of "alternative proof", the prosecution is entitled to adduce such evidence and ignore the right conferred by S.46 of the Nigeria Evidence Act. The second observation to make is that in the case of the provisions of subsection (a) of S.46 of the Act, the previous bad character of the accused allowed in evidence in proof of his guilty knowledge in the present charge is that "other property" stolen within the period of twelve months preceeding the date of the offence charged was found or had been in his possession. For this type of evidence to be admissible in evidence under this subsection, it is submitted that the accused or any other person need not have been convicted of theft of such "other property". The third and final observation to make is that in the case of the provisions of subsection (b) of S.46 of the Nigeria Evidence Act, the bad character of the accused in the form of a previous conviction against him, intended to be given, must be confined to a conviction within the five years preceeding the date of the offence charged as stipulated in the subsection. It must not be extended beyond that period as was the case in Odutade v Police, where the prosecution tendered evidence of previous convictions over ten years old, and the court held that such evidence was not admissible under S.46 (b) of the Evidence Act. The conviction was therefore on that account, quashed as the appeal court found that the appellant had not had a fair trial.

1) (1952) 20 N.L.R. 81
It cannot be over emphasised, that, proof of guilty knowledge is a notoriously difficult matter, in a receiving case, and the statutory provisions may be regarded as supplementary to the case-law concerning the provisional presumption arising from the accused's possession of the property mentioned in the indictment shortly after the theft. It was held under the Act of 1916 that the court has a discretion to exclude evidence which was technically admissible under the subsection, and this would no doubt be held to be the case under the Act of 1968. The extent of the evidence admitted must be carefully confined to that permitted by S.27 (3) of the 1968, Theft Act, and its equivalent in other jurisdictions. And where the accused denies possession on some counts of an indictment particular care must be taken to make it plain that his previous convictions are only admissible on counts on which guilty knowledge is in issue.

In New Zealand, the provisions of S. 27 (3) of the Theft Act of 1968, are contained in S.258 (2) of the Crimes Act 1961. So far as S. 258 (2) is concerned, the prosecution may prove the circumstances in which the other stolen property was found, together with the accused's explanatory statements. The finding may be proved before evidence is given that the property was stolen, but, if this evidence is not adduced later, the whole matter must be withdrawn from the jury. As we know even if the statutory provision is not complied with, the fact that other stolen goods were received by the accused may be admissible at common law, if for example, they were sold to him by the same thief. Section 258 (3) provides that S.258(2)

is not to apply when the accused is simultaneously being tried on a charge of any offence other than receiving\(^1\). The effect of this provision is that the evidence of possession of property criminally obtained or of accused's previous convictions for receiving must be excluded whenever an accused is charged with both theft and receiving in respect of the same goods.

There are a number of other provisions that should be mentioned in the discussion of statutory provisions that may render evidence of similar facts evidence admissible in specific circumstances. A good example is the provision of S.21 of the Firearms Act, 1968, which makes it an offence for a person who has been sentenced to imprisonment for a term of three years or more to have a firearm or ammunition in his possession at any time. The jury must be sure, before they can convict, of each element of the offence; one of the elements is that the defendant is a person who has, on a previous occasion, been sentenced to such a term of imprisonment. No other aspect of his character is relevant to guilt, and the jury must be directed to ignore the implications of the evidence for the defendant's character generally, in considering that issue.

And on a somewhat lower level, the offence of driving a motor vehicle on a road while disqualified for holding or obtaining a driving licence, contrary to S.99 of the Road Traffic Act, 1972, involves proof that the defendant was, on the material date, a person so disqualified, the fact of disqualification alone is in issue.

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1) Cf R v O'Grady (1960) NZLR 585 which was decided before this subsection was enacted. For the position in England, see R v Davis (1953) 1 Q.B. 489; (1953) 1 All E.R. 541; and R v Jackson (1953) 37 Cr. App. Rep. 43
Also, the offence of loitering or soliciting for the purpose of prostitution contrary to S. 1 of the Street Offence Act 1959 can be committed by a "common prostitute", a fact which may be proved by previous convictions or other evidence of the defendant's way of life generally, and is frequently proved by the assertion of the arresting officer in evidence, unless expressly disputed.

It is also pertinent to mention the provisions of the Commonwealth Crimes Act 1914 S. 24 AB¹, which creates the indictable offence of sabotage which is defined as the "destruction defence of the Commonwealth" of certain specified articles. Subsection (3) of the section provides that "on a prosecution under this section it is not necessary to show that the accused person was guilty of a particular act tending to show a purpose intended to be prejudicial to the safety or defence of the Commonwealth and, notwithstanding that such an act is not proved against him, he may be convicted if from the circumstances of the case, from his conduct or from his known character as proved, it appears that his purpose was a purpose intended to be prejudicial to the safety or defence of the Commonwealth". The sub-section seems to have been taken from the English Official Secrets Act 1911-1920 S.1 (2). The wording of subsection (3) to Section 24 AB of the Commonwealth Crimes Act 1914, above, shows that evidence of the accused's misconduct may be given although it is only relevant because it shows that he is the kind of man whose purpose in doing certain acts might be of the type prescribed by the statute.

1) An Australian statute
(VII) THE PREVIOUS CONVICTIONS OF THE PARTIES AS EVIDENCE OF SIMILAR FACTS

As we know, evidence of similar facts, usually consists of proof of similar conduct by the accused on other occasions, which tend to establish his guilt of the crime charged against him. Such conduct may be the subject of other charges joined in the same indictment as in R v Sims\(^1\) or it may not be the subject of any charge and be introduced as relevant evidence on its own merits. Very occasionally, it may have been the subject of a previous charge and conviction, but the cases in which similar fact evidence of this kind has been introduced are so few and of such a nature that the attitude of the courts on the matter remains somewhat doubtful or unsettled particularly in criminal cases. Generally speaking, previous convictions may not be proved against the accused as facts relevant to the issue because they amount to nothing more than evidence concerning the facts on which they were founded.

(a) CIVIL CASES

In Civil cases it is always allowed to prove a party's conviction on a particular occasion provided it is among the facts in issue; an example being when a libel in which the conviction was alleged is justified. The only situation in which convictions for misconduct, on other occasions than that which the court is inquiring, are regularly admitted, is that which arises when a party is cross-examined as to his credit. The fact that he has been convicted may be elicited in

\(^1\) (1946) I K.B. 532
cross-examination or if denied, proved under Section 6 of the Criminal Procedure Act, 1865. However in New South Wales - Australia - there was a disagreement in the case of Bugg v Day, where Dixon J., was of the opinion that convictions for offences touching credibility only may be proved, but Williams J took the contrary view; it is my considered opinion that the view expressed by Dixon J may be more acceptable especially in Scottish courts.

(b) CRIMINAL CASES

It is pertinent to point out that in addition to the possibility of eliciting or proving a conviction in consequence of cross-examination under the legislation empowering an accused person to give evidence - (Criminal Evidence Act, 1898) - statutory provisions such as those already considered - (see S.15 of the Prevention of Crimes Act 1871; S.1(2) of the Official Secrets Act 1911; and section 27 (3) of the Theft Act 1968) - allow the proof of previous convictions in the circumstances to which they apply.

And since these circumstances have already been discussed, it will be unnecessary going into them any further. It should however be pointed out that in Western Australia, the Evidence Act 1906 - 1976, S.23 enables the cross-examiner to prove convictions for indictable offences only. The court has a discretion to exclude evidence of previous convictions even though it is technically admissible and the discretion will be exercised where guilty knowledge is not a live issue.

1) See S.19 of the Statutes Amendment Act 1939 (New Zealand) 2) (1949) 79 C.L.R. 442 3) (1949) 79 C.L.R. 442 at 465 4) Ibid at 475 5) A previous conviction may be proved to show that the accused was a "suspected person" - R v Fairbairn (1949) 2 K.B. 690 - although the police were unaware of it - R v Clarke (1950) I K.B. 523; see also NSW: Crimes Act 1900 S.412. Proof may be by certificate pursuant to Evidence Act 1898 S.23 or otherwise Crimes Act 1900 S.445; R v Gibson (1929) 30 SR (NSW) 282. Vic: Evidence Act 1958 S.33; Qld: Evidence Act 1977 S.16 Tas: Evid Act 1910 S.110 6) R v List (1965) 3 All E.R. 710; R v Herron (1966) 2 All E.R. 26
It is probably true to say that general opinion in the past has been that it would not be permissible to put in evidence of the previous convictions of an accused person to prove a charge except under the statutory authority. Similar fact evidence tending to show that an accused has committed other offences than those with which he is charged may be, and frequently is, admitted, but evidence that he has been convicted of such other offences would normally be regarded as inadmissible.

Section 1(f) of the Criminal Evidence provides that: "A person charged and called as a witness .... shall not be asked any questions tending to show that he has committed or been convicted of ... any offence other than that wherewith he is charged .... unless - (1) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is charged;"

It suffices for present purposes to say that this provision excepts the existence of circumstances in which the previous convictions of an accused person may be admissible evidence to prove his guilt, although the Act is silent about what those circumstances may be. Are there any, apart from those provided for by statute? It is worthwhile to see whether a clear answer can be derived from an examination of the relevant cases. The case of R v Tomasso\(^1\) seems to be the first in which the question of the time of previous convictions was raised. In that case, the appellant had been convicted at the Central Criminal Court of possessing counterfeit coins with

1) (1934) 25 Cr. App. R. 14
intent to utter them, under S.11 of the Coinage Act, 1861. The indictment contained another count charging him with committing the offence after a previous conviction for the same offence, but this had not been proceeded with. The appellant had given evidence on his own behalf, and in his examination-in-chief admitted possession of the coins knowing them to be counterfeit, but said he had taken them deliberately in order to obtain evidence against another person and for the purpose of informing the police. He did not put his character in issue. In cross-examination, it was put to him that in 1926 he had pleaded guilty to possessing counterfeit coin, and he admitted the conviction. On appeal, it was argued on his behalf (a) that there could be no nexus or relationship between a previous conviction in 1926 and a similar charge in 1934, and (b) that in any event there was a distinction between former conduct tending to show guilty intent and a previous conviction. For the Crown it was contended that the evidence of the previous conviction went to show a guilty design or to rebut a defence of mistake, and that as the evidence of a previous incident of possessing counterfeit coin would have been admissible, the question about a previous conviction for a similar offence was admissible under S.1 (f) (i) of the Criminal Evidence Act, 1898. The Court of Criminal Appeal allowed the appeal and quashed the conviction. The judgement, however, was a very short one, and the court gave no clear indication whether it was the fact that the conviction for the previous offence took place eight years
before, or the fact that the conviction had been mentioned at all which led to the appeal being allowed. Lord Hewart C. J., dealt with the point at issue in these words: "When he (the appellant) went into the witness-box to give evidence on his own behalf he was cross-examined about a previous conviction which took place eight years ago .... In our opinion that question was clearly improper and vitiates the conviction which followed."

Less than a year later came the case of R v Porter. The appellant had been convicted of obtaining money by false pretences, arising out of a business carried on by him. The false pretence alleged that he had falsely represented his business to be a bona fide association honestly carried on, and in a position to offer advantages in return for subscription of members. At the trial, the appellant did not dispute that the persons alleged to have been defrauded had been induced to part with their money by reason of his representations, and the essence of his defence was that he had no intent to defraud. In 1930 he had carried on a similar business and made similar representations as a result of which he had been tried and convicted in 1931 for obtaining money by false pretences. In cross-examination he was asked a number of questions about the previous similar business carried on by him, although no reference was made by prosecuting counsel to any previous charge or conviction. In the course of the questions, however, the appellant himself referred to his previous conviction.

The appeal was based solely on the ground that questions to the

appellant about the previous business were inadmissible, particular reliance being placed on the period of time (actually about two-and-a-half-years) between the end of the appellant's first venture and the beginning of the second. Counsel for the appellant also contended that although the previous conviction was not specifically put to the appellant, the questions tended to show that he had committed a previous offence and thereby offended against S.1 (f) of the Criminal Evidence Act. The Court of Criminal Appeal held that the question and evidence about the previous business were admissible and dismissed the appeal. Avory J., who delivered the judgement of the court, pointed out that part of the period between the two businesses had been spent by the appellant in prison, and that the remarkable similarity in method adopted by the appellant in each case was sufficient justification for admissibility on the issue of intent to defraud. In referring to the mention of the previous conviction, he said: "Unfortunately the appellant, not content with answering the questions put to him, himself introduced before the jury the fact that he had been convicted of obtaining money by false pretences in 1931. The prosecution are not responsible for that."

Porter's case is, therefore, clear authority for the principle that the facts of a previous charge which has resulted in a conviction may be introduced as similar fact evidence, given the necessary nexus between the two sets of circumstances. However it is arguable that it is a matter for conjecture whether the decision would have been the same if the prosecution had been responsible for introducing

1) In India, on a charge of keeping a common gambling house under the provisions of the Bombay Act (4 of 1887) previous convictions under the same Act was held admissible to prove the intention and knowledge which the offence charged involves - R v Alloomiya, 28 B. 129: 5 Bom L.R. 805
evidence of the previous conviction of the accused.

The question arose again in a different form in R v Marsh\(^1\). In this case the appellant had been tried at assizes before Lord Goddard C. J., on a charge of carnal knowledge of a child of eight. The child was the daughter of the appellant's wife by another man. At the trial, for the purpose of corroborating her evidence, the prosecution was permitted to call evidence that eighteen months before, at a time when the appellant, the child and her mother had been living in the same house, the appellant had confessed to, pleaded to, and been sentenced for an indecent assault on the same child. The appellant's defence was an alibi.

It appears from the judgement from the Court of Criminal Appeal that on the appeal counsel for the appellant at first urged that the evidence about the previous conviction was inadmissible, but later conceded that on the authorities it was admissible, and relied simply on the contention that it had such small probative value that it should have been excluded by the trial judge. The authorities relied upon in argument by the prosecution were cases none of which involved the proof of previous conviction against the accused\(^2\), but there is nothing to show that this point was expressly taken by counsel for the appellant.

Giving the judgement of the court dismissing the appeal, Oliver J., said that there was no question that the evidence was admissible; the real principle was laid down in R v Ball\(^3\), where evidence of previous

1) (1949) 33 Cr. App. R. 185  2) R v Ball (1911) A.C. 47; R v Shellaker (1914) 1 K.B. 414, and R v Hewitt (1925) 19 Cr. App. R. 64  3) (1911) A.C. 47
association between a brother and sister was held admissible as tending to prove a guilty passion between them on a charge of incest. In the present case the Lord Chief Justice had admitted the evidence for the purpose of showing a guilty lust. The surprising thing about this case - R v Marsh - is the ease with which the court reached the conclusion that the evidence about the previous conviction was admissible. The only essential differences from R v Tomasso, in which a question about a previous conviction of the accused was rejected as "clearly inadmissible" was the interval of time, in Tomasso eight years, in Marsh eighteen months, between the previous conviction and the offence for which the accused was tried. The two cases would be easier to reconcile if it was clear that the long interval of time was the reason for the decision in Tomasso. As already indicated, it is by no means clear that this was so. Again, although in R v Porter the Court of Criminal Appeal felt no difficulty about admitting questions about the facts of a previous charge resulting in a conviction, they regarded it as "unfortunate" that the conviction itself had been mentioned.

Another important question for discussion in relation to the matter of previous conviction as evidence of similar facts, is the issue of the rebuttal of a defence that an action was involuntary. The pertinent case for consideration is R v Harrison-Owen. The facts were that the prisoner had been found in a dwelling-house early one morning. At his trial for burglary he pleaded by way of defence that he had no recollection of entering the house and must have done so in

a state of automatism, and he gave evidence to this effect. The trial Judge, Stable J., thereupon directed counsel for the prosecution to put to the prisoner a number of previous convictions for larceny and house-breaking after ruling that the essence of the prisoner's defence was that his presence in the house was accidental and not intentional. The Court of Criminal Appeal allowed the appeal in this case, and quashed the conviction. Delivering judgement, Lord Goddard C. J., said the prisoner's real defence was that his presence in the house was involuntary and there was no authority for the admissibility of previous convictions to rebut such a defence.

The actual ratio decidendi of the decision appears to be that the previous convictions of the accused for crimes similar to that for which he is being tried are not admissible to rebut a defence that what he did was involuntary and unintentional, as distinct from a defence that it was accidental. Lord Goddard was at some pains to make this distinction in relation to the facts of the case, and it seems a reasonable assumption that had the defence been one of accident the court would have been prepared to hold that the evidence as to the convictions was relevant and admissible. No direct reference was made to the propriety of proving previous convictions as such, although, Lord Goddard may have had this in mind when he referred to the "remarkable state of affairs" which would arise if the trial judge's ruling was held to be correct.

The conclusion that may be drawn from the cases to which reference
has been made is that the courts have declined to lay down any
general principles on the admissibility of previous convictions as
similar fact evidence. It might, perhaps, be truer to say that they
have not regarded it as involving any special issue of principle at all,
and have preferred to decide each case entirely on its merits. On
this basis, therefore, it would seem that if previous acts or conduct
of an accused person are relevant to a charge against him, it is
immaterial that he may have been previously charged and convicted in
these cases. The cases *R v Tomasso*¹, and *R v Harrison-Owen*², in
which evidence of previous convictions was held to be inadmissible
are capable of being explained not on the ground of objection that in
each case the evidence was not relevant to the issue. Normally, of
course, it will be the facts of the previous charge, what the accused
was proved to have done on that occasion that will be relevant,
rather than the previous conviction. If it is possible to adduce
evidence of the facts without bringing in the previous conviction as
the prosecution did in *R v Porter*³, so much the better. But where,
as in *R v Marsh*⁴, the evidence is of previous charge to which the
accused pleaded guilty this can hardly be done.

(C) THE REHABILITATION OF OFFENDERS ACT, 1974

When the admissibility of previous convictions or questions about
them are under consideration, the provisions of the Rehabilitation of
Offenders Act, 1974 must be borne in mind. Section 4 (1) of the
Rehabilitation of Offenders Act 1974, provides that in certain cases,

convictions recorded against an offender shall become "spent", and that the offender shall be treated in law as if he had not committed the offence. Section 7 (2) of the Act provides that nothing in S. 4 (1) "shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto - (f) in any proceedings in which he is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consent to determination of the issues or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of Section 4 (1)." It needs to be said that it is not clear how far a party to an action is protected by the provision. For example, may a wife pursuing an action of divorce for cruelty rely on a conviction of her husband for assaulting her which is dated prior to the applicable rehabilitation period? If he had been given a fine or other non-custodial sentence, the period would be five years. It seems unlikely that the defender would be held to "consent to the determination of the issue" simply by defending the action, or by failing to defend it. It may be that the pursuer would have to persuade the court to exercise the discretion to admit evidence of the conviction which is conferred on the court by S.7 (3): "If at any stage in any proceedings before a judicial authority in Great Britain (not being a criminal proceedings, service disciplinary proceedings, proceedings involving minors or pupils, or defamation actions) the authority is satisfied, in the
light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of Section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions."

It has been said that it is difficult to predict how S.7 (3) is likely to be operated in practice. It is thought that a difficulty similar to that which could arise in the cruelty case earlier figured, would face a pursuer in an action of damages for personal injuries caused by careless driving, where the defender had been convicted of careless driving and fined: it is not unlikely that such a difficulty could arise because the applicable rehabilitation period in such a case is five years, or two and a half years if the defender was under seventeen years of age at the date of the conviction. Thus it seems that the victim of a 16 year old convicted careless motor-cyclist would be well advised to bring his action to trial within the latter period.

It is generally agreed that the simple interpretation of the effect of S. 4 (1) as qualified by S.7 (2) and S.7 (3) is that, once a conviction is "spent" , no evidence is admissible, no question may be

1) See Reynolds v Phoenix Assurance Co , The Times, 16 February 1978
2) Sherrif Macphail - Research Papaer On the Law of Evidence of Scotland - §11:21
put, in civil proceedings to show that the "rehabilitated person" has been charged with, or has committed or been convicted of the offence unless permitted by the judge on the ground that justice cannot be done. The Act does not apply in various situations of which one is the use of previous convictions in the course of criminal proceedings. Where, therefore, it is permissible to introduce evidence of previous convictions, the fact that a conviction is spent does not prevent its being referred to, as a matter of law. However, unless clearly cogent as similar-fact evidence or of particular relevance to credit, convictions old enough to be spent will be unlikely to carry much weight, and may often create in the mind of the jury a sense of unfairness to the defendant. Quite apart from this, it is obviously desirable that the spirit of the Act, should be observed, and for this purpose, an important practice direction was issued by the Lord Chief Justice on 30th June 1975. The most significant provisions for the present purposes are paragraph 4, which indicates that no reference should be made to a spent conviction: "when such reference can be reasonably avoided"; and paragraph 6, which provides that: "No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require". Apart from criminal proceedings, evidence of spent convictions is also rendered admissible in proceedings concerning minors and pupils and here too questions relating to such convictions may in general either not be asked or, if asked, need not be answered. Further excepted classes of proceed-

1) (1975) I W.L.R. 1065
ings are provided by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975¹.

The Act does not apply to any of the proceedings mentioned in the Order, which include in Scotland, proceedings before the Sheriff under the Mental Health (Scotland) Act, 1960, applications for firearms certificates and the like: spent convictions may be mentioned in such proceedings and in any appeal from them.

It is pertinent to ask when a conviction becomes "spent". A conviction becomes spent after the expiration of a specified period from its date, the period varying according to the gravity of the offence as reflected in the sentence. Convictions resulting in a life sentence or a fixed term of more than thirty months are outside the Act. The rehabilitation period is ten years in the case of a conviction resulting in a sentence of imprisonment for thirty months or more than six months; seven years when the period of imprisonment is six months or less; and five years when a fine is imposed or a community service order made. In the case of a conditional discharge or probation order, the period is one year from the date of the conviction, or the period of the discharge or order, whichever is the longer; in the case of absolute discharge the period of six months. There are several provisions about the rehabilitation period and in S.8 of the Act, special provisions about actions for defamation are provided for.

It is important also to observe the provisions of Section 16 (2) of

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¹) S.I. 1975, No 1023
the Children and Young Persons Act, 1963, which provides that if the defendant is over twenty-one offences of which he was found guilty while under fourteen must be disregarded. The section states as follows: "In any proceedings for an offence committed or alleged to have been committed by a person of or over the age of twenty-one, any offence of which he was found guilty while under the age of fourteen shall be disregarded for the purposes of any evidence relating to his previous convictions; and shall not be asked, and if asked shall not be required to answer, any question relating to such an offence, notwithstanding that the question would otherwise be admissible under Section 1 of the Criminal Evidence Act 1898."

The position in the United States with regards to Rehabilitation and spent convictions can be seen in the elaborate provisions of Section 609 (b) and (c) of the Federal Rules of Evidence. It provides as follows: "S.609 (b) - "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide. the adverse party
with a fair opportunity to contest the use of such evidence. Section 609 (c), Federal Rules of Evidence states: "Evidence of a conviction is not admissible under this rule if: (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence."

The above provisions reflect that in America too, there is sensitivity to problems of remoteness, and rehabilitation vis-a-vis convictions.