EVIDENCE OF SYSTEM

Part 2*

As there is legislative provision for the admission of evidence of system in Malaysia it would seem to be unnecessary for the courts to rely on English authorities. However as we have seen in the case of *Public Prosecutor* v. *Ong Kok Tan*[1] the Federal Court held that the principles laid down in *Makin* v. *Attorney-General of New South Wales*[2] are embodied in section 15 of the Evidence Act. Similarly in the case of *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor*[3] Counsel for the appellant in his argument on the subject of evidence of system paraphrased the judgment in *Makin's Case.*

The subject of similar fact evidence has been recently discussed by the House of Lords in England. In *Director of Public Prosecutions* v. *Kilbourne*[4] the facts were that the accused was charged on an indictment containing seven counts and convicted of one offence of buggery, one of attempted buggery and five of indecent assault. The counts fell into two groups. Counts 1–4 referred to offences alleged to have been committed in 1970 and involved four boys; counts 5 to 7 alleged offences committed a year later and involved two other boys. The boys were all between the ages of nine and twelve at the time of the alleged offence. The prosecution alleged that the accused encouraged the boys to come to his house by providing them with various inducements and having got them into his house he committed the acts charged in the indictment. The accused admitted that the boys had come to his house but claimed that his association with them had been entirely innocent. The judge directed the jury that they were entitled to take the evidence of the boys of one group as corroborating the evidence of boys in the other group. The Court of Appeal quashed the convictions holding that although the evidence of the boys of one group was admissible in relation to the charges concerning boys of the other group as tending to show that the accused was a homosexual whose proclivities took a particular form and as tending to rebut the defence of innocent association, that evidence could not in law

*Part I was published in [1977] JMCL p. 175.

[1] [1969] 1 M.L.J. 118 at p. 120.

[2] [1894] A.C. 57.

[3] [1977] 2 M.L.J. 155 at p. 172.

[4] [1973] 1 All E.R. 440.

constitute corroboration of the evidence of boys of the other group. The prosecution appealed to the House of Lords and the House of Lords held that no distinction could be drawn between evidence which could be used as corroboration and evidence which might help the jury to determine the truth of the matter. Since the evidence of one group of boys was admissible in relation to the charges concerning the other group as being relevant to matters in dispute and implicating the accused in the criminal conduct alleged that evidence if believed constituted corroboration.

Lord Hailsham L.C. said –

"The difficulty which has arisen in the present case was complicated by the fact that the witnesses requiring corroboration were said to be corroborated by witnesses not of the same incident, but of incidents of a similar character themselves all of the class requiring corroboration. A considerable part of the time taken up in argument was devoted to a consideration whether such evidence of similar incidents could be used against the respondent to establish his guilt at all, and we examined the authorities in some depth from *Makin* v. *A.G. for New South Wales*, through Lord Sumner's observations in *Thompson* v. *R*[5] to *Harris* v. *Director of Public Prosecutions*[6]. I do not myself feel that the point really arises in the present case. Counsel for the respondent was in the end constrained to agree that all the evidence in this case was both admissible and relevant, and that the Court of Appeal was right to draw attention to the 'striking features of the resemblance' between the acts alleged to have been committed in one count and those alleged to have been committed in the others, and to say that this made it 'more likely that John was telling the truth when he said that the (respondent) had behaved in the same way to him.' In my view, this was wholly correct. With the exception of one incident:

> "... each accusation bears a resemblance to the other and shows not merely that the respondent 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."

I also agree with the Court of Appeal in saying that the evidence of each child went to contradict any possibility of innocent association. As such it was admissible as part of the prosecution case, and since, by the time the judge came to sum up, innocent association was the foundation of the defence put forward by the respondent, the admissibility, relevance, and, indeed cogency of the evidence was beyond question. The word 'corroboration' by itself means no more than evidence tending to confirm

[5] [1918] A.C. 221.

[6] [1952] 1 All E.R. 1044.

other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the required particular, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration. As Professor Cross well says in his book on Evidence:

> 'The ground of the admissibility of this type of evidence was succinctly stated by Hallett J. when delivering the judgment of the Court of Criminal Appeal (in *R* v. *Robinson*)[7]: "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."'

That this is so in the law of Scotland seems beyond dispute, and it would be astonishing if the law of England were different in this respect, since one would hope that the same rules of logic and common sense are common to both. We were referred to *Moorov* v. *HM Advocate*[8] (an indecent assault case), *HM Advocate* v. *AE*[9] (an incest case) and *Ogg* v. *HM Advocate*[10] (a case of indecent conduct with male persons).

[7](1953) 37 Cr. App. R.95 at p. 106.

[8][1930] J.C. 73; [1930] S.L.T. 596. In this case the accused was charged that having formed a scheme for procuring women into his employment and gaining a domination over them through his relationship with them as their employer for the purpose of compelling them to commit acts of indecency upon and towards them he did in furtherance of the said scheme, advertise for female assistants and did engage as such assistants certain women and he did indecently assault and attempt to ravish certain of the said female assistants. The charges numbered twenty-one in all. In the case of thirteen of the charges the only direct evidence was that given by the woman who deposed that she had been assaulted. Four of the charges were withdrawn. The presiding judge directed the jury that a charge of assault, even as spoken to by one witness could be corroborated by another charge spoken to by one witness if of the same character and in the same connection and that the individual charges of a similar nature might be held to support each other. The jury found the accused guilty upon seven charges of assault and nine charges of indecent assault.

[9][1937] J.C. 96; [1938] S.L.T. 70. In this case the accused was charged (1) that on various occasions between 1st April 1927 and 5th July 1933 in his house and (2) on various occasions between 28th November 1933 and 14th January 1937 in his house and (3) on one occasion between 1st and 31st January 1935 in the house of a third party he did have incestuous intercourse with his daughter J. Similar charges were made in relation to his daughter E the period alleged being 1st February 1931 and 5th July 1933 and also between 28th November 1933 and 3rd June 1936. The trial judge held that if the evidence of the two girls was accepted, the one may be taken as corroborating the other.

[10][1938] J.C. 152; [1938] S.L.T. 513. In this case the accused was tried on an indictment charging him with ten offences of a perverted sexual character. At the end of the evidence the Crown withdrew three of the ten charges. The accused was found guilty of four of the remaining seven charges namely three charges of gross

I quote from these cases at length because they are not easily available in parts of England. My only criticism of them in principle is that they seem to suggest in places that cases of sexual misconduct are in some ways different from other cases. I do not believe this is so. They are, I believe, particular applications of general principles which *mutatis mutandis*, can be applied elsewhere. In *Moorov* v. *HM Advocate* the Lord Justice General (Lord Clyde) said:

> 'In the present case there is direct evidence in support of the factum probandum as regards each charge which the jury found proved. But the evidence is that of a single credible witness only to each charge. Corroboration is sought from the circumstance that the charges thus supported are numerous and of the same kind, and the question is whether the case is one in which resort may legitimately be had to corroboration derived from this circumstance. 'It is beyond doubt, in the law of Scotland, that corroboration may be found in this way, provided that the similar charges are sufficiently connected with, or related to each other – Hume on Crimes; Alison's Criminal Law. But what is the test of sufficiency? The test I think is whether the evidence of the single witnesses as a whole – although each of them speaks to a different charge – leads by necessary inference to the establishment of some circumstance or state of fact underlying and connecting the several charges, which, if it had been independently established, would have afforded corroboration of the evidence given by the single witnesses in support of the separate charges. If such a circumstance or state of fact was actually established by independent evidence, it would not occur to anyone to doubt that it might be properly used to corroborate the evidence of each single witness. The case is that same, when such a circumstance is established by an inference necessarily arising on the evidence of the single witnesses, as a whole. The only difference is that the drawing of such an inference is apt to be a much more difficult and delicate affair than the consideration of independent evidence. No merely superficial connexion in time, character, and circumstance between the repeated acts – important as these factors are – will satisfy the test I have endeavoured to formulate. Before the evidence of single credible

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indecency, and one of sodomy. As regards the last offence of gross indecency alleged to be committed in June 1967 there was independent evidence to support the conviction but as regards the three earlier offences the only evidence in each case was that of the victim. In each case the victim was a stranger and the manner in which the accused was alleged to have carried out the offence was similar. On appeal the conviction on the three earlier charges were set aside.

witnesses to separate acts can provide material for mutual corroboration, the connexion between the separate acts (indicated by their external relation in time, character, or circumstance) must be such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign, or adventure, which lies beyond or behind – but is related to – the separate acts. The existence of such an underlying unity, comprehending and governing the separate acts, provides the necessary connecting link between them, and becomes a circumstance in which corroboration of the evidence of the single witnesses in support of the separate acts may be found – whether the existence of such underlying unity is established by independent evidence, or by necessary inference from the evidence of the single witnesses themselves, regarded as a whole. It is just here, however, that the pinch comes, in such a case as the present. The Lord Advocate spoke as if it would be enough to show from the evidence of the single witnesses that the separate acts had occurred in what he called "a course of criminal conduct." Risk of confusion lurks behind a phrase of that kind; for it might correctly enough be applied to the everyday class of case in which a criminal recurs from time to time to the commission of the same kind of offence in similar circumstances. It might be justly said, in relation to the evidence in support of any indictment in which a number of such similar crimes committed over a period of (say) three years are charged together, that the accused had been following ' a course of criminal conduct." If any of the crimes in the series had formed the subject of a former prosecution or prosecutions, and convictions had been obtained, neither the commission of such former crimes nor the previous convictions could afford any material for corroborating the evidence of a single witness in support of the last member of the series. And therefore – especially in view of the growing practice of accumulating charges in one indictment – it is of the utmost importance to the interests of justice that the "course of criminal conduct" must be shown to be one which not only consists of a series of offences, the same in kind, committed under similar circumstances, or in a common locus – these are after all no more than external resemblances – but which owes its source and development to some underlying circumstance or state of fact such as I have endeavoured, though necessarily in very general terms, to define.'

The Lord Justice-Clerk (Lord Alness) in a similar passage said:

'The principle to be extracted from these passages may, I think, be expressed both negatively and positively. Negatively it may be expressed thus:– that where different acts of the same crime have

no relation or connexion with each other, it is not competent to eke out and corroborate the evidence of one witness to one act by the evidence of another witness to another act. Positively the rule may be expressed thus:– that where, on the other hand, the crimes are related or connected with one another, where they form part of the same criminal conduct, the corroborative evidence tendered is competent. In that case, as Dickson (On Evidence (Grierson's Edition p. 1810) says: "The unity of character in such cases makes it highly probable that they were all parts of one thieving expedition." The statement of the distinction is easy but its application is manifestly difficult. In every case, as it seems to me, the Court must put itself the question – Is there some sort of nexus which binds the alleged crimes together? Or, on the other hand, are they independent and unrelated?'

Lord Sands spoke to the same effect:

'In regard to the relevancy as corroboration of such evidence as is here in question, there is not, as in the case of previous convictions or of statements by a client to his agent, any clear-cut rule of law formulated in non-ambulatory terms. These are two extremes. On the one hand, it is not in dispute that, in the case of certain offences, such as indecent conduct towards young children, evidence of one offence is corroborative of the evidence of another alleged to have been committed at a near interval of time and under similar circumstances. On the other hand, it is not in dispute that, in the case of two thefts having no peculiar connexion the one with the other, evidence of the commission of the one is not corroboration of evidence of the commission of the other. Cases which fall clearly within the one class or the other present no difficulty. But between the two classes one seems to get into somewhat open country. This consideration leads me to fall back upon what I said at the outset about the function of evidence to ascertain the truth of the matter by fair and impartial inquiry. In that view it is admissible to take into account evidence in support of another, when the former, taken in connexion with the latter, is – to use a familiar old expression – relevant to infer that the panel committed the latter offence. It does not suffice merely that the evidence in support of the one charge makes it more comfortable to convict upon the other; it must be such evidence as helps to bring home the guilt of the accused to a reasonable and logical mind with sure conviction ... The other landmark is what has been described as embarking on a course of conduct. Where the accused, about the time the alleged offence was committed, has embarked upon a certain peculiar course of conduct,

the fact that he has done so is corroborative of evidence of a special act alleged to have been committed in pursuance of that course of conduct. I say "peculiar course," and I do so advisedly. Evidence of a general evil course will not suffice. There must be some peculiarity, or some special incidents, which stamp the offences charged as within the ambit of a course of conduct. This may be illustrated by the case I have already referred to of indecent offences against children. Evidence inferring a course of general immorality would not be admissible or corroborative of an indecent offence against an adult. But indecency against children is a rare and peculiar offence, and, accordingly, evidence inferring a course of conduct is admitted as relevant.'

Finally Lord Blackburn said:

'I agree with your Lordship in the chair that the greatest caution is necessary in applying the rule that the evidence of a single witness to a particular offence may be held to be corroborated by the evidence of another single witness to a similar offence. That such a rule may apply in certain cases admits of no doubt, but it is, I think, difficult, if not hopeless, to attempt to define within precise limits the classes of cases, or the circumstances, in which it should be applied. I agree with your Lordship that there must be a close similarity between the nature of the two offences to each of which only one witness speaks, before the evidence of the one witness can be taken as corroborating the evidence of the other. I also agree that there must be some connexion between the two offences in the matter of time. I have already committed myself to the view that such corroboration is competent in the case of offences against young girls – *M'Donald*. That appears to me to be a class of case isolated from all others in one respect at any rate, viz., that a child of tender age is not only liable to be easily influenced by an adult, but is herself in the eyes of the law incapable of giving any consent to, or encouragement of, the offence which is committed against her. If what the child says did happen, then a crime has been committed, and the fact that the child is telling a true story may be corroborated by the proved truthfulness of the child on other incidental matters, and by the fact that another child, also proved to be truthful, has had a similar experience at the hands of the same man.'

In *HM Advocate* v. *AE*, a case at first instance, the Lord Justice-Clerk (Lord Aitchison) summed up to the jury as follows:

'Now, I want finally to put before you one or two circumstances that you may think point in the direction of corroboration. First, I must give you a direction on this question – Can you take the evidence of the one girl as corroboration of the evidence of the other? Now, unless you believe both girls you need not consider

whether you are going to take the evidence of the one as corroboration of the other. If you believe J. and do not believe E., then, of course, E's evidence would be no use in the case of J., because you do not believe what E. said. And J.'s evidence would be of no use in the case of E., for the same reason; but, if you believe both, I want you to consider anxiously whether you ought not to accept the evidence of the one as corroborating the evidence of the other. Now, it is a well-established rule in our criminal law that you do not prove one crime by proving another or by leading evidence tending to show that another crime has been committed. That is a good general rule. But then, when you are dealing with this class of crime there is some relaxation of the rule, otherwise you might never be able to bring the crime home at all. Let me give you an illustration that is not at all unfamiliar – there are many cases of it, especially in our large cities – you get a degraded man who finds some little girl in the street, and he gives her a penny, and gets her to go up a close, and there he does something immoral with her, and then he sends her away. Nobody sees what he has done; there is only the evidence of the child. And then the same thing happens with another child, and again nobody sees that; and then there is a third child, and the same thing happens again. Well, of course, if you had to have two witnesses to every one of these acts – they are all separate crimes – you would never prove anything at all. But that is not the law. The law is this, that, when you find a man doing the same kind of criminal thing in the same kind of way towards two or more people, you may be entitled to say that the man is pursuing a course of criminal conduct, and you may take the evidence on one charge as evidence on another. That is a very sound rule, because a great many scoundrels would get off altogether if we had not some such rule in our law. Now, I give you this direction in law. If the conduct which is the subject of these charges is similar in character and circumstances, and substantially coincident in time, and you believe the evidence of both of these girls, then the evidence of the one may be taken as corroboration of the evidence of the other. This is in substance what was laid down in the High Court in the case of *Moorov* v. *HM Advocate*. That was a case where an employer in a Glasgow warehouse used to take one girl employee at a time up to his private office, and there commit an act of indecency, and then she was put out of the door. Nobody saw the act of indecency committed. There was only the girl's word for it. And then he would get another girl to go up, and the same thing would happen. Again nobody else was there, and there was just the girl's word for it. Now, no doubt there were in that case a number of these criminal assaults committed upon separate girls, whereas in this case we are only

> dealing with two, but I do not hesitate to tell you — and I take the responsibility of telling you — that if you believe the evidence of these two girls whom you have seen in the witness-box, and accept it as the evidence of reliable witnesses, you may take the one as corroborating the other, and, therefore, as against the accused on each charge.'

Lord Simon of Glaisdale in his judgment dealt with the question of similar evidence. He said —

"Your Lordships have been concerned with four concepts in the law of evidence: (i) relevance; (ii) admissibility; (iii) corroboration; (iv) weight. The first two terms are frequently, and in many circumstances legitimately, used interchangeably; but I think it makes for clarity if they are kept separate, since some relevant evidence is inadmissible and some admissible evidence is irrelevant (in the senses that I shall shortly submit). Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness', except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable. To link logical probativeness with relevance rather than admissibility (as was done in *R. v. Sims*[11]) not only is, I hope, more appropriate conceptually, but also accords better with the explanation of *R. v. Sims* given in *Harris v. Director of Public Prosecutions*[12]. Evidence is admissible if it may be lawfully adduced at a trial. 'Weight' of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law (though its relevance may exceptionally, as will appear, be dependent on its evaluation by the tribunal of fact).

Exceptionally evidence which is irrelevant to a fact which is in issue is admitted to lay the foundation for other, relevant, evidence (e.g. evidence of an unsuccessful search for a missing relevant document, in order to lay the foundation for secondary evidence of the document). Apart from such exceptional cases no evidence which is irrelevant to a fact in issue is admissible. But some relevant evidence is nevertheless inadmissible. To cite a famous passage from the opinion of Lord Herschell LC in *Makin v. A.G. for New South Wales:*

> 'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal

[11] [1946] 1 All E.R. 697.

[12] [1952] A.C. 694; [1952] 1 All. E.R. 1044.

> acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused in 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 the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is 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.'

That what was declared to be inadmissible in the first sentence of this passage is nevertheless relevant (i.e. logically probative) can be seen from numerous studies of offences in which recidivists are matched against first offenders, and by considering that it has never been doubted that evidence of motive (which can be viewed as propensity to commit the particular offence charged, in contradistinction to propensity to commit offences generally of the type charged) is relevant. All relevant evidence is prima facie admissible. The reason why the type of evidence referred to by Lord Herschell LC in the first sentence of the passage is inadmissible is, not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted; the law therefore exceptionally excludes this relevant evidence; whereas in the circumstances referred to in the second sentence the logically probative significance of the evidence is markedly greater: see also Lord Moulton in *R.* v. *Christie*,[13]

Not all admissible evidence is universally relevant. Admissible evidence may be relevant to one count of an indictment and not to another. It may be admissible to rebut a defence but inadmissible to reinforce the case for the prosecution. The summing up of Scrutton J in *R.* v. *Smith*[14] ('The Brides in the Bath' case) was a striking example – the jury was directed to consider the drowning of other newly-wedded and well-insured wives of the accused for the purpose only of rebutting a defence of accidental death by drowning - but not otherwise for the purpose of positive proof of the murder charged: see also Lord Atkinson, Lord Parker concurring, in *R.* v. *Christie*.

In the instant case it is not disputed that the evidence of the other boys with regard to the offences committed against themselves was admissible on each count of the indictment. It was plainly admissible to rebut the

[13] [1914] A.C. 545.

[14] [1914–15] All E.R. Rep. 262.

defence of innocent association (*R.* v. *Sims*[15], *R.* v. *Campbell*[16], *R.* v. *Ball*[17]). But was it admissible for (i.e. relevant to, logically probative of) any other matter in particular to reinforce the case for the Crown? In view of *R.* v. *Sims* and *R.* v. *Campbell* counsel for the respondent did not contend to the contrary; but it is necessary to examine the question, if only as a step to considering the validity of *R.* v. *Sims* and *R.* v. *Campbell*. In *Moorov* v. *HM Advocate*[18] the accused was convicted of a series of assaults and indecent assaults on various female employees. In respect of many of the charges the only direct evidence against the accused was that of the woman against whom the particular offence was alleged to have been committed. The evidence of each woman was, however, held to have been corroborative of that of the others, which involved that it was both admissible on and relevant to the other charges. The Lord Justice-General (Lord Clyde) started his judgment 'The question in the present case belongs to the department of circumstantial evidence. This consideration is vital to the whole matter . . .' Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities". Why should evidence of assault on the other women in Moorov be evidence from which it was a reasonable inference that the accused had committed that particular assault? The answer was given in the passage 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. As it was put in *R.* v. *Sims*:

> 'The probative force of all the acts together is much greater than one alone; for, whereas the jury might think 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.'

(See also *R.* v. *Smith*).[19]

In *Boardman* v. *Director of Public Prosecutions*[20] the facts were that

[15] See note 11.

[16] [1956] 2 All E.R. 272.

[17] [1911] A.C. 47.

[18] [1930] J.C. 68. See note 8.

[19] See note 14.

[20] [1974] 3 All E.R. 887; [1973] A.C. 72. See L.H. Hoffmann, "Similar Facts after Boardman" in 1975 L.Q.R. 193 and D.T. Zeffertt, Similar Fact Evidence in Criminal Proceedings, 1977 South African Law Journal p. 399.

the appellant was the headmaster of a school which largely catered for boys up to the age of 19 from foreign countries who wished to learn English. He was charged on two counts with offences involving a 16 year old boy, Said and a 17 year old boy Hamidi, both of whom were pupils at the school. Count 1 charged the appellant with buggery with Said and Count 2 charged him with inciting Hamidi to commit buggery with him. The counts were tried together and both Said and Hamidi gave evidence. There was no suggestion that Said and Hamidi had collaborated together to concoct a similar story. Each boy gave evidence that the appellant had visited the boy's dormitory in the early hours of the morning and invited the boys to go with him to his sitting room and that the appellant had asked each boy to take the active part while the appellant took the passive part in acts of buggery. In his summing up the judge pointed out to the jury that the kind of criminal behaviour alleged against the appellant in the two counts was in each case of a particular, unusual kind; that it was not merely a straightforward case of a schoolmaster indecently assaulting a pupil but that there was an 'unusual feature' in that a grown man had attempted to get an adolescent boy to take the male part while he himself played the passive part in acts of buggery. On that basis the judge directed the jury that it was open to them to find in Hamidi's evidence on Count 2 corroboration of Said's evidence on Count 1 and vice versa. The appellant was convicted on both counts. The Court of Appeal dismissed an appeal by the appellant but certified that a question of law of general public importance was involved, that is, where on a charge involving an allegation of homosexual conduct there was evidence that the accused was a man whose sexual proclivities took a particular form, whether that evidence was thereby admissible even though it tended to show that the accused had been guilty of criminal acts other than those charged.

Lord Morris in his judgment said – "My Lords, the well-known words of Lord Herschell LC in delivering the judgment of the Privy Council in *Makin v. Attorney-General for New South Wales* have always been accepted as expressing cardinal principles. On the one hand, it is clear that the prosecution cannot adduce evidence which tends to show that an accused person has been guilty of criminal acts other than those with which he is charged for the purpose of leading to the conclusion that he is one who is likely from his criminal conduct or character to have committed the criminal acts with which he is charged. On the other hand, there may be evidence which is relevant to an issue in a criminal case and which is admissible even though it tends to show that an accused person has committed other crimes.

The line separating exclusion and admission will often, as Lord Herschell LC said, be difficult to draw. In some cases a ruling will be sought from a judge at the time when certain evidence is tendered. The judge will then have to decide whether a particular piece of evidence is on the one side or the other and whether, in the words of Viscount Simon in

Harris v. *Director of Public Prosecutions*,[21] the evidence which it 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. But at whatever stage a judge gives a ruling he must exercise his judgment and his discretion having in mind both the requirements of fairness and also the requirements of justice. The first limb of what was said by Lord Herschell LC in *Makin's case* was said by Viscount Sankey LC in *Maxwell* v. *Director of Public Prosecutions*[22] to express 'one of the most deeply rooted and jealously guarded principles of our criminal law'. Judges can be trusted not to allow so fundamental a principle to be eroded. On the other hand, there are occasions and situations in which in the interests of justice certain evidence should be tendered and is admissible in spite of the fact that it may or well tend to show guilt in the accused of some offence other than that with which he is charged. In the second limb of what he said in *Makin's case*, Lord Herschell LC gave certain examples. In his speech in *Harris* v. *Director of Public Prosecutions* Viscount Simon pointed out that it would be an error to attempt to draw up a closed list of the sorts of cases in which the principle operates. Just as a closed list need not be contemplated so also, where what is important is the application of principle, the use of labels or definitive descriptions cannot be either comprehensive or restrictive. While there may be many reasons why what is called 'similar fact' evidence is admissible there are some cases where words used by Hallett J are apt. In *R.* v. *Robinson*[23] he said:

> 'If a 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.'

But as Viscount Simon pointed out in *Harris* v. *Director of Public Prosecutions* evidence of other occurrences which merely tend to

[21] See note 12.

[22] [1935] A.C. 309.

[23] [1953] 37 Cr. R. 95. In this case the appellant was charged with robbery with violence on September 3, 1952 and with robbery with aggravation on September 19, 1952. The appellant was identified as the driver of a car which had been seen rehearsing the attack which was the subject of the first charge. He was identified by another witness as one of the assailants in the second charge. It was held that the jury, if it was proved to their satisfaction that the appellant was the driver of the car concerned in the first charge, were entitled to have regard to that fact as assisting them on the issue of identity in the second charge and that it was proper so to direct them.

deepen suspicion does not go to prove guilt; so evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided. I think that it follows from this that, to be admissible, evidence must be related to something more than isolated instances of the same kind of offence.

Though certain passages in the judgment of the Court of Criminal Appeal in *R. v. Sims*[24] have been disapproved, I am wholly unable to accept the argument now presented that the decision should be rejected. In *Director of Public Prosecutions v. Kilbourne*[25] as Lord Hailsham L.C. pointed out in his speech, we examined in some depth the authorities between 1894 and 1952 in relation to the admissibility of 'similar incidents' evidence. Though *Kilbourne's case* proceeded after an admission that the evidence under consideration was both admissible and relevant to the evidence requiring corroboration, there was, in our decision, not only no rejection of but, on the contrary, an acceptance of what was decided in *R. v. Sims* i.e. that there are cases in which evidence of certain acts becomes admissible because of their striking similarity to other acts being investigated and because of their resulting probative force. There was in *Kilbourne's case* disapproval of what had been said in *R. v. Sims* in regard to corroboration. There was disapproval of the suggestion that a certain variety of sexual offences can be put in a special category. In the earlier case in the Privy Council of *Noor Mohamed v. R.*[26] there was criticism of one passage in the reasoning of the judgment of the Court of Appeal in R. v. *Sims*. But the decision in *R. v. Sims* stands.

Professor Cross in his book on Evidence (3rd Edn. (1967), p. 319 thus summarises the decision in *R. v. Sims*:

> 'The similar fact evidence was admissible because there were specific features which made each accusation bear a striking resemblance to the others. The evidence showed, not merely that the accused was a homosexual, but also that he proceeded according to a particular technique; not only was the accused given to committing the crime charged, but he was also given to doing it according to a particular pattern.'

In *Kilbourne's case* the Court of Appeal had followed *R. v. Sims* in holding that the contested evidence was admissible. They said:

> '. . . each accusation bears a resemblance to the other and shows not merely that the appellant was a homosexual (which would not have

[24] See note 11.

[25] See note 20.

[26] [1949] 1 All E.R. 365.

> been enough to make the evidence admissible), but that he was one whose proclivities in that regard took a particular form.'

They also held that the evidence of each boy went to rebut the defence of innocent association. They also said:

> 'What, for example, did Gary's evidence prove in relation to John's on count 1? The answer must be that his evidence, having the striking features of the resemblance between the acts committed on him and those alleged to have been committed on John, makes it more likely that John was telling the truth when he said that the appellant had behaved in the same way to him.'

Of the reasoning in these passages we indicated approval in *Kilbourne's case*. It was on the issue as to corroboration that we differed from the Court of Appeal. The valuable citations from some of the Scottish cases contained in the speech of Lord Hailsham LC give added support to the central reason for the decision in *Sims' case*. Thus in *Moorov* v. *HM Advocate*[27] there is reference to the existence of 'an underlying unity, comprehending and governing the separate acts' and to 'a certain peculiar course of conduct' and to 'a close similarity between the nature of the two offences to each of which only one witness speaks'. So in *HM Advocate* v. *AE*[28] there is a reference to finding a man 'doing the same kind of criminal thing in the same kind of way towards two or more people'. So in *Ogg* v. *HM Advocate*[29] the trial judge had told the jury that while in general the mere fact that a number of similar offences are charged in one indictment does not make evidence with regard to any one charge available with regard to the others yet it may be otherwise if the acts are 'closely related in time, in circumstance and in character'.

But these and other similar expressions must only be used as guides to principle. It is always for a jury to decide what evidence to accept. If told that they may take one incident into consideration when deciding in regard to another it will be entirely for them to decide what parts of the evidence they accept and how far they are assisted by one conclusion in reaching another. It will be for the judge in his discretion to rule whether the circumstances are such that evidence directed to one count becomes available and admissible as evidence when consideration is being given to another count.

The certified point of law requires some examination. If the question is raised whether there is a special rule in cases where there is a charge involving an allegation of homosexual conduct the answer must be that

[27] See note 8.

[28] See note 9.

[29] See note 10.

there is no such special rule. But in such cases there may be, depending on the particular facts, room for the application of the principle to which I have been referring. The word 'thereby' in the certified point of law seems to raise a question whether there is a rule which gives automatic admissibility to evidence where proclivities take a particular form. There is no such specific rule which would automatically give admissibility. But there may be cases where a judge, having both limbs of Lord Herschell LC's famous proposition in mind, considers that the interests of justice (of which the interests of fairness form so fundamental a component) make it proper that he should permit a jury when considering the evidence on a charge concerning one fact or set of facts also to consider the evidence concerning another fact or 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 said — My Lords, the question for decision in this appeal is whether, on a charge against the appellant of buggery with one boy, evidence was admissible that the appellant had incited another boy to buggery — and vice versa. The judge ruled that, in the particular circumstances of this case, the evidence was admissible. We have to decide whether this ruling was correct: for reasons which others of your Lordships have given, we cannot answer the question certified in the terms in which it is stated. Whether in the field of sexual conduct or otherwise, there is no general or automatic answer to be given to the question whether evidence of facts similar to those the subject of a particular charge ought to be admitted. In each case it is necessary to estimate (i) whether, and if so how strongly, the evidence as to other facts tends to support, i.e. to make more credible, the evidence given as to the fact in question; (ii) whether such evidence, if given, is likely to be prejudicial to the accused. Both these elements involve questions of degree.

It falls to the judge, in the first place by way of preliminary ruling, and indeed on an application for separate trials if such is made (see the opinion of my noble and learned friend, Lord Cross of Chelsea) to estimate the respective and relative weight of these two factors and only to allow the evidence to be put before the jury if he is satisfied that the answer to the first question is clearly positive, and on the assumption, which is likely, that the second question must be similarly answered, that on a combination of the two the interests of justice clearly require that the evidence be admitted.

Questions of this kind arise in a number of different contexts and have, correspondingly, to be resolved in different ways. I think that it is desirable to confine ourselves to the present set of facts, and to situations of a similar character. In my understanding we are not here concerned with cases of 'system', 'underlying unity' (compare *Moorov* v. *HM*

Advocate)[30] words whose vagueness is liable to result in their misapplication, nor with a case involving proof of identity, nor an alibi, nor, even, is this a case where evidence is adduced to rebut a particular defence. 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. But we need not consider the validity or scope of this proposition. The Court of Appeal dealt with the case on the basis, submitted by the appellant's counsel, that no defence of innocent association was set up; in my opinion we should take the same course.

This is simply a case where evidence of facts similar in character to those forming the subject of the charge is sought to be given in support of the evidence on that charge. Though the case was one in which separate charges relating to different complainants were tried jointly, the principle must be the same as would arise if there were only one charge relating to one complainant. If the appellant were being tried on a charge relating to Said, could the prosecution call Hamidi as a witness to give evidence about facts relating to Hamidi? The judge should apply just as strict a rule in the one case as in the other. If, as I believe, the general rule is that such evidence cannot be allowed, it requires exceptional circumstances to justify the admission. This House should not, in my opinion, encourage erosion of the general rule.

We can dispose at once of the suggestion that there is a special rule or principle applicable to sexual, or to homosexual, offences. This suggestion had support at one time – eminent support from Lord Sumner in *Thompson* v. *R.*[31] but is now certainly obsolete (see per Lord Reid and other learned Lords in *Kilbourne*).[32] Evidence that an offence of a sexual character was committed by A against B cannot be supported by evidence that an offence of a sexual character was committed by A against C, or against C, D and E.

The question certified suggests that the contrary may be true if the offences take a 'particular form'. I do not know what this means; all sexual activity has some form or other and the varieties are not unlimited: how particular must it be for a special rule to apply? The general salutary rule of exclusion must not be eroded through so vague an epithet. The danger of it being so is indeed well shown in the present case, for the judge excluded the (similar fact) evidence of one boy because it showed 'normal' homosexual acts while admitting the (similar fact) evidence of another boy

[30] See note 8.

[31] See note 5.

[32] See note 20.

because the homosexual acts assumed a different, and, in his view, 'abnormal' pattern. Distinctions such as this, rightly called fine distinctions by the judge, lend an unattractive unreality to the law.

If the evidence was to be received, then, it must be on some general principle not confined to sexual offences. There are obvious difficulties in the way of formulating any such rule in such a manner as, on the one hand, to enable clear guidance to be given to juries, and, on the other hand, to avoid undue rigidity.

The prevailing formulation is to be found in the judgment of the Court of Criminal Appeal in *R. v. Sims*[33] where it was said:

> '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 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.'

R. v. Sims has not received universal approbation or uniform commentary, but I think it must be taken that this passage has received at least the general approval of this House in *Director of Public Prosecutions v. Kilbourne*.[34] For my part, since the statement is evidently related to the facts of that particular case, I should deprecate its literal use in other cases. It is certainly neither clear nor comprehensive. A suitable adaptation, and, if necessary, expansion should be allowed to judges in order to suit the facts involved. 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.[35] This probative force is derived, if at all, from the circumstance that the facts testified to by the 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. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s).

I use the words 'a cause common to the witnesses' to include not only (as in *R v. Sims*) the possibility that the witnesses may have invented a

[33] See note 11.

[34] See note 20.

[35] L.H. Hoffmann *op. cit* note 14 says that this in a nutshell in the *ratio decidendi* of Boardman.

story in concert but also that a similar story may have arisen by a process of infection from media of publicity or simply from fashion. In the sexual field, and in others, this may be a real possibility; something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed. This is well illustrated by *Kilbourne's case* where the judge excluded 'intra group' evidence because of the possibility as it appeared to him, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out.

If this test is to be applied fairly, much depends in the first place on the experience and common sense of the judge. As we said by Lord Simon of Glaisdale in *Kilbourne's case,* in judging whether one fact is probative of another, experience plays as large a place as logic. And in matters of experience it is for the judge to keep close to current mores. What is striking is one age is normal in another; the perversions of yesterday may be the routine or the fashion of tomorrow. The ultimate test has to be applied by the jury using similar qualities of experience and common sense after a fair presentation of the dangers either way of admission or of rejection. Finally, whether the judge has properly used and stated the ingredients of experience and common sense may be reviewed by the Court of Appeal.

The present case is, to my mind, right on the borderline. There were only two relevant witnesses, Said and Hamidi. The striking similarity as presented to the jury was and was only the active character of the sexual performance to which the accused was said to have invited the complainants. In relation to the incident which was the subject of the second charge, the languages used by the boy was not specific; the 'similarity' was derived from an earlier incident in connection with which the boy used a verb connoting an active role. I agree with, I think, all your Lordships in thinking that all of this, relating not very specifically to the one striking element, common to two boys only, is, if sufficient, only just sufficient. Perhaps other similarities could have been found in the accused's approaches to the boys (I do not myself find them particularly striking), but the judge did not rest on them or direct the jury as to their 'similarity'. I do not think that these ought now to be relied on. The dilution of 'striking' fact by more prosaic details might have weakened the impact on the jury rather than strengthening it. The judge dealt properly and fairly with the possibility of a conspiracy between the boys".

Lord Hailsham of St. Marylebone said – "Counsel for the appellant perfectly properly made much of the passages in *Kilbourne* which indicate that we were concerned with corroboration and not with admissibility as such. This is somewhat misleading since it was impossible, for reasons which I will explain, wholly to disentangle the conceptions and arguments

relating to admissibility, relevance, weight and corroboration. This appears very clearly from the opinion of Lord Simon of Glaisdale in that case (see especially (1973) 1 All E.R at 460, (1973) AC at 756).

The position, as I see it, is this. The passage in *Sims* which appears to say that –

> 'evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether the prisoner has committed the act charged'

must now be read in the light of Lord du Parcq's criticism of it in *Noor Mohamed* v. *R.*[36] where he said:

> "The expression "logically probative" may be understood to include much evidence which English law deems to be irrelevant.'

Lord du Parcq was clearly referring there not merely to the first rule in Lord Herschell L.C's famous exposition in *Makin* v. *Attorney-General for New South Wales* to which I shall be referring shortly, but matters like the exclusion of hearsay evidence, which can clearly be relevant and logically probative on occasion, evidence consisting in secondary evidence of documents, and, of course, the whole complex set of rules contained in the law relating to confessions, and the so-called Judges' Rules. As Lord du Parcq truly said: 'Logicians are not bound by the rules of evidence which guide English Courts . . ." Nonetheless, if these technical rules of exclusion in the interests of the accused are for any reason not applicable, to ask whether evidence can be corroboration or is relevant is really to ask the same question in two different ways. The reason for this is clearly seen from the speech in *Kilbourne* of Lord Simon of Glaisdale when he points out that 'relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable' and 'Corroboration is . . . nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence . . . It is, in short, evidence which renders other evidence more probable.'

It is true that in *Kilbourne* we were at pains to get rid of the artificial distinction between evidence which corroborates other evidence and evidence which helps one to determine its truth as well as the 'circular argument' doctrine in *R.* v. *Manser*[37] disapproved in *Director of Public Prosecutions* v. *Hester*[38]. But it is quite wrong to regard *Kilbourne* as having nothing to do with admissibility and relevance. It was in this context that I cited at such length the three Scottish cases, *Moorov* v. *H.M. Advocate*,[39] H.M. Advocate v. *AE*[40] and *Ogg* v. *H.M. Advocate*[41] which

[36] See note 26.

[37] (1934) 25 Cr. App. R. 18.

[38] [1972] 1 All. E.R. 440.

[39] See note 8.

[40] See note 9.

[41] See note 10.

Lord Reid described as affording 'valuable guidance'. In this connection I hope we shall hear no more of the contention put forward in this case that there is a relevant distinction between English and Scottish law as to what can and cannot constitute corroboration in cases of this kind. They are the same, insofar as the rules of logic and common sense are the same and prevail in both countries.

Another contention put forward by appellant's counsel was that the decision in *Sims* was wrong, and that any cases founded on *Sims* fell with it. It is true, as I have said, that the passage relating to evidence which is logically probative must now be read in the light of Lord du Parcq's criticisms in *Noor Mohamed*. It is also true that in *Kilbourne* both Lord Reid and I expressed the view that the opinion which seems to put sodomy as a 'crime in a special category' goes a great deal too far, and that Lord Sumner's statement in *Thompson* v. *R.* ought not to be read in this sense. Lord Reid said:

> 'Then there are indications of a special rule for homosexual crimes. 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.'

Both Lord Morris of Borth-y-Gest and I said the same by implication. But, subject to these two points, and the specific point decided in *Kilbourne*, *Sims* has never been successfully challenged and was expressly approved in general terms in *Kilbourne* by myself, Lord Reid and Lord Morris of Borth-y-Gest, and by implication by Viscount Simon in *Harris* v. *Director of Public Prosecutions*[42] and followed in *R.* v. *Campbell*.[43]

The truth is that, apart from these qualifications, *Sim* was never in need of support, for in the sense explained in Professor Cross's book on Evidence (3rd Edn. (1967), p. 319 it was only a particular example of a general principle which stems from *Makin* v. *Attorney-General for New South Wales* and goes down through a long list of cases, English and Scottish, including *Moorov* and *Ogg*, to the present time. This rule is contained in the classic statement of Lord Herschell LC, which I quote here once again solely for convenience:

> 'It is undoubtedly not competent for the prosecution to adduce evidence tending to shew 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 the evidence adduced tends to shew the commission of other

[42] See note 12.

[43] [1956] 2 All E.R. 272.

> 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.'

This statement may be divided into its component parts. The first sentence lays down a general rule of exclusion. 'Similar fact' evidence, or evidence of bad character, is not admissible for the purpose of leading to the conclusion that a person, from his criminal conduct or character, is likely to have committed the offence for which he is being held.

Two theories have been advanced as to the basis of this, and both have respectable judicial support. One is that such evidence is simply irrelevant. No number of similar offences can connect a particular person with a particular crime, however much they may lead the police, or anyone else investigating the offence, to concentrate their enquiries on him as their prime suspect. According to this theory, similar fact evidence excluded under Lord Herschell L.C's first sentence has no probative value and is to be rejected on that ground. The second theory is that the prejudice created by the admission of such evidence outweighs any probative value it may have. An example of this view is to be found in the speech of Lord Simon of Glaisdale in *Kilbourne* where he said:

> 'The reason why the type of evidence referred to by Lord Herschell LC in the first sentence of the passage is inadmissible is, not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by prejudice to the accused, so that a fair trial is endangered if it is admitted . . .'

With respect, both theories are correct. When there is nothing to connect the accused with a particular crime except bad character or similar crimes committed in the past, the probative value of the evidence is nil and the evidence is rejected on that ground. When there is some evidence connecting the accused with the crime, in the eyes of most people, guilt of similar offences in the past might well be considered to have probative value (cf. the statutory exceptions to this effect in the old law of receiving and under the Theft Act 1968). Nonetheless, in the absence of a statutory provision to the contrary, the evidence is to be excluded under the first rule in *Makin* because its prejudicial effect may be more powerful than its probative effect, and thus endanger a fair trial because it tends to undermine the integrity of the presumption of innocence and the burden of proof. In other words, it is a rule of English law which has its root in policy, and by which, in Lord du Parcq's phrase, logicians would not be bound.

But there is a third case, to which the second rule in *Makin* applies. The mere fact that the evidence adduced tends to show the commission of

other crimes does not by itself render it inadmissible if it is relevant to an issue before the jury and it may be so relevant if it bears on 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.

Contrary to what was suggested in argument for the appellant, this rule is not an exception grafted on to the first. It is an independent proposition introduced by the words: 'On the other hand', and the two propositions together cover the entire field. If one applies, the other does not.

Thus in *R.* v. *Ball*[44] evidence of inclination and affection of a sexual kind was admitted to show inclination in a case of brother and sister incest; in *Thompson* v. *R.*[45] evidence of a particular tendency was admitted to show that the accused was present at a particular time and place of meeting as the result of previous assignation, and was not purely fortuitous as claimed by the accused; in *R.* v. *Smith*[46] (the 'Brides in the Bath' case) evidence of similar circumstances was admitted to exclude coincidence where there was no other evidence either of the fact of killing or the intent; similar considerations seem to have prevailed in *R.* v. *Straffen*[47]. The permutations are almost indefinite. In *Moorov* coincidence of story as distinct from coincidence in the facts was held to be admissible and corroborative, and this, after some fairly agonised appraisals, was what was thought in *Kilbourne*. The fact is that, although the categories are useful classes of example, they are not closed (see per Viscount Simon in *Harris* v. *Director of Public Prosecutions*) and they cannot in fact be closed by categorisation. The rules of logic and common sense are not susceptible of exact codification when applied to the actual facts of life in its infinite variety.

What is important is not to open the door so widely that the second proposition merges in the first. (See, e.g., what was said in *R.* v. *Flack*[48] *R.* v. *Chandor*[49] and *Ogg* v. *HM Advocate*[50]). Contrary to what was said in *Flack* and *Chandor* I do not see the logical distinction between innocent association cases and cases of complete denial, since the permutations are too various to admit of universally appropriate labels. The truth is that a mere succession of facts is not normally enough (see *Moorov* on 'a course

[44] See note 16.

[45] See note 5.

[46] See note 14.

[47] [1952] 2 All E.R. 657.

[48] [1969] 2 All E.R. 784.

[49] [1959] 1 All E.R. 702.

[50] See note 10.

of criminal conduct'), whether the cases are many or limited to two as in *HM Advocate* v. *AE*. There must be something more than mere repetition. What there must be is variously described as 'underlying unity' *(Moorov)* 'system' (see per Lord Reid in *Kilbourne*) 'nexus', 'unity of intent, project, campaign or adventure' *(Moorov)*, 'part of the same criminal conduct', 'striking resemblance' *(Sims)*. These are all highly analogical not to say metaphorical expressions and should not be applied pedantically. It is true that the doctrine 'must be applied with caution' (see *Ogg* per Lord Aitchison), but 'The test in each case, and in considering each particular charge, is, Was the evidence with regard to the other charges relevant to that charge?' (Ibid, per Lord Wark). The test is (per Lord Simon of Glaisdale in *Kilbourne*) whether there is 'such an underlying unity between the offences as to make coincidence an affront to common sense' or, to quote Hallett J. in *Robinson*[51] in the passage cited by Professor Cross (Evidence (3rd Edn. 1967), p. 316:

> 'If the jury are precluded by some rule of law from taking the view that something is a coincidence which is against all 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 common sense.'

This definition would seem easy enough were it not for the fact that the judge must, as a matter of law, withhold from the jury evidence which is outside the definition. The jury can treat the matter as one of degree and weight, which it is. The judge is constrained to assert a line of principle before he allows it to go to the jury. I do not know that the matter can be better stated that it was by Lord Herschell LC in *Makin* remembering the note of caution sounded in *Ogg*, and perhaps finding useful as guides, but not as shackles, the kind of factors enumerated there, as e.g. the number of instances involved, any interrelation between them, the intervals or similarities of time, circumstances and the details and character of the evidence. Reference may also be made to the passage in Lord du Parcq's judgment in *Noor Mohamed* v. *R.*, noticed with approval by Lord Simon in *Harris*. 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 reasoning. The judge also has a discretion, not as a matter of law, but of good practice, to exclude evidence whose prejudicial effect, though the evidence

[51] See note 7.

be technically admissible on the decided cases, may be so great in the particular circumstances as to outweigh its probative value to the extent that a verdict of guilty might be considered unsafe or unsatisfactory if ensuing (cf per Lord Simon in *Harris*). In all these cases it is for the judge to ensure as a matter of law in the first place, and as a matter of discretion where the matter is free, that a properly instructed jury, applying their minds to the facts, can come to the conclusion that they are satisfied so that they are sure that to treat the matter as pure coincidence by reason of the 'nexus', 'pattern', 'system', 'striking resemblances' or whatever phrase is used, is 'an affront to common sense'. In this the ordinary rules of logic and common sense prevail, whether the case is one of burglary and the burglar has left some 'signature' as the mark of his presence, or false pretences, and the pretences alleged to have too many common characteristics to have happened coincidentally, or whether the dispute is one of identity and the accused in a series of offences had some notable physical features or behavioural or psychological characteristics, or, as in some cases, is in possession incriminating articles, like a jemmy, a set of skeleton keys, or, in abortion cases, the apparatus of the abortionist. Attempts to codify the rules of common sense are to be resisted. 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. When that is the only purpose for which the evidence is being tendered, it should be excluded together, as in *R* v. *Horwood*[52]. Where the purpose is an inference of another kind, subject to the judge's overriding discretion to exclude, the evidence is admissible, if in fact the evidence be logically probative. Even then it is for the jury to assess its weight, which may be greater or less according as to how far it accords with other evidence, and according as to how far that other evidence may be conclusive.

[52] [1969] 3 All. E.R. 1156. In this case it was held that in cases of gross indecency, the correct approach for the court when considering evidence that the accused has admitted to the police that he had been a homosexual is to look first and decide whether the evidence tends to show that the accused has been guilty of criminal acts other than the offences charged and/or that the accused is a person with a propensity for committing offences of that kind and/or that the accused is a person of bad character. If the evidence is of that kind, then prima-facie it must be excluded unless it is also relevant to an issue before the jury. The evidence must be such as to be probative in some real degree that the accused committed the offence charged. Assuming that the expression "I am a homosexual" does not necessarily convey that the accused has committed homosexual offences, it must be only in very exceptional circumstances that evidence of this nature can be admitted to rebut innocent association. In this case the boy was a hitch-hiker to whom the accused had given a lift. The circumstances of their relationship did not in themselves suggest impropriety or require further explanation. Compare with *King* (1967) 2 Q.B. 338 where the accused admitted picking up two boys in a public lavatory, inviting them home and taking one of them to his bed.

There are two further points of a general character that I would add. The 'striking resemblances' or 'unusual features', or whatever phrase is considered appropriate, to ignore which would affront common sense, may be either in the objective facts, as for instance in 'Brides in the Bath' (*R. v. Smith*) or *Straffen* or they may constitute a striking similarity in the accounts by witnesses of disputed transactions. For instance, 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 walls of the sitting room, or an esoteric symbol written in lipstick on the mirror, might well be enough. In a sex case, to adopt an example given in argument in the Court of Appeal, 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 —

Lord Cross of Chelsea said — "My Lords, on the 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 to common sense. Take, for example, *R. v. Straffen.*[53] 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 the body though this might easily have been done. The accused, who had just escaped from Broadmoor and was in the neighbourhood at the 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. As Viscount Simon said in *Harris*

[53] See note 9.

v. *Director of Public Prosecutions*,[54] it is not possible to compile an exhaustive list of the sort of cases in which 'similar fact' evidence – to use a compedious phrase – is admissible. 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. That, indeed, is how the matter was regarded by the Criminal Law Revision Committee: see s.3(1)(2) of their draft Criminal Evidence Bill which was intended to state the existing law.

The setting in which the question arises in this case is familiar enough. When A is charged with an offence against B in what circumstances (if any) can the prosecution strengthen B's evidence by calling C and D to say that A committed similar offences against them? This problem was considered by a full Court of Criminal Appeal in *R.* v. *Sims*.[55] The facts there were that the defendant was charged on different counts with homosexual offences of a similar character involving four different men. Each said that the defendant had invited him to his house and had then had homosexual relations with him. The defendant admitted that each of the men had in fact visited him at his invitation on the occasions in question: but he denied that he had been guilty of any improper conduct with any of them. The court gave three separate reasons for saying that on each count the evidence of the other men as to what the defendant had done to them was admissible to support the evidence of the man with whom the offence to which the count related was alleged to have been committed. The first reason was expressed in the following terms (per Lord Goddard CJ:)

> '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 . . . The probative force of all the acts together is much greater than one alone; for, whereas the jury might think 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.'

The second reason was that homosexual offences formed a special class in respect to which 'similar fact' evidence was more readily admissible than in other cases. The third reason was that 'similar fact' evidence was always

[54] See note 12.

[55] See note 11.

admissible to rebut a defence of 'innocent association'. In *Director of Public Prosecutions* v. *Kilbourne* several of your Lordships expressed the view that the second reason given in *R.* v. *Sims* for the admission of the similar fact evidence could not be supported. Those expressions of opinion were only *obiter dicta* since in *Kilbourne* it was common ground that the similar fact evidence was admissible but I have no hesitation in agreeing with them. The attitude of the ordinary man to homosexuality has changed very much even since *R.* v. *Sims* was decided and what was said on that subject in 1917 by Lord Sumner in *Thompson* v. *R.*[56] from which the view that homosexual offences form a class apart appear to stem — sounds nowadays like a voice from another world. Speaking for myself I have also great difficulty in accepting the third reason. If I am charged with a sexual offence why should it make any difference to the admissibility or non-admissibility of a 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. Moreover when, as here, the accused is a schoolmaster who was of necessity associating day in and day out with the alleged victim it becomes difficult — as the courts below saw — to say whether his defence to any particular charge can or cannot be fairly described as a defence of 'innocent association'. In *R.* v. *Chandor*[57] and *R.* v. *Flack*[58] the Court of Appeal approved the distinction between the two types of defence for the purposes of the admission of similar fact evidence. But though the decision in these two cases may well have been correct, I cannot, as at present advised, agree with that part of the reasoning in them.

If the decision in *R.* v. *Sims* is to be justified it must, as I see it, be for the first reason. One must, however, bear in mind that such a case as *R.* v. *Sims* or this case differs materially from such cases as *R* v. *Straffen* or *R.* v. *Smith.* In those cases there was no direct evidence that the accused had committed the offence with which he was charged but equally there was no question of any witness for the prosecution telling lies. In the first case one started with the undoubted fact that the child had been murdered by someone and in the second case with the undoubted fact that Mrs. Smith had been drowned in her bath on her honeymoon. The 'similar fact' evidence was equally indisputable — namely, in the first case that Straffen had committed two identical murders and in the second that two other brides of Mr. Smith had been drowned in their baths on their honeymoons. If it was admitted, this evidence, the truth of which was not open

[56] See note 5.

[57] See note 49.

[58] See note 48.

to challenge, provided very strong circumstantial evidence that in each case the accused had committed murder. In such cases as *R.* v. *Sims* or this case on the other hand there is, it is true, some direct evidence that the offence was committed by the accused but he says that that evidence is false and the similar fact evidence – which he says is also false – is sought to be let in in order to strengthen the case for saying that his denials are untrue. In such circumstances the first question which arises is obviously whether his accusers may not have put their heads together to concoct false evidence and if there is any real chance of this having occurred the similar fact evidence must be excluded. In *Kilbourne* it was only allowed to be given by boys of a different group from the boy an alleged offence against whom was being considered. But even if collaboration is out of the way it remains possible that the charge made by the complainant is false and that it is simply a coincidence that others should be making or should have made independently allegations of a similar character against the accused. The likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar allegations and the more striking are the similarities in the various stories. In the end, as I have said, it is a question of degree.

Before I come to the particular facts of this case there is one other matter to which I wish to refer. When in a case of this sort the prosecution wishes to adduce 'similar fact' evidence which the defence says is inadmissible, the question whether it is admissible ought, if possible, to be decided in the absence of the jury at the outset of the trial and if it is decided that the evidence is inadmissible and the accused is being charged in the same indictment with offences against the other men the charges relating to the different persons ought to be tried separately. If they are tried together the judge will, of course, have to tell the jury that in considering whether the accused is guilty of the offence alleged against him by A, they must put out of mind the fact – which they know – that B and C are making similar allegations against him. But, as the Court of Criminal Appeal said in *R.* v. *Sims*, it is asking to much of any jury to tell them to perform mental gymnastics of this sort. If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons. It is said, I know, that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is a reason for doubting the wisdom of the general rule excluding similar fact evidence. But so long as there is that general rule the courts ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence by trying all the charges together".

Lord Salmon said – My Lords, evidence against an accused which tends only to show that he is a man of bad character with a disposition to

commit crimes, even the crime with which he is charged, is inadmissible and deemed to be irrelevant in English law. I do not pause to discuss the philosophic basis for this fundamental rule. It is certainly not founded on logic, but on policy. To admit such evidence would be unjust and would offend our concept of a fair trial to which we hold that everyone is entitled. Nevertheless, if there is some other evidence which may show that an accused is guilty of the crime with which he is charged, such evidence is admissible against him, notwithstanding that it may also reveal his bad character and disposition to commit crime.

I have no wish to add to the anthology of guidance concerning the special circumstances in which evidence is relevant and admissible against an accused, notwithstanding that it may disclose that he is a man of bad character with a disposition to commit the kind of crime with which he is charged. The principles on which such evidence should be admitted or excluded are stated with crystal clarity in the celebrated passage from the judgment delivered by Lord Herschell LC in *Makin* v. *Attorney-General for New South Wales*. I doubt whether the learned analyses and explanations of that passage to which it has been subjected so often in the last 80 years add very much to it.

It is plain from what has fallen from your Lordships (with which I respectfully agree) that the principles stated by Lord Herschell LC are of universal application and that homosexual offences are not exempt from them, as at one time seems to have been supposed: see *Thompson* v. *R.* per Lord Sumner and *R.* v. *Sims* per Lord Goddard CJ.

The doctrine that evidence which is admissible and relevant to prove guilt might at the same time be incapable of constituting corroboration was finally laid to rest in *Director of Public Prosecutions* v. *Kilbourne*. It was a strange doctrine resting on the fallacy that evidence which might itself require corroboration was therefore incapable of corroborating any other evidence. If corroborating evidence is suspect that no doubt goes to its weight but not to its admissibility. After all, corroboration is only evidence tending to implicate an accused in the commission of the offence with which he is charged. '(It) confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.' (*R.* v. *Baskerville*[59] per Lord Reading CJ).

My Lords, whether or not evidence is relevant and admissible against an accused is solely a question of law. The test must be — is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged? In the case of an alleged homosexual offence, just as in the case of an alleged burglary, evidence which

[59](1916) 2 K.B. 658.

proves merely that the accused has committed crimes in the past and is therefore disposed to commit the crime charged is clearly inadmissible. It has, however, never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner to other crimes commited by the accused, the manner in which the other crimes were committed may be evidence on 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 coincidence. I would stress that the question whether the evidence is capable of being so regarded by a reasonable jury is a question of law. There is no easy way out by leaving it to the jury to see how they decide it. If a trial judge wrongly lets in the evidence and the jury convict, then, subject to the proviso, the conviction must be quashed. If, for example, A is charged with burglary at the house of B and it is shown that the burglar, whoever he was, entered B's house by a ground floor window, evidence against A that he had committed a long series of burglaries, in every case entering by a ground floor window, would be clearly inadmissible. This would show nothing from which a reasonable jury could infer anything except bad character and a disposition to burgle. The factor of unique or striking similarity would be missing. There must be thousands of professional burglars who habitually enter through ground floor windows and the fact that B's house was entered in this way might well be a coincidence. Certainly it could not reasonably be regarded as evidence that A was the burglar. On the other hand, if, for example, A had a long series of convictions for burglary and in every case he had left a distinctive written mark or device behind him and he was then charged with burglary in circumstances in which an exactly similar mark or device was found at the site of the burglary he was alleged to have committed, the similarity between the burglary charged and those of which he had previously been convicted would be so uniquely or strikingly similar that evidence of the manner in which he had committed the previous burglaries would, in law, clearly be admissible against him. I postulate these facts merely as an illustration. There is a possibility, but only, I think, a theoretical possibility, that they might arise. In such a case, A would no doubt say, quite rightly, that, with his record, it is inconceivable that he would have left the mark or device behind him had he been the burglar; he might just as well have published a written confession; the mark or device must have been made at the time of or just after the burglary by someone trying to implicate him. This, however, would be a question for the jury to decide.

If a trial judge rightly rules that the evidence is relevant and admissible, he still, of course, has a discretion to exclude it on the ground that its probative value is minimal and altogether outweighed by its likely prejudicial effect. Once, however, he lets in evidence which is in law admissible, it is only in a very clear case that an appellate tribunal would

interfere with the exercise of his discretion".

In *R.* v. *Rance*[60] the facts were that Rance, the managing director of a building company was convicted of corruptly procuring the payment of money to a local government councillor, Herron. The payment was supported in the company's records by a bogus certificate signed by Rance naming Herron as a sub-contractor. Rance's defence was that he must have been tricked into signing the certificate. Evidence was admitted of similar payments to two other councillors. As to these Rance said he had signed the certificate believing that they were genuine and the trial judge warned the jury that they were not to take it as read that those payments were corrupt. Rance applied for leave to appeal on the ground *inter alia* that the evidence should not have been admitted. The application was refused.

Lord Widgery L.C.J. in giving the judgment of the Court of Appeal said

"The question whether evidence of those two other case should be admitted had to depend on the recent conclusions of the House of Lords in the case of *D.P.P.* v. *Boardman.*[61] There are two very helpful passages which indicate a crisp, modern test to decide the vexed and oft-argued question of how far evidence of similar criminal transactions can be admitted.

"I take first a passage from Lord Cross's speech at p. 185, 457. He says– "As Viscount Simon said in *Harris* v. *D.P.P.* it is not possible to compile an exhaustive list of the sort of cases in which "similar fact" evidence – to use a compedious phrase – is admissible. The question must always be whether the similar fact evidence taken together with 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".

Then later Lord Salmon dealing with the same point uses these words at pages 188 and 462 of the respective reports. He said, "My Lords, whether or not evidence is relevant and admissible against an accused is solely a question of law. The test must be: is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged? In the case of an alleged homosexual offence, just as in the case of an alleged burglary, evidence which proves merely that the accused has committed crimes in the past and is therefore disposed to

[60](1976) 63 Cr. App. R. 118. See note in [1976] Cr. L.R. p. 311. Compare *R.* v. *Nightingale* [1977] Cr. L.R. 744.

[61]See note 20.

commit the crime charged is clearly inadmissible. It has, however, never been doubted that if the crime charged is committed is 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".

It seems to us that we 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 by Lord Salmon is that evidence is admissible as similar fact evidence if, but only if, it goes beyond a tendency to commit crimes of this kind and is positively probative in regard to the crime charged. That, we think, is the test which we have to apply on the question of the correctness or otherwise of the admission of similar fact evidence in this case.

We think quite clearly that the evidence of the other transactions did if accepted by the jury go beyond showing that Rance was a person who was not above passing a bribe. The essence of each of these three cases is that a bribe was paid to a councillor in respect of a contract in which Rance's company was interested and in every case there is the bogus document of some kind with Rance's signature on it which is the basis upon which the bribe was to be covered up. We have no doubt in saying that in those circumstances the similar fact evidence – did go beyond merely showing a tendency on the part of Rance to commit the offence. Therefore it passed the test in *D.P.P.* v. *Boardman* and so far was correctly admitted".

In the recent English case of *R.* v. *Mustafa*[62] the facts were that M went to a frozen food shop where he bought over £20 worth of meat and nothing else. He used a stolen Barclay card to pay and forged the signature of the holder on the sales voucher. He left the shop and went to a similar shop down the street where he repeated the performance obtaining £18–£20 worth of meat. The issue was one of identification. M was of distinctive appearance and the evidence was strong, a number of witnesses having identified him at a parade. M was also identified by G. the Manager of another frozen food shop, as a man who three months earlier loaded his trolley with £18–£20 of meat, noticed he was being observed and left the shop. A week after the two successful offences had been committed police found at M's house an Access Card in a Barclay holder. The Access Card had been stolen and M admitted he had been copying the signature on it. The trial judge admitted this further evidence. M appealed on the ground that the further evidence was wrongly admitted. He submitted that the evidence of G. while admissible as similar fact evidence ought to have been excluded as being prejudicial. As to the Access Card relying on

[62] [1977] Cr. L.R. 283; (1977) 65 Cr. App. R. 27.

Boardman[63] he submitted that it was inadmissible as a matter of law. It was held dismissing the appeal, although G's evidence had some prejudicial effect the trial judge had rightly admitted it. As to the access card evidence it was admissible on the basis of the ruling in *Reading*[64] (where it was evidence relating to materials which might be used in a particular type of robbery and articles which might have been stolen in the course of the robber charged)

In *R. v. Tricoglus*[65] another recent English case the facts were that about 1 a.m. on May 18, 1975, A left a club in Newcastle intending to walk home. She reluctantly accepted a lift pressed upon her by a bearded man driving a Mini. He drove her to a cul-de-sac where he raped her in the car. The manner of the rape was unpleasant and peculiar. She told the police that she would be unable to identify the man. Some 12 days later G. had suffered a similar fate having been driven to the same cul-de-sac and raped in the same peculiar manner. Again the rapist was bearded but G said he had been driving an 1100. On May 14, M and C were independently offered lifts in a persistent manner in the city centre by a bearded man driving a Mini. Both had refused but C took the car number which but for one figure corresponded to that of the Mini owned by T. T was arrested and taken to a police station. His car was also possessed by the police. G attended an identification parade where she picked out someone other than T as her assailant. Shown T's car she identified it as the one in which she was raped. In evidence in chief G. unexpectedly made a dock identification of T. Although A's evidence together with the forensic evidence was just enough to make a case for T to answer the Crown had applied to call G, M and C to give similar fact evidence, which application had been granted. T appealed on the ground that the evidence had been wrongly admitted. It was held, allowing the appeal, applying *Boardman* the evidence of G. was properly admitted (presumably because of the peculiar manner of the rape). The evidence of M and C was held to be wrongly admitted as it was bound to lead the jury to think that T had a propensity towards a particular type of crime. No mention had been made in the summing up of the dock identification by G. The jury should have been warned against that evidence. Looking at the very unsatisfactory nature of G's evidence, the scientific evidence and the prejudice introduced by the inadmissible evidence of M and C, the court was unable

[63] See note 20.

[64] (1960) Cr. App. R. 98.

[65] [1977] Cr. L.R. 284; (1977) 65 Cr. App. R. 16.

to say that without the evidence of G, M and C there was still enough upon which a properly directed jury could not have failed to convict.

In *R.* v. *Scarrott*[66] the appellant was charged on an indictment containing thirteen counts. The counts covered a period of four and a half years and charged an assortment of offences of indecency against boys. He was convicted on 10 counts involving eight boys. Basing himself on the decisions in *Kilbourne* and *Boardman* (supra) the trial judge ruled that the evidence of the boys was strikingly similar and so admissible and was capable of corroborating the evidence on those counts to which the boys did not directly speak. The similarities were: the ages of the boys, the way in which their resistance was worn down, the location of the offences and the offences themselves. The appellant appealed on the ground that the similar fact evidence which was used as admissible was as a matter of law inadmissible. The appeal was dismissed.

Julius Stone[67] after reviewing the early cases in England on the rule of exclusion of similar fact evidence concludes that the rule in 1850 was as follows:

"The foregoing examination of the writers and cases prior to 1850 leads to the conclusion that whenever the evidence of similar facts offered was relevant to any specific fact or issue upon which the jury has to make up its mind it was admitted. *Rex* v. *Cole*[68] set the only boundary line of admissibility and its authority had never been questioned despite its meagre report. The rule deducible from it, however, is not a rule excluding all evidence of similar offences unless it falls under some one of a closed list of exceptions. It is authority merely for the proposition that if the evidence offered is relevant only by an argument which proceeds from the other crimes to the disposition of the prisoner to convict such crimes, and thence to the probability of his having committed the crime charged it is not admissible".

The rule in *Makin's* case, he says, is no broad rule of exclusion with exceptions, but a broad rule of admissibility where there is relevance, except where the only relevance is via disposition.

He states the rule of exclusion as it exists in England today as follows:—

"Evidence which is relevant merely as showing that a person has a propensity to do acts of a certain kind is not admissible to prove that he did any such acts."

[66] [1977] Cr. L.R. 745; (1977) 65 Cr. App. R. 125. See also *R.* v. *Johannsen* (1977) 65 Cr. L.R. 101 and *R.* v. *Novac* (1977) 65 Cr. L.R. 106.

[67] J. Stone, The Rule of Exclusion of Similar Fact Evidence: England in (1932–33) 46 Harvard Law Review p. 954.

[68] Cited in Phillips, Law of Evidence (1st Ed.) 69–70; in that case it was held by all the judges that "in a prosecution for an infamous crime, an admission by a prisoner that he had committed such an offence at another time and with another person and that he had a tendency to such practices ought not to be admitted".

The rule is thus stated in a positive way. Similar fact evidence is usually to be admitted if relevant; it is only to be excluded in some specific instances. Cross[69] states that an item of similar fact evidence may be rejected –

(a) because it fails to satisfy the test of logical relevance;
(b) because it is logically relevant but substantially through disposition only; or
(c) in criminal cases, because, although logically relevant for reasons other than disposition, its relevance is minimal having regard to its prejudice.

This view was adopted by the Court of Criminal Appeal in 1946 in *R. v. Sims* in a judgment delivered by Lord Goddard L.C.J. but prepared by Lord Denning.[70] It was rejected by the Privy Council in *Noor Mohamed v. R*[71], Lord Goddard himself resiled from it in *R. v. Alfred Hall*[72] and the House of Lords in *Harris v. D.P.P.*[73] left the question entirely open; but it appears to have been adopted by Lord Simon in the case of *D.P.P. v. Kilbourne*[74] where he said after referring to Lord Herschell's opinion in *Makin v. Attorney General for New South Wales*, "All relevant evidence is prima facie admissible. The reason why this type of evidence referred to by Lord Herschell L.C. in the first sentence of the passage is inadmissible is not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted; the law therefore exceptionally excludes this relevant evidence; whereas in the circumstances referred to in the second sentence the logically probative significance of the evidence is much greater".

Another view has been expressed by Mr. Ernest E. Williams in two articles[75] in which on an analysis of the cases since 1894 he has attempted

[69] Cross on Evidence 3rd Edition p. 372. In the fourth edition at p. 310 the rule is thus summarised "Evidence of the misconduct of a party on other occasions (including his possession of incriminating material) must not be given if the only reason why it is relevant is that it shows a disposition towards wrong doing in general, or the commission of the particular crime or civil wrong with which such party is charged, unless such disposition is of particular relevance to a matter in issue in the proceedings as it would be, for example, if it were a disposition to employ a technique resembling, in significant respects, that alleged to have been employed on the occasion in question".

[70] See note 11.

[71] See note 26.

[72] [1952] 1 All. E.R. 66, 68; [1952] 1 K.B. 302, 306.

[73] See note 12.

[74] See note 4.

[75] Ernest E. Williams in Law Quarterly Review Vol. 23 p. 28 and Vol. 39 p. 212.

to treat them on the basis of a broad rule of exclusion with a limited number of specific exceptions. The rule of exclusion is seen as an old and established canon of the common law and he comes to the conclusion with regret that "Looking back over the list of cases it will surely be agreed that they display on the whole a continuation of the tendency to widen the area of admissibility of evidence of other offences and so to take away from the accused person the protection which in many cases would ensure his acquittal".

This view seems to find support in the Digest of the Law of Evidence by Sir James Stephen,[76] who was the author of the Indian Evidence Act. In Article X of his Digest he stated, "A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith – is deemed not to be relevant to such facts". The exceptions to this rule are thus classified – "similar acts or words on other occasions may be proved if they show the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of body or mind or of any state of body or bodily feeling the existence of which is in issue or is deemed to be relevant to the issue"; also "when there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of occurrences, in each of which the person doing the act was concerned is deemed to be relevant". Thus both sections 14 and 15 of the Act are exceptions to the general rule implicit in section 5 of the Act which states that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant and of no others".

This is the approach that has been generally taken (until very recently) in England and it appears to be the view taken in the Indian and Malaysian cases. Another approach is suggested by R.N. Gooderson in an article in the Cambridge Law Journal.[77] In any criminal trial, he points out, the

[76] See Cross on Evidence 4th Edition p. 25, where he says "In his *Digest of the Law of Evidence* Stephen attempted to state the rules concerning the matters that may be proved in court wholly in terms of relevancy. The result was that he had to explain the rejection of hearsay on the ground that it was irrelevant or deemed to be irrelevant, whilst its reception under exceptions to the hearsay rule was based on the fact that it was relevant or deemed to be so. Other exclusionary rules were likewise said to involve the rejection of evidence which is irrelevant or deemed to be irrelevant. The objection to this mode of expression is that much of evidence which English law rejects is highly relevant, and no one would now wish wholeheartedly to adhere to the terminology of the Digest, although its influence has been considerable." See also E.C. Mc Hugh, "Similar Facts in Criminal Cases", (1949) 22 Australian Law Journal, p. 502 and 551, and L.H. Hoffmann, Similar Facts after Boardman in (1975) L.Q.R. 193 at p. 204f.

[77] R.N. Gooderson, Similar Facts and the Actus Reus, in (1959) Cambridge Law Journal p. 210.

three main questions that arise are first whether there was a criminal act or as is often called an actus reus; secondly whether the accused was the author of it; and thirdly whether the accused had the necessary mens rea. In the first edition of Halsbury's Laws of England in 1910 it was stated that in the first two instances there was a general rule of exclusion, qualified by certain exclusions. Mr. Gooderson has adopted the analysis in Halsbury and stated that in so far as it concerned the actus reus similar fact evidence is admissible –

(1) To prove the occurrence of the main fact, the actus reus, –
   (a) where the accused denies the actus reus and avers that he himself had no opportunity to commit the crime. The leading cases under this head are *R* v *Alfred Hall*[78] and *R* v *Twiss*[79]
   (b) where the accused denies the actus reus, but admits opportunity relying on a plea of innocent association. The leading cases are *D.P.P.* v *Ball*,[80] *R*v *Smith*,[81] *R* v *Cole*,[82] and *R* v *Sims*[83].

(2) To prove that the accused was the author of the crime –
   (a) where the accused admits the actus reus (or it is otherwise independently proved) but denies opportunity e.g. by pleading an alibi. The leading cases under this head are *Thompson* v.

[78] [1952] 1 All E.R. 66. H's defence in regard to one of the men Ritchie with whom he was alleged to have committed an act of gross indecency was that he had never seen him. The Court of Criminal Appeal held that the evidence of the two other men Broadman and Chapman were admissible on the charge regarding Ritchie as it went to identity as in *Thompson* v.R. See Cowen and Carter, Essays on the Law of Evidence p. 121–122.

[79] [1918] 2 K.B. 853. In that case the accused was charged with gross indecency with a boy of sixteen. Evidence was admitted that photographs of nude boys were found on the accused's person when he was arrested and others at his lodging. One report describes the accused's defence as putting the whole story of the boy in controversy. See however Cross on Evidence, p. 292.

[80] [1911] A.C. 47.

[81] (1915) 11 Cr. App. R. 229. In this case the deceased died in her bath. The accused her husband was the only person with the opportunity of murdering her. The question was whether she died from natural causes or the accused murdered her. It was held that evidence that the accused had gone through a form of marriage with two other women and that they both died in their baths in circumstances similar to those of the deceased in this case was admissible.

[82] (1941) 28 Cr. App. R. In this case the accused was charged with indecent assault and gross indecency with a male person. Some indecent letters indicative of homosexual tendencies were found in the accused's possession. At the trial the defence was a complete denial of the acts. It was held that the letters were inadmissible. See Gooderson *op. cit* note 5.

[83] [1946] 1 All ER 697. Sims stated in that case that the men came to his house for a game of cards.

R[84] and *R* v *Robinson.*[85]

(b) where the accused admits the actus reus (or it is otherwise independently proved) and also opportunity but denies that he committed the crime. The leading cases are *R* v *Straffen*[86] and *Harris* v *D.P.P.*[87]

Apart from this similar fact may be admissible to prove *mens rea.* In particular if the accused denies the actus reus but admits the external fact, pleading accident or innocence, the question is then substantially one of mens rea as in *R* v *Alfred Hall.*[88]

It might be noted that in England as well as in Malaysia there are statutory abrogations of the rule of exclusion in certain criminal cases. Sections 441 and 442 of the Criminal Procedure Code provide --

441. Where proceedings are taken against any person for having received goods knowing them to be stolen or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

442. Where proceedings are taken against any person for having received goods knowing them to be stolen or for having in his possession stolen property and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings and may be taken into consideration for the purpose of proving that the person accused knew the

[84] [1918] A.C. 221. Evidence of powder puffs and indecent photographs admitted to prove identity.

[85] (1953) 37 Cr. App. R. 95. The accused was charged with robbery on two different occasions. In each case a paycar had been forced to stop by a Jaguar and the occupants assaulted and robbed by masked men. The accused pleaded an alibi. He could not deny that a crime had been committed by someone. It was held that the sole issue was one of identification and on this evidence by two entirely different people in respect of two entirely different raids was admissible on both charges.

[86] [1952] 2 Q.B. 911.

[87] [1952] A.C. 694.

[88] [1952] 1 All. E.R. 66. In regard to two of the men Boardman and Ritchie the accused admitted the acts alleged, but pleaded that they were done as medical treatment. The accused was not a qualified doctor but if his defence was established it would rebut any evidence of indecency.

property which was proved to be in his possession to have been stolen: provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to enter in the charge the previous conviction of the person so accused.

These provisions follow the provisions of section 19 of the English Prevention of Crimes Act 1871, which were substantially re-enacted in section 43(1) of the Larceny Act, 1916. The corresponding provision in England is now contained in section 27(3) of the Theft Act, 1968.

Section 54 of the Evidence Act, 1950 also provides as follows:—

54. (1) In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

(2) A person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless —

(a) the proof that he has committed or been convicted of that other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;

(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(c) he has given evidence against any other person charged with the same offence.

Explanation 1 — This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2 — A previous conviction is relevant as evidence of bad character.

This follows in part the provisions of section 1 of the English Criminal Evidence Act 1898. The English provision has given rise to difficulties in interpretation and its repeal has been recommended by the Criminal Law Revision Committee,[89] who have recommended the following provisions in its place —

6. — (1) Where in any proceedings the accused gives evidence, then,

[89] 11th Report, paragraphs 114–136. See C. Tapper, (1973) 36 Modern Law Review p. 167 and Cross in 6 Sydney Law Review p. 173.

subject to the provisions of this and the next following section, he shall not in cross-examination be asked, and if asked shall not be required to answer, any question tending to reveal to the court or jury –

(a) the fact that he has committed, or has been charged with or convicted or acquitted of, any offence other than the offence charged; or

(b) the fact that he is generally or in a particular respect a person of bad disposition or reputation.

(2) Subsection (1) above shall not apply to a question tending to reveal to the court or jury a fact about the accused such as is mentioned in subsection (1)(a) or (b) above if evidence of that fact is (by virtue of section 3 of this Act or otherwise) admissible for the purpose of proving the commission by him of the offence charged.

(3) Where, in any proceedings in which two or more persons are jointly charged, any of the accused gives evidence, subsection (1) above shall not in his case apply to any question tending to reveal to the court or jury a fact about him such as is mentioned in subsection (1)(a) or (b) above if evidence of that fact is admissible for the purpose of showing any other of the accused to be not guilty of the offence with which that other is charged.

(4) Subsection (1) above shall not apply if –

(a) the accused has personally or by his advocate asked any witness for the prosecution or for a person jointly charged with him any question concerning the witness's conduct on any occasion or as to whether the witness has committed, or has been charged with or convicted or acquitted of, any offence; and

(b) the court is of the opinion that the main purpose of that question was to raise an issue as to the witness's credibility;

but the court shall not permit a question falling within subsection (1) above to be put to the accused by virtue of this subsection unless of opinion that the question is relevant to his credibility as a witness.

(5) Subsection (1) above shall not apply where the accused has himself given evidence against any person jointly charged with him in the same proceedings.

7.–(1) In any proceedings the accused may –

(a) personally or by his advocate ask questions of any witness with a view to establishing directly or by implication that the accused is generally or in a particular respect a person of good disposition or reputation; or

(b) himself give evidence tending to establish directly or by implication that the accused is generally or in a particular respect such a person; or

(c) call a witness to give any such evidence;

but where any of these things has been done, the prosecution may call,

and any person jointly charged with the accused may call or himself give, evidence to establish that the accused is a person of bad disposition or reputation, and the prosecution or any person so charged may in cross-examining any witness (including where he gives evidence, the accused) ask him questions with a view to establishing that fact.

(2) Where by virtue of this section a party is entitled to call evidence to establish that the accused is a person of bad disposition or reputation, that party may call evidence of his previous convictions, if any, whether or not that party calls any other evidence for that purpose; and where by virtue of this section a party is entitled in cross-examining the accused to ask him questions with a view to establishing that he is such a person, section 6(1) of this Act shall not apply in relation to his cross-examination by that party.

The question how far evidence should be admissible to show that the accused has been guilty of misconduct other than the offence charged has also been discussed by the Criminal Law Revision Committee in England. The Committee summarised the general rule as follows: "The general rule is that evidence showing only that the accused has a disposition to commit the kind of offence charged or crimes in general is inadmissible for the purpose of showing that he committed the offence charged. To this general rule there are important exceptions". In its report the Committee proposed to preserve the substance of the common law rule that evidence showing a disposition to commit the offence charged is in general inadmissible but to relax it in one important respect, that is to make provision as to the admissibility of evidence of previous convictions for the purpose of proving that the accused committed the misconduct in respect of which he was convicted. The draft proposed by the Committee[90] is as follows:—

"3.1 (1) Subject to the provisions of this section, in any proceedings evidence of other conduct of the accused shall not be admissible for the purpose of proving the commission by him of the offence charged by reason only that the conduct in question tends to show in him a disposition to commit the kind of offence with which he is charged or a general disposition to commit crimes.

In this section "other conduct of the accused" means conduct of the accused other than the conduct in respect of which he is charged.

(2) In any proceedings evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be admissible for the said purpose if the

[90] Ibid, paragraphs 70–101. See Tapper in (1973) 36 M.L.R. 56 and Cross in (1973) Cr. L.R. 400.

disposition which that conduct tends to show is, in the circumstances of the case, of particular relevance to a matter in issue in the proceedings, as in appropriate circumstances would be, for example —

(a) a disposition to commit that kind of offence in a particular manner or according to a particular mode of operation resembling the manner or mode of operation alleged as regards the offence charged; or

(b) a disposition to commit that kind of offence in respect of the person in respect of whom he is alleged to have committed the offence charged; or

(c) a disposition to commit that kind of offence (even though not falling within paragraph (a) or (b) above) which tends to confirm the correctness of an identification of the accused by a witness for the prosecution.

(3) Where in any proceedings evidence of any other conduct of the accused is admissible by virtue of subsection (2) above for the purpose of proving the commission by him of the offence charged, and the accused has in respect of that other conduct been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere, then, if evidence tending to establish the conduct in question is given by virtue of that subsection, evidence that he has been so convicted in respect of it shall be admissible for that purpose in addition to the evidence given by virtue of that subsection.

(4) In any proceedings where the conduct in respect of which the accused is charged is admitted in the course of those proceedings by or on behalf of the accused, evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be admissible for any of the following purposes, namely —

(a) to establish the existence in the accused of any state of mind (including recklessness) proof of which lies on the prosecution; or

(b) to prove that the conduct in respect of which the accused is charged was not accidental or involuntary; or

(c) to prove that there was no lawful justification or excuse for the conduct in respect of which the accused is charged,

notwithstanding that the other conduct is relevant for that purpose by reason only that it tends to show in the accused a disposition to commit the kind of offence with which he is charged:

Provided that no evidence shall be admissible by virtue of this subsection for the purpose of proving negligence on the part of the accused.

(5) If in any proceedings evidence of any other conduct of the accused is admissible by virtue of subsection (4) above for any purpose mentioned in that subsection, evidence that he has in respect of that other conduct been convicted of an offence by or before any court in the United

Kingdom or by a court-martial there or elsewhere shall (notwithstanding anything in subsection (3) above) be admissible for that purpose, whether or not any other evidence of that conduct is given.

(6) If at the trial of a person for an offence the court is satisfied with respect to any matter which is admissible in evidence by virtue of subsection (2), (3), (4) or (5) above that the admissibility of that matter did not arise or become apparent until after the conclusion of the prosecution's case or that it was not reasonably practicable for evidence of that matter to be given before the conclusion of that case, then, notwithstanding any rule of practice –

(a) any person who gives evidence for the defence may be cross-examined about that matter; and

(b) subject to any directions by the court as to the time when it is to be given, evidence of that matter may be given on behalf of the prosecution after the conclusion of the prosecution's case.

(7) Nothing in the foregoing provisions of this section shall prejudice –

(a) the admissibility in evidence in any proceedings of any other conduct of the accused in so far as that conduct is relevant to any matter in issue in the proceedings for a reason other than a tendency to show in the accused a disposition; or

(b) the operation of any enactment (whether contained in this Act or in any other Act, whenever passed) by virtue of which evidence of other conduct of the accused, or evidence of his conviction of an offence, is or may become admissible in any criminal proceedings.

(8) The provisions of section 25 of this Act apply for the purposes of this section.

(9) Section 27(3) of the Theft Act 1968 (admissibility, where a person is being proceeded against for handling stolen goods, of evidence that he has acted in certain ways with respect to stolen goods or has been convicted of theft or of handling stolen goods) shall cease to have effect.

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CONTINGENCY FEES: A CASE STUDY FOR MALAYSIA*

O.W. Holmes in the opening sentence of *The Common Law*[1] said "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen have had a good deal more to do than the syllogism in determining the rules by which men should be governed." The application of this philosophy to Malaysia provides the basis of several questions. For example, whose times, moral and political theories, and institutions of public policy, as embodied in the law have been received from England via the common law and statute of reception?[2] If the laws reflect the values of groups, societies, at certain times and places can it be sagelu assumed that the transportation of these values can be effectively adopted and implemented by a new and alien community. In this paper the idea of received values is tested. In England and Wales the law governing maintenance and chanperty and the solicitors ' practice rules make the legal and ethical introduction of contingency fees an impossibility. This paper attempts to show the historical reasons for the emergence of maintenance and champerty and the antipathy towards the American style of fee payment. It spells out the consequences, as laid out in English case law, of efforts to evade the common law rules by lawyers, and indicates the importance of these rules and cases in Malaysia. The paper highlights the divorce between the theory and practice of law in this country by focusing on personal injuries: running down and vehicle accident cases. Although it attempts to tackle this issue constructively by offering a series of proposals to alleviate the present difficulties the paper can be read inductively. Received values are not necessarily supportive of national policy or community needs. They require analysis for function and utility.

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[1] Little, Brown (1964).

[2] Civil Law Act 1956 (Revised 1972), s. 3.