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Present : Schneider and Dalton JJ. and Jayewardene A.J.

THE KING *v.* SENEVIRATNE.

No. (1), 3rd Western Circuit, P. C. Colombo, 254.

Evidence—Charge of cheating and criminal breach of trust—Proof of similar acts—System—Intent of accused—Series of occurrences—Jurisdiction of Court—Evidence Ordinance, ss. 14 and 15—Courts Ordinance, s. 90.

The accused was charged on four counts in the indictment with cheating and criminal breach of trust in respect of a money transaction in which he acted as Notary Public for two of his clients, E and Mrs. P.

On December 21, 1920, the accused raised a sum of Rs. 5,000 for E on the primary mortgage of a land, the lender being one Welsh. Within a few weeks accused informed E that Welsh had recalled the loan, and that Mrs. P. was willing to lend a sum of Rs. 6,250 on a primary mortgage of the same land. Accordingly, on January 21, 1921, a bond was executed by E for the sum, of which Rs. 750 was paid to E, and Rs. 5,000 was retained by the accused to pay off Welsh and to obtain a cancellation of his bond, which the accused failed to do. The accused was then charged as stated with cheating and criminal breach of trust.

The accused's explanation was that he had paid Rs. 750 to Mrs. P at the request of E, and that with the consent of the latter he kept the balance, which was not sufficient to obtain a discharge of Welsh's bond. E denied having given authority to the accused to pay Mrs. P or to use the balance. After leading the direct evidence in the case, the Crown proposed to lead further evidence of another instance in which the accused had in a similar manner cheated another lady client and committed breach of trust of certain moneys raised by her through the accused.

Held, the evidence regarding the other transaction was admissible..

Per SCHNEIDER and DALTON JJ.—The proving of one isolated act apart from the act set out in the charge does not amount to a proof of the fact that there was a series of similar occurrences of which the act charged was one within the meaning of section 15 of the Evidence Ordinance.

Per JAYEWARDENE A.J.—In my opinion two acts amount to a number of acts, and would be sufficient to constitute a series.

The prohibition contained in section 90 of the Courts Ordinance, which forbids a Judge to hear an appeal from or review any judgment, sentence, or order passed by him, applies to a case reserved by a Judge of the Supreme Court under section 355 (1) of the Criminal Procedure Code.

CASE reserved by Jayewardene A.J. under section 335 (1) of the Criminal Procedure Code. The facts are stated in the reference as follows :—

"In this case the accused was charged on an indictment containing four counts. The first and second were for cheating under section 403 ; the third and fourth for criminal breach of trust, being an agent, under section 392 of the Ceylon Penal Code.

"The facts disclosed showed that the accused, who was a Notary Public, raised a sum of Rs. 5,000 for one Edirisinghe, the chief witness for the prosecution, from G. C. Welsh on the mortgage (primary) of a land at Mirihana. This was on December 21, 1920. Within a few weeks Edirisinghe says the accused informed him that Mr. Welsh had recalled his loan, and that there was another party (Mrs. Pollocks) who was willing to lend him Rs. 6,250 on a primary mortgage of the same land. Then it was arranged that the accused should raise this loan from Mrs. Pollocks on a primary mortgage and discharge Mr. Welsh's bond. Accordingly, on January 21, 1921, bond No. 5,572 was executed by Edirisinghe as a primary mortgage, although at the time Mr. Welsh's bond was still outstanding. The intention, no doubt, was to pay Mr. Welsh as soon as the second bond was registered and showed a clear title. The Rs. 6,250 raised on this bond were in the hands of the notary (to whom it had been handed over by Mrs. Pollocks). Out of this Rs. 6,250 Edirisinghe obtained Rs. 750 and Rs. 500 was to be retained by the accused for his notarial and stamp fees, &c. Rs. 5,000 was left in the accused's hands to pay off Mr. Welsh and obtain a cancellation of his bond. This was never done, and both Mr. Welsh and Mrs. Pollocks sued Edirisinghe on their bonds. The accused's explanation of the failure was that he had given Mrs. Pollocks Rs. 750 out of the money remaining in his hands with the consent of Edirisinghe, and the balance left was not sufficient to obtain a discharge of Mr. Welsh's bond. When Edirisinghe was informed of this, the accused says he consented to the accused using the Rs. 4,000 or Rs. 4,250 until Edirisinghe was in a position to find the Rs. 750 which he had consented to the accused paying over to Mrs. Pollocks. So he used the money, and as Edirisinghe never paid the Rs. 750, Mr. Welsh's bond could not be discharged. Edirisinghe, of course, denies having consented to the accused paying Mrs. Pollocks Rs. 750 or authorizing the accused to use the balance for his own purposes, and says that the accused has misappropriated the money and committed criminal breach of trust.

"After leading the direct evidence in the case, Crown Counsel proposed to lead evidence of another instance where the accused had in a similar manner cheated a Mrs. Ludowyke and committed

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breach of trust of certain moneys raised by her through the accused. The facts of the second occurrence were said to be as follows :—

"Mrs. Ludowyke wanted a sum of Rs. 5,000, and asked the accused to raise it for her on the mortgage of her premises, "Matilda House." He agreed to do so, and told her that Mr. Welsh would lend the money at 12 per cent. Two bonds were executed, one for Rs. 4,000 and the other for Rs. 1,000, in favour of Mr. Welsh and dated July 4 and 18, 1921, respectively. Soon after another mortgagee, Fernando, was found, who was prepared to lend Rs. 7,500 on a primary mortgage of the same property at 8½ per cent. per annum.

"So it was arranged to give a primary mortgage in favour of Fernando, and with the money raised from him to pay off Mr. Welsh's Rs.5,000. On August 16, 1921, the mortgage in favour of Fernando was signed, and the accused was paid a sum of Rs. 7,500— Rs. 500 by cheque and the balance in cash. Out of this, Rs. 3,000 was retained to pay Mr. Welsh, for it would appear that only Rs. 3,000 had been obtained out of Mr. Welsh's money, and Rs. 2,000 had been obtained by Mrs. Ludowyke from her account in the Savings Bank. This Rs. 2,000, less the notary's charges and stamp fees, had been paid back to Mrs. Ludowyke's son. The balance Rs. 2,500 the accused retained with him, and put off paying Mrs. Ludowyke. About two months later the accused gave her a postdated cheque, which he asked her not to cash without informing him. In January, 1922, the cheque was sent to the Bank and was dishonoured. Mr. Welsh sent Mrs. Ludowyke a letter demanding the payment of the money and interest which had fallen into arrears. The accused had in his hands Rs. 2,500 of the money he raised from Mr. Welsh and Rs. 3,000 out of the Rs. 7,500 paid him by Fernando. Mrs. Ludowyke was sued by Mr. Welsh and Fernando, and she had to pay both a sum of about Rs. 10,500, with interests and costs, by selling her property, "Matilda House." Mrs. Ludowyke's son, an uneducated young man, appeared to be somewhat doubtful as to whether Mr. Welsh's money was utilized or not, but it is clear from the facts that Rs. 3,000 at least of that money must have been used to pay Mrs. Ludowyke's creditor.

"When Crown Counsel proposed to lead evidence of the facts connected with Mrs. Ludowyke's transactions, Counsel for the accused objected on the ground that it did not come within the terms of section 15 of the Evidence Ordinance. After hearing him I overruled the objection, and stated that I would give my reasons if the necessity to do so arose. Crown Counsel accordingly called Mrs. Ludowyke's son, who deposed to the main facts of his mother's transactions with regard to the two bonds."

The question whether the evidence of the second occurrence is admissible or not is not free from difficulty, and when the accused was convicted and sentenced, I decided to refer the

question for the consideration of a Bench of three Judges. I proceed now to give the reasons for my ruling in favour of the admissibility of the evidence. The object of leading this evidence was to prove that the accused had a guilty mind or dishonest intention, and to negative the defence set up by him that he had used the money with the consent and authority of Edirisinghe. This is permissible under section 15 of the Evidence Ordinance, provided the act which is the subject of the charge against the accused "formed part of a series of similar occurrences in each of which the accused was concerned." This section reproduces a rule of the English Law of Evidence which was authoritatively enunciated in the Privy Council judgment in *Makin v. The Attorney-General of New South Wales*[1] by Lord Herschell L.C.

He said :—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purposes 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 show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

Under our law questions as to the admissibility of evidence are not determined solely by the provisions of the Evidence Ordinance, for section 100 provides: "Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in this Island, such question shall be determined in accordance with the English Law of Evidence for the time being."

There are numerous English cases decided both before and after the Privy Council case in which this question has been discussed, and the principles deduced therefrom have been summarized (in my

[1] *(1894) A. C. 57 (65).*

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opinion correctly) by the High Court of Calcutta in *Amrita Lal Hazra v. Emperor*[1] referred to in *Emperor v. Panchu Das*[2] as follows :—

> "Facts similar to but not part of the same transaction as the main fact are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact ; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question."

In *Rex v. Boyle and Merchant*[3] Lord Reading C.J. explained the reasons for the admission of such evidence :

> "We think," he said, "that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction, the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between that act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence

[1] *(1915) 42 Cal. 957.* [2] *(1920) 47 Cal. 671 (695).*

[3] *(1914) 3 K. B. 339 (347).*

admissible. See *Reg. v. Rhodes*[1] per Lord Russell C.J. and *Rex v. Ellis*.[2] In the recent case of *Rex. v. Mason*,[3] this Court followed the decision in *Reg. v. Rhodes* (*supra*), and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible in order to rebut the defence set up."

In this connection the case of *Rex v. Mason* (*supra*), referred to in the above judgment, is of considerable importance, as it is, in my opinion, very similar to the present case, if not on all fours with it. In this case too the judgment was that of Lord Reading C.J. There the accused was charged with forging and uttering a lease. He was acquitted of forging, but found guilty of uttering. At the trial evidence was tendered of two other forged deeds found in the possession of the accused two weeks and five months later. The evidence was admitted. The accused appealed, contending that the two deeds found in his possession subsequently were not admissible in evidence. In overruling this objection, the Court said:

"This evidence was tendered to show guilty mind and to rebut a defence of the appellant. What is meant by guilty mind in this connection is a mind guilty of the offence which is charged, and it does not mean evidence of a generally fraudulent or dishonest mind.

"Evidence must not be of isolated transactions, but of transactions with some nexus or connection with the offence charged." . . . .

"In *Ellis, 5 Cr. App. Rep. at 58*, Bray J. cites Lord Alverstone C.J. (in *Bond (1906) 2 K. B. 394*): "The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts, other than those covered by the indictment, cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved."

"Mr. Maddocks tried to bring himself within this, and to say that the evidence could only show a general fraudulent disposition. It is not evidence of a general fraudulent disposition which is admissible, but evidence of frauds so connected with the forgery charged as to form part of the evidence in support of it, or to rebut a defence to the charge." *10 Cr. App. Rep., pp. 172-173.*

[1] *(1899) 1 Q. B. 77.*
[2] *(1910) 2 K. B. 764.*
[3] *(1914) 10 Cr. App. Rep. 169.*

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I would also refer to the judgment of Wills J. in *Reg. v. Rhodes* (*supra*) quoted in the argument of *Rex v. Mason* (*supra*), where the learned Judge has said :

> "What difference does it make if they were immediately after the act complained of ? If they formed part of the same system of fraud, I think it can make no difference. The only difficulty in this case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only nexus between such transactions is their proximity in point of time."

Under section 15 it is necessary to show that the act complained of "formed part of a series of similar occurrences." This, I take it, means that there must be some nexus or connection between the acts as laid down in the English cases. Such a nexus or connection can be created by proximity in point of time. In the present case there is such proximity in point of time. Questions of proximity must depend on the nature of the act committed and on the circumstances.

In the case of a notary, he can attest deeds only where parties appear before him, and the fraud alleged here cannot be committed except where a party wishes to execute a bond to raise money to pay off an earlier bond. Opportunities for committing a fraud of this kind are not many, and cannot be created at the will of the notary. Thus in *Rex v. Mason* (*supra*) one of the forged deeds was found in the accused's possession five months after the commission of the offence. In *Rex v. Boyle and Merchant* (*supra*) there was a lapse of six months between the act complained of and the act proved in evidence. Another "connection" is provided by the similarity of the acts, which shows that they formed part of the same system of fraud. Further, the prosecution suggests, if I conclude rightly, that the accused was systematically using Mr. Welsh's money to commit frauds on his clients in the manner disclosed by the facts of the two instances referred to.

In my opinion there is clearly a "*nexus* or *connection*" between the act charged and the evidentiary act, and the two acts formed part of a series of similar occurrences. Further, if we apply the reasons in *Rex v. Mason* (*supra*), the evidence of the subsequent fraud is so connected with the previous one as to rebut a defence to the charge. I do not think that in order to constitute a series of similar occurrences and to attract the provisions of section 15 it is necessary to have more than one other act in addition to the act complained of.

See *Rex v. Boyle and Merchant* (*supra*), where there was only one other act proved. Otherwise there would be a *casus ommissus* in our Evidence Ordinance, and the English rule on the point would apply. It is hardly necessary to attempt to show that the occurrences referred to are similar. They are obviously so.

For these reasons the evidence in question was, in my opinion, admissible.

I invite the opinion of this Bench as to its correctness. I may also state that there was ample evidence, both direct and circumstantial, apart from the evidence objected to, on which the conviction could have been based.

There is also another indictment against the accused in respect of the Ludowyke transactions.

H. A. P. Sandarasegara, K.C. (with *Clement de Jong, H. V. Perera,* and *Bandaranaike*) for the accused, appellant.—Under section 15 of the Evidence Act proof of prior or subsequent acts is relevant when there is a question whether the act is accidental or one of a series of intentional acts. The section applies when intention, not general, but particular knowledge, is in issue.

Such evidence should not be led to prove a fact (*Tennekoon v. Dingiri Banda* [1]).

In *King v. Wijesinghe* [2] Ennis J. says that such evidence was admissible to show the absence of accident or presence of intention but not to prove the original fact itself.

When there is no question of accident, the evidence was held to have been wrongly admitted (*King v. Peiris* [3]).

Where defence was that possession of stolen lead was accidental, such evidence might be led by the prosecution (*King v. Wijeratne* [4]). *Empress v. Vyapoory Moodeliar* [5] deals with section 14, not 15.

In *Emperor v. Panchu Das* (*supra*) evidence was held to be inadmissible where the acts were plainly intentional and where there was no question of accident or intention. Evidence, therefore, is admissible in three cases: (1) to prove system, (2) to rebut defences of accident, (3) to prove knowledge of some fact bearing on intention (*Rex v. Rodley* [6]).

A single prior act of a like criminal nature would not be admissible as evidence of a system (*Rex v. Bond* (*supra*)).

No question of the intention of the accused is in issue in this case between the prosecution and the defence. Therefore evidence of similar intention is inadmissible. Evidence was inadmissible where it only proved that the accused was of a general fraudulent disposition (*King v. Fisher* [7]).

My submission is that the accused's representation to Mrs. Ludowyke six months later was not similar to his representations to Edirisinghe.

The issue really was "Whether such an act was done," *not* What was the intention with which it was done.

[1] *3 C. W. R. 364.*
[2] *(1919) 21 N. L. R. 230.*
[3] *(1912) 16 N. L. R. 11.*
[4] *6 C. W. R. 314.*
[5] *6 Cal. 655.*
[6] *9 Cr. App. Rep. 69.*
[7] *(1910) 1 K. B. 149.*

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The scope of the section cannot be enlarged. The English law can be applied when there is a *casus omnissus*. Here there is no ommission. Section 15 is clear, and must be strictly construed.

Sections 14 and 15 are cognate sections.

Vide Ameer Ali's (*Evidence Act*) comment on section 15 :—Similar acts are not admissible for proof of the fact in question. It is meant to establish facts, which are otherwise ambiguous without the admission of collateral facts (page 203).

S. Obeyesekere, D. S.-G. (with *R. F. Dias, C. C.*), for the Crown.—The accused admitted the receipt of the money. He says that he used it innocently.

[SCHNEIDER J.—The fact in question is whether he had authority to use it in a particular way. The only issue, whether such authority was given, is one of fact. You seek to introduce evidence to disprove the truth of the defence that he had authority.]

Yes, to prove his intent and thereby to disprove the truth of the defence.

In *Jayawardene v. Diyonis* [1] the accused were charged with having been in unlawful possession of ganja. Their defence was that the ganja had been foisted on them by the prosecution. Evidence was led to prove that the accused had sold ganja before as medicine.

It was held that the evidence was admissible to negative the defence.

In *King v. Armstrong* [2] the prisoner was indicted for murder of his wife by administering arsenic to her. It was proved that the accused had purchased arsenic. The defence was that he had done so for an innocent purpose. The prosecution attempted to prove that he had attempted to administer arsenic to another person after the death of his wife. It was held that the evidence was admissible.

Evidence of similar acts is admissible upon the issue whether the acts charged against the accused were designed or accidental, or to rebut a defence otherwise open to him (*Makin v. The Attorney-General of New South Wales* (*supra*)).

In *Rex v. Bond* (*supra*) opinion was divided. Lord Alverstone C.J. says that the mere fact that the evidence tendered pointed to only one fact is not conclusive against the admissibility. Evidence of similar acts subsequent to the charge may be proved (*Reg. v. Rhodes* (*supra*) and *Reg. v. Boyle* (*supra*)) shows the elasticity of the term *nexus*.

Evidence is admissible under sections 14 and 15. The principle is that a similar offence or offences cannot be proved to establish the *factum ;* but that once the *factum* is established, such offence or

[1] *(1915) 18 N. L. R. 239.*

[2] *(1922) 2 K. B. 555.*

offences can be proved to show the accused's state of mind and to rebut his defence (*Emperor v. Debendra Prasad* [1]).

Counsel also cited the following authorities (*Queen Empress v. Vaji Ram* [2]), (*Emperor v. Yakub Ali* [3]), (*Wickremesinghe v. Seryhamy* [4]); (*King v. Wijeyeratne* [5]), (*King v. Arnolis* [6]).

Cur. adv. vult.

September 25, 1925. SCHNEIDER J.—

This is a case stated by my brother Jayewardene under the provisions of section 355 of the Criminal Procedure Code, 1898, referring for the decision of a Court consisting of three Judges, a question of law which had arisen on the trial of a person before him. After the argument of the case had proceeded during the greater part of the first day, Mr. Perera, one of the junior counsel for the prisoner, raised the question whether my brother Jayewardene had jurisdiction to sit as one of the three Judges of the Court. Mr. Sandarasegara, who was present in Court at the time and who was the leading counsel for the prisoner, stated that he had no objection whatever to my brother Jayewardene being one of the three Judges. But it would appear from the provisions in the section that if Mr. Perera's objection is to prevail, Mr. Sandarasegara's consent would not vest jurisdiction in my brother. After hearing Mr. Perera upon his objection, the Court decided to proceed with the hearing of the case, my brother still continuing to take part as one of the Judges. Mr. Perera's objection is based upon the following provision in section 90 of the Courts Ordinance, 1889 (No. 1 of 1889) :—

> "Except as is by the provisions of this Ordinance and of the Civil Procedure Code, 1889, provided with regard to the hearing of judgments in review preliminary to appeals to Her Majesty in Her Privy Council, no Judge shall hear an appeal from or review any judgment, sentence, or order passed by himself."

Unlike other sections of that Ordinance which have been amended from time to time, this section stands to-day in its original form. It contains two distinct provisions. The earlier has no application to the question under consideration. The interpretation given to the word "Judge" in the interpretation clause (section 3) of the Ordinance makes it amply clear, apart from the language of the section itself, that that provision applies not only to Judges of the Supreme Court, but also to the Judges of all the Courts of the Island. It provides for those cases where a Judge is a party to, or is personally

[1] *36 Cal. 573.*
[2] *(1892) 16 Bom. 414.*
[3] *(1917) 39 All. 273.*
[4] *4 C. L. Rec. 83.*
[5] *6 C. W. R. 314.*
[6] *(1921) 23 N. L. R. 225.*

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concerned in, any judicial proceeding. The provision relied on by Mr. Perera refers only to Judges of the Supreme Court and prohibits a Judge—

(1) To hear an appeal from ; or

(2) To review any judgment, sentence, or order passed by himself.

The only exception mentioned is the hearing of judgments in review, preliminary to appeals to the Privy Council according to the provisions of the Courts Ordinance itself and of the Civil Procedure Code. The exception no longer exists, because the provisions for hearing judgments in review in both Ordinances were repealed by the Appeals (Privy Council) Ordinance, 1909 (No. 31 of 1909).

We are not hearing " an appeal " in hearing this case, the objection must therefore rest, if at all, upon the second part of the prohibition, which is, that no Judge shall " review any judgment, sentence, or order passed by himself." During the argument I was inclined to regard the word " review " as meaning review by way of revision. I thought so, as section 21 of the Courts Ordinance, which appears to deal with the main jurisdiction of the Supreme Court, divides that jurisdiction into (1) an original criminal jurisdiction and (2) an appellate jurisdiction, and indicates that the latter jurisdiction is to be exercised by way of appeal and revision. I regarded the provision as intended for those cases which are not of infrequent occurrence where a District Judge but for the prohibition might have his own decisions brought up before him when he is acting on the Supreme Court bench. The only special case of an appeal from the decision of a single Judge of the Supreme Court is that provided for in section 40 of the Courts Ordinance. For the hearing of such an appeal express provision is made in section 41, which directs that it shall be heard by " two *other* Judges." I was accordingly inclined to regard section 90 as being confined to those ordinary cases where a Judge would be acting in a matter brought up before him by way of appeal and by way of revision as distinct from appeal. But a closer consideration of the Statute law has convinced me that there is no justification for confining the meaning of the word " review " to cases of revision. The word " review " was to be found in section 42, now repealed, of the Courts Ordinance with reference to the procedure for hearing judgments in review. Since 1901 it is also to be found in section 54 (A). It may have been there before, but I am unable to ascertain that now. In this latter section the words are : " Any case brought by way of appeal, review, or revision," which appears to contemplate a matter being brought up in any one of those three ways—" in review" being one of them. But the strongest argument in favour of Mr. Perera's contention lies in the fact that the very words " to review " are to be found in section 425 of chapter XXXII. of the Criminal Procedure Code of 1883. The presence of those words in the later enactment (No. 1 of

1889) suggests that the word "review" was advisedly used so as to include cases stated under chapter XXXII. of the older Criminal Procedure Code. The retention of the words "to review" in section 355 (3) of the present Criminal Procedure Code (No. 15 of 1898), which section comes within the group of sections comprised under chapter XXXI. and which chapter corresponds to chapter XXXII. of the older Code, also points to the same conclusion.

I am accordingly of opinion that the provision in question does apply to cases stated under chapter XXXI. of the Criminal Procedure Code of 1898. But it should be noticed that what the enactment prohibits is that the Judge should review any judgment, sentence, or order passed by him. It does not prohibit him from deciding as a member of the Court the question of law stated in the case. It is the decision of the question of law which is really contemplated by the provisions in sub-section (1) and also sub-section (2) of section 355. The decision of that question is not reviewing a judgment, or a sentence, or an order. Strictly speaking, therefore, the prohibition does not deprive a Judge of his authority to decide the question of law, but of the right to make an order upon that decision which it would be competent for him to make but for the existence of the prohibition. Under section 355 (2) the Court has the right "to reverse, affirm, or amend the judgment, or to make any other such order." The word "thereupon," which confers upon the Court the power to do those things after the decision of the question of law, establishes a close connection between the decision of the question of law and the order consequent upon that decision. It does seem, therefore, that it is not consistent with the true spirit of the legislation for a Judge to take part in deciding the question of law while he is incompetent to make the order which should be made in consequence of such decision. I am indebted to Mr. Perera for the good service rendered by his taking the objection and so pressing it that the provisions of the section had to be considered. It is probable that they had not been considered before with reference to cases under chapter XXXI. of the Criminal Procedure Code. When constituting Courts for the decision of such cases in the future, the provisions of section 90 would, I take it, not be lost sight of. Nevertheless, I do not think we were wrong in proceeding to hear and decide the present case after the objection had been raised and considered. The fact that my brother Jayewardene took part in the hearing of the case does not vitiate the decision of my brother Dalton and myself of the question of law referred for the decision of the Court. It is true that the reference was to a Court of three Judges, but it is not essential that the Court should consist of three Judges. It is competent for a Court of two Judges to decide such a question. I understood from my brother Jayewardene that he did not mind the other two Judges of the Court dealing with the matter. As the Court was unanimous in the

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opinion that the evidence, the admission of which was the question of law, was admissible, the order which should be made thereupon is that the "judgment" (section 251, Criminal Procedure Code) of imprisonment passed on the prisoner is affirmed. I should mention that the Registrar of the Court stated to me that he was following an invariable practice in arranging for the Judge, who had stated the case, to be one of the Judges of the Court constituted to decide the reference. I am myself aware of three instances where that Court was so constituted. It seems to me that if my brother Jayewardene only joined the other members of the Court in deciding the question of law, and refrained from making any order affirming his judgment of imprisonment, he will not be doing anything strictly obnoxious to the law.

I shall now proceed to consider the question of law involved in the case stated. The facts are set out fully and carefully in the reference. The four counts in the indictment upon which the prisoner was tried related to a single money transaction in which the prisoner figured as the notary acting for two of his clients—one Edirisinghe and a Mrs. Pollocks. He was charged with having cheated each of them by dishonest inducement, and with having committed criminal breach of trust by dishonest misappropriation of the money which had come into his hands as a result of the transaction. The four offences were alleged to have been committed on January 21, 1921. The question is whether the trial Judge was right in admitting evidence of another money transaction in which also the prisoner figured as the notary acting for two other clients, namely, a Mrs. Ludowyke and one Fernando, and in respect of which transaction there is another indictment against him charging him similarly with having cheated each of those clients by dishonest inducement, and with having committed criminal breach of trust by dishonest misappropriation of the money. The four offences in regard to this transaction are alleged to have been committed on August 6, 1921. The admission of the evidence of this second transaction was objected to by Mr. Sandarasegara, who appeared for the prisoner on his trial, on the ground that it was not admissible under the provisions of section 15 of the Evidence Ordinance, 1895 (No. 14 of 1895). The trial Judge was of opinion as stated in his reference, that it was admissible under that section.* It appears to me that the evidence is not admissible under that section.

It enacts that:

> "When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that sucha ct formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

* *Section 15, No. 14 of 1895.*

The principles underlying the provisions of sections 14 and 15 of the Ceylon Evidence Ordinance were formulated and enunciated by the Privy Council in *Makin v. The Attorney-General for New South Wales* (*supra*) in the passage cited in the reference from the judgment. According to that judgment the evidence of criminal acts other than those covered by the indictment are relevant if it bears upon the question whether the acts alleged to constitute the offence charged in the indictment were designed or accidental and to rebut a defence which would otherwise be open to the accused. From this case and from a large number of others cases, among which I would mention *Reg. v. Geering*,[1] *Rex v. Bond* (*supra*), *Rex v. Armstrong* (*supra*), it is clearly to be deduced that the evidentiary facts are admissible to prove the intention regarding the *factum probandum* by showing what is described variously as " system " or " design " or " course of conduct " or " practice." In the earlier decisions, as for instance *Geering's case* (*supra*) in 1849 and *Makin v. The Attorney-General for New South Wales* (*supra*), in 1894 the evidence held admissible consisted of more than two acts at least, but in the more recent decisions, as for instance *Rex v. Boyle and Merchant* (*supra*) decided in 1914 and *Rex v. Armstrong* (*supra*) decided in 1922, evidence of but one other act was held admissible to prove the criminal intent of the act forming the charge in the indictment. Section 15 would appear to be framed upon the principles to be gathered from the older of the decisions. It requires that the evidence tendered to prove the criminal intent should be such as would prove the fact that the act charged against the prisoner formed part of a series of similiar occurrences. The word " series " denote that more than one other act will have to be proved. Two transactions, as in this case, cannot be regarded as forming a series by themselves. " Series " means, as I understand the word, a number of things connected with one another. The very illustrations[2] (which are cases actually decided in the Courts) appended to section 15 make it clear that the series contemplated must consist of more than two instances besides the one upon which the charge is founded. I find it difficult to understand how the proof of one other similiar act will prove that the act charged formed part of a series. The two money transactions in this case were undoubtedly occurrences of a similiar character in more than one respect. In each of them the prisoner was concerned. In those respects the requirements of section 15 were fulfilled. But they of themselves are not a " series." Discussing the admissibility of similiar evidence in the course of his judgment in *Rex v. Bond* (*supra*), Bray J. said :

> " I do not think that the proof of but one similiar case, without any special connection with the case charged in the indictment would prove, or indeed would be evidence of, a

[1] *(1849) L. J. (M. C.) 215.*

[2] *The Law of Evidence (Woodroffe and Ameer Ali) 192.*

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system or course of conduct within the cases. Of course it may be said that if two cases will not do, how many will? But this is a difficulty which always arises in such cases. To prove that a man was twice drunk, and nothing more, will not prove that he is an habitual drunkard. I think when evidence of this class is tendered the Judge should require an assurance from the Counsel for the prosecution that in his opinion he has evidence of a sufficient number of cases to prove a system. In criminal trials no real difficulty can rise, because the Judge has before him the depositions of the witnesses called before the Magistrates and the proofs of any additional witnesses proposed to be called. He can, therefore, see for himself whether the evidence is sufficient; and in my opinion, before admitting evidence of this kind the Judge, should satisfy himself that the evidence tendered will, if true, establish, or tend to establish, what I have called a system."

Among the large number of decisions cited at the argument of the present case there was not one prior to 1895 (the year when the Ceylon Evidence Ordinance was enacted), where only one other similar instance was considered sufficient. Now the cases not only required more than one other act, but also that there should be some "link" or "connection" or "nexus" between the other acts and the one forming the charge. What this " nexus " was depended on the facts of each case. It is this " nexus " spoken of in the cases which the word " series " and the words " similar occurrences in each of which the person doing the act was concerned " in section 15 denote. I am therefore of opinion that the evidence objected to was not admissible under section 15, as the evidence of the second money transaction would not prove that the first money transaction, upon which the charges were based, formed part of a *series* of similar occurrences. If there had been evidence of a number of similar occurrences, it appears to me that that evidence would have been admissible more appropriately under section 15 than under section 14.

But the question for our decision is not whether the evidence was admissible under section 15, but whether it was admissible under any provision of the Law of Evidence applicable to this Island. It is of no materiality that the question of its admissibility was discussed and decided having regard only to the provisions of section 15. The evidence objected to, although not admissible under section 15, is admissible under section 14.

The defence offered by the prisoner to the charges upon which he was tried was that he had not acted dishonestly in regard to the money left in his hands by Edirisinghe. He said it was left in his hands to pay Welsh, but that he could not pay Welsh as, with

Edirisinghe's consent, he paid a small portion of that sum to Mrs. Pollock, and also with the consent of Edirisinghe had appropriated to his own use the balance, which was much the larger portion. Edirisinghe denied the truth of these statements. He denied that he had consented either to the prisoner paying any money to Mrs. Pollock or to appropriating any money for his own purposes. The Crown and the prisoner were therefore at issue as to the fact whether the prisoner had acted innocently in appropriating the money to his own use, as averred by the prisoner, or whether the prisoner had acted "dishonestly," as averred by the Crown, in doing so. The term "dishonestly" imports a state of mind, namely, the intention with which the act of appropriation of the money was done. The evidence tendered by the Crown was to show that the prisoner had employed similar subterfuges in both instances for keeping the money of his clients in his hands; that in both instances he had acted in his capacity as notary for all the parties concerned, and that he utilized the fact of his having the opportunity to invest Mr. Welsh's money to deceive his clients in the second instance connected with this case. In fact the suggestion for the Crown was that the prisoner made "a practice," by means of Mr. Welsh's money, of deceiving other clients of his into leaving their moneys in his hands.

The part of section 14 material to the question under consideration is the following—

> "Facts showing the existence of any state of mind—such as intention . . . . are relevant, when the existence of that state of mind . . . . is in issue or relevant."

Commenting in the introduction (page 192) to their book "The Indian Law of Evidence," Woodroffe and Ameer Ali say of this section:

> It "is in accordance with the principle laid down in numerous cases that, to explain states of mind, evidence is admissible, though it does not otherwise bear upon the issue to be tried."
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> * * * * * * * *
>
> It "makes general provision for the subject (that is for the admission of such evidence), and the next section is a special application of the rule contained in this section . . . . The only point for the Court to consider, in deciding upon the admissibility of evidence under this section, is whether the fact can be said to show the existence of the state of mind or body under investigation. The same considerations will, it is apprehended, determine the question of the admissibility of facts *subsequent* to the fact in issue to

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prove intent and other like questions. So also, though the collateral facts sought to be proved should not be so remote in time as not to afford a reasonably certain ground for inference, yet such remoteness will, as a rule, go to the weight of the proffered evidence only."

In holding that the evidence was admissible under section 14, I shall be following the plain words of the section and the application of the principle as shown in the larger number of the decisions cited.

Besides some decisions of this Court, several decisions of the Court in England and in India were cited by Counsel on both sides during the argument. I do not propose to discuss those decisions. I have had the advantage of seeing the judgment of my brother Dalton, and later the judgment of my brother Jayewardene, after I had written the above portion of this judgment and before I could obtain the reports from which the decisions were cited. Both of them have considered, and commented on, the decisions cited. Those decisions do no more than afford most helpful illustrations of the application of the principles of law upon which the provisions of sections 14 and 15 rest. No useful purpose would be served by my discussing them in the circumstances.

But I would offer a few words regarding the bearing and application of cases decided in Courts outside this Island when a question of the Law of Evidence applicable to the Island has to be considered. The decisions of the Courts in England and in India are frequently cited, and received with all deference in the Island, as they are often of the most valuable assistance, although we are not bound by them. As regards the Law of Evidence those decisions have a special value, derived from the history of our law on the subject. In 1895 our Evidence Ordinance was enacted. Nearly the whole of it is a reprint of the Indian Evidence Ordinance, 1872, as that Act stood in 1895. Sections 14 and 15 of our Ordinance are to this day identical word for word with the Indian Act. I would quote below the comments in the introduction by Woodroffe and Ameer Ali to their " The Law of Evidence " (*supra*) as being equally applicable to our Ordinance as to the Indian Act :

> " It has been said that with some few exceptions the Indian Evidence Act was intended to, and did, in fact, consolidate the English Law of Evidence ; that the Act itself is little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India ; and that it was drawn up chiefly from *Taylor on Evidence*. It is true that, although the Code is, in the main, drawn on the lines of the English Law of Evidence, there is no reason to suppose that it was intended to be a servile copy of it ;

and indeed, as already stated, it does in certain respects differ from English law. Moreover, these dicta do not recognize the undoubted original character of sections (5–16) dealing with the relevancy of facts.

" Although, as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides, though, of course, English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the ones to be considered.

" Even where a matter has been expressly provided for by the Act, recourse may be had to English or American decisions, if, as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted. Authority abounds for the use of the extraneous sources to which reference has been made in cases such as these. As was observed by Edge C.J. in *The Collector of Gorakhpur v. Palakdhari Singh* : ' No doubt cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries. In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man and may safely afford guidance to us here.'

" It must not, however, be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence, repealing all rules other than those saved by the last portion of its second section. The method of construction has been expounded by Lord Herschell in terms which have been adopted by the Privy Council and cited and applied in other cases in this country.

" A similiar rule had been previously laid down in this country with reference to the construction of this Act. In the case of the *R. v. Ashootosh Chuckerbutty* it was said : ' Instead of assuming the English Law of Evidence and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law, the principles and the application of these principles to the cases of most frequent occurrence ; but in respect of matters expressly provided for in the Act we must so to speak start from the Act, and not deal with it as a mere modification of the Law of Evidence prevailing in England.'

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" Questions, however, may arise as regards matters not expressly provided for in the Act. It has been held that the second section in effect prohibits the employment of any kind of evidence not specially authorized by the Act itself, and that a person tendering evidence must show that it is admissible under some one or other of the provisions of this Act. It is to be regretted that the Act was not so framed as to admit other rules of evidence on points not specifically dealt with by it, as was in effect done by the Commissioners in the second section of their draft. In that case whenever omissions occur (and some do in fact occur) in the Act, recourse might be had to the present or previous law on the point existing in England, or the previous rules, if any, in this country."

Unlike the Indian Act, we have a section in our Ordinance (section 100) which expressly provides that all questions not provided for in the Ordinance shall be determined by the "English Law of Evidence"

I hold that the evidence objected to was rightly admitted, and I affirm the judgment of imprisonment passed on the prisoner upon his conviction.

Mr. Sandarasegara, upon whose objection this case came to be stated, argued the case for his client, the prisoner, exhaustively, and with much ability, and I feel that he has done a good service to the administration of justice. His objection has resulted in a careful consideration and very helpful study of the decisions bearing upon the rules of law contained in sections 14 and 15 of the Ordinance.

DALTON J.—

This is a case reserved under the provisions of section 355 of the Criminal Procedure Code, the accused having being convicted and sentenced at the 3rd Western Circuit for 1925 at Colombo for criminal breach of trust, under section 392 of the Ceylon Penal Code. There were four counts in the indictment, the accused being found guilty on the fourth count, which was as follows :

". That at the time and place aforesaid, you being an agent did commit criminal breach of trust in respect of a sum of Rs. 5,500 (which was a portion of the sum of Rs. 6,250) entrusted to you by the said Edirisinghe Arachchige Paulis Joris Edirisinghe in your capacity as such agent for the purpose of being paid over to the said G. C. Welsh in cancellation of the said bond No. 5,564, and that you have thereby committed an offence punishable under section 392 of the Ceylon Penal Code."

The facts set out in the reference to this Court are as follows :

" The facts disclosed showed that the accused, who was a Notary Public, raised a sum of Rs. 5,000 for one Edirisinghe, the

chief witness for the prosecution, from G. C. Welsh on the mortgage (primary) of a land at Mirihana. This was on December 21, 1920. Within a few weeks, Edirisinghe says, the accused informed him that Mr. Welsh had recalled his loan, and that there was another party (Mrs. Pollocks) who was willing to lend him Rs. 6,250 on a primary mortgage of the same land. Then it was arranged that the accused should raise this loan from Mrs. Pollocks on a primary mortgage and discharge Mr. Welsh's bond. Accordingly, on January 21, 1921, bond No. 5,572 was executed by Edirisinghe as a primary mortgage, although at the time Mr. Welsh's bond was still outstanding. The intention, no doubt, was to pay Mr. Welsh as soon as the second bond was registered and showed a clear title. The Rs. 6,250 raised on this bond were in the hands of the notary (to whom it had been handed over by Mrs. Pollocks). Out of this Rs. 6,250 Edirisinghe obtained Rs. 750, and Rs. 500 was to be retained by the accused for his notarial and stamp fees, &c. Rs. 5,000 was left in the accused's hands to pay off Mr. Welsh and to obtain a cancellation of his bond. This was never done, and both Mr. Welsh and Mrs. Pollocks sued Edirisinghe on their bonds. The accused's explanation of the failure was that he had given Mrs. Pollocks Rs. 750 out of the money remaining in his hands with the consent of Edirisinghe, and the balance left was not sufficient to obtain a discharge of Mr. Welsh's bond. When Edirisinghe was informed of this, the accused says he consented to the accused using the Rs. 4,000 or Rs. 4,250 until Edirisinghe was in a position to find the Rs. 750 which he had consented to the accused paying over to Mrs. Pollocks. So he used the money, and as Edirisinghe never paid the Rs. 750, Mr. Welsh's bond could not be discharged. Edirisinghe, of course, denied having consented to the accused paying Mrs. Pollocks Rs. 750 or authorizing the accused to use the balance for his own purposes, and says that the accused misappropriated the money and committed criminal breach of trust."

After leading the direct evidence in the case, Crown Counsel proposed to lead evidence of another instance where the accused had in a similar manner cheated a Mrs. Ludowyke and committed breach of trust of certain moneys raised by her through the accused. The facts of the second occurrence were said to be as follows :

" Mrs. Ludowyke wanted a sum of Rs. 5,000, and asked the accused to raise it for her on the mortgage of her premises 'Matilda House.' He agreed to do so, and told her that Mr. Welsh would lend the money at 12 per cent. Two bonds were executed, one for

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Rs. 4,000 and the other for Rs. 1,000 in favour of Mr. Welsh and dated July 4 and 18, 1921, respectively. Soon after another mortgagee, Fernando, was found, who was prepared to lend Rs. 7,500 on a primary mortgage of the same property at 8½ per cent. per annum. So it was arranged to give a primary mortgage in favour of Fernando, and with the money raised from him to pay off Mr. Welsh's Rs. 5,000. On August 16, 1921, the mortgage in favour of Fernando was signed, and the accused was paid a sum of Rs. 7,500—Rs. 500 by cheque and the balance in cash. Out of this, Rs. 3,000 was retained to pay Mr. Welsh, for it would appear that only Rs. 3,000 had been obtained out of Mr. Welsh's money, and Rs. 2,000 had been obtained by Mrs. Ludowyke from an account in the Savings Bank. This Rs. 2,000, less the notary's charges and stamp fees, had been paid back to Mrs. Ludowyke's son. The balance Rs. 2,500 the accused retained with him, and put off paying Mrs. Ludowyke. About two months later the accused gave her a post-dated cheque, which he asked her not to cash without informing him. In January, 1922, the cheque was sent to the bank and was dishonoured. Mr. Welsh sent Mrs. Ludowyke a letter demanding the payment of the money and interest which had fallen into arrears. The accused had in his hands Rs. 2,500 of the money he raised from Mr. Welsh and Rs. 3,000 out of the Rs. 7,500 paid him by Fernando. Mrs. Ludowyke was sued by Mr. Welsh and Fernando, and she had to pay both a sum of about Rs. 10,500, with interest and costs, by selling her property 'Matilda House.' Mrs. Ludowyke's son, an uneducated young man, appeared to be somewhat doubtful as to whether Mr. Welsh's money was utilized or not, but it is clear from the facts that Rs. 3,000 at least of that money must have been used to pay Mrs. Ludowyke's creditor.

"When Crown Counsel proposed to lead evidence of the facts connected with Mrs. Ludowyke's transactions, Counsel for the accused objected on the ground that it did not come within the terms of section 15 of the Evidence Ordinance. After hearing him I overruled the objection, and stated that I would give my reasons if the necessity to do so arose. Crown Counsel accordingly called Mrs. Ludowyke's son, who deposed to the main facts of his mother's transactions with regard to the two bonds."

The question for this Court to decide is whether or not the evidence of the second occurrence, the circumstances attending the loan to Mrs. Ludowyke, is admissible on the charge then before the Court.

The learned Judge who reserved the matter has decided that this evidence was admissible under the provisions of section 15 of the Ceylon Evidence Ordinance, 1895, and he sets out his reasons for his decision in the reference.

The first point I would deal with has reference to the composition of this Court. It has been objected that the learned Judge who has referred the matter cannot properly sit as a member of the Court to which the matter is referred. Section 90 of the Courts Ordinance, 1889, enacts that except in certain specified cases : " No Judge shall hear an appeal from or review any judgment, sentence, or order passed by himself." A reference to this Court under the provisions of section 355 of the Criminal Procedure Code does not come within the exceptions. Do then the provisions of section 90 apply to such a reference as this ?

The powers conferred on the Court by section 355 in respect of the reference are very wide, it having " power to hear and finally determine such question, and thereupon to reverse, affirm, or amend the judgment, or to make such other order as justice may require." These words appear to have been adapted from section 2 of 11 and 12 Vict. c. 78. Subsequently, by section 15 of the Supreme Court Judicature Act, 1881 (44 and 45 Vict. c. 68), the jurisdiction and authority in relation to questions of law arising in criminal trials was vested in the Judges of the High Court of Justice, any five or more of whom could exercise such jurisdiction, the Lord Chief Justice being required to be one of them. This Court was superseded in 1907 by the present Court of Criminal Appeal.

The practice as regards the composition of this Court in Ceylon is beyond doubt. The Judge who has referred the question to the Court has always sat on the Court when the question had been argued. The Court may be comprised of two Judges only. In England the practice has not been the same ; sometimes he has sat on the Court, but so far as I can ascertain, during the last three years prior to 1907, more often he did not. In any case, where a Court is comprised of five Judges at least, his presence can be of far less importance than where the quorum of the Court is as here only two.

The Court of Crown cases reserved is in effect a Court of Criminal Appeal, although a limited one. It is so termed, be it noted, in a margin of the section I have cited from 44 and 45 Vict. c. 68. I have been unable to find any section in an English Statute equivalent in terms to section 90 of the Courts Ordinance, nor does the Criminal Appeal Act, 1907, contain any specific direction that a

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Judge shall not sit on an appeal from himself. Possibly it may be inferred from the provisions of section 8, where the Judge from whom the appeal comes is asked to give his opinion on the case. There is at any rate no doubt in my mind that the objection taken to the composition of this Court is a valid one if the spirit of section 90 be relied on. The question, however, to be answered is whether it is contrary to the exact provision of the section. My brothers are agreed that it is not, and they are fortified by the practice which has obtained since the year 1889. I need not, therefore, under the circumstances, as the majority of this Court is against the validity of the objection, do more than express my very grave doubt as to whether the practice of past years is not contrary to the provisions of section 90 of Courts Ordinance.

The question then to be answered by this Court is whether the learned Judge was correct in admitting this evidence. It appears from the reference that it was admitted under the provisions of section 15 of the Evidence Ordinance, which is as follows :—

> " When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is relevant."

I am of opinion that the evidence was not admissible under that section. To claim that the section applies, it must be shown that the act charged formed part of a series of similar occurrences. This is a local equivalent of the English law, which deals with a system or course of conduct. The section of the local Ordinance is in fact precisely the same as Article 12 of *Stephen's Digest of the Law of Evidence, 6th ed.* The proving of one isolated act, apart from the act set out in the charge, cannot to my mind be said to be proof of the fact that there was a series of similar occurrences of which the act charged was one. It was asked, in course of the argument, of what does a series consist. It may of course vary, but the cases show that at any rate one act itself, apart from the act charged, does not come within the provisions of this section as being a relevant fact. (*Rex v. Bond* (*supra*).)

Although inadmissible under section 15 of the Ordinance, I have no doubt, however, on the authorities that the evidence was admissible under the provisions of section 14. Under that section facts showing " the existence of any state of mind, such as intention, knowledge, good faith, negligence, are relevant, when the existence of any such state of mind . . . . is in issue or relevant."

As has frequently been pointed out, and too much stress cannot be laid on this, it is not open to the prosecution to lead evidence to show that the person charged has committed other similar offences for the

purpose of showing that he is a kind of person who would commit the crime with which he is charged, or of creating a bad impression against him as regards his character or conduct. The evidence of other acts tendered must be relevant to the charge before the Court, for example, to show his guilty mind or dishonest intention, in the offence with which he is charged, when the existence of such state of mind is relevant or in issue. The fact that the admission of such evidence shows that accused has committed other crimes does not then make it inadmissible. It will appear, therefore, how important it is to the accused that the admission of any such evidence should be very carefully considered, when tendered. As the learned Judge points out in his reference, it is a matter not always free from difficulty, since it is not easy always to see at first sight exactly where the dividing line comes. Attention is drawn to this difficulty in *Makin v. Attorney-General* (*supra*), to which I refer below.

In the case, however, before this Court on the facts submitted to us, there is on the authorities cited, to my mind no doubt as to the admissibility of the evidence. The accused admitted he had received the money, the subject of the charge under the circumstances set out, and also that he had used it for his own purposes, but he states he had the permission of Mr. Edirisinghe to so use it. It was then clearly relevant to the charge to show what was the state of mind of the accused when he used this money, to show whether he acted in good faith or otherwise, to show, in the words used in the reference, whether, in the offence charged, he acted with a guilty mind or dishonest intention. It is true that it was open to the prosecution to call Edirisinghe (as they did), who denied that he had ever given accused permission to use the money as he claimed, but that could not debar the prosecution from leading any evidence upon which they might wish to rely to prove the guilt of the accused.

The case has been exhaustively argued by Mr. Sandarasegara, but I do not think it necessary to refer to all the authorities which he cited. The case of *Makin v. Attorney-General for New South Wales* (*supra*) is probably the best known, and it has been followed in local Courts before. On the facts here, in my opinion, that authority supports the admission of the evidence of Mrs. Ludowyke's transaction with the accused. It was relevant to an issue before the jury, to a defence which was open to the accused and which he had adopted, that he had acted *bona fide* and with no guilty intention, but with permission. The case of *Rex v. Armstrong* (*supra*) applies *Makin v. Attorney-General* (*supra*). It also states that in the opinion of the Court an intimation given by Counsel at an early stage of the case as to the defence upon which he proposes to rely cannot preclude the prosecution from offering any necessary evidence to show that the accused committed the crime. It was urged by

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Mr. Sandarasegara that at the outset of the case it was clear what was the defence from the statutory statement made by accused, namely, that he had received permission to use this money. Under those circumstances he urged, the evidence of Mrs. Ludowyke's transaction was not relevant to that defence, and I think there is something to be said for his contention. But the question is whether the evidence tendered was relevant to the charge ; if it was, then any particular defence made cannot preclude the prosecution from leading that evidence. Both in respect of the time and circumstances Mrs. Ludowyke's transaction have a distinct connection with, or bearing upon, the charge before the Court, not to show that accused was the kind of person who was guilty of breaches of trust, but to answer the question, did the accused retain the money of Welsh as he states innocently, or did he use it as the prosecution set up in breach of his trust. The grounds upon which such evidence is admissible are stated in clear language in *Rex v. Boyle and Merchant* (*supra*). The accused were charged with demanding money partly through an agent with menaces. Evidence was admitted at the trial to prove that a few months previously a transaction similar in all respects to that charge had been carried out by the same agent, and a sum of money paid to him. In the course of his judgment, Reading L.C.J. says :

> " We think that the ground upon which such evidence is admissible is that it is relevant to the question of real intent of the accused in doing the act. Its object is to negative such a defence as mistake or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged." He continues " There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused had a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction the subject matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible."

It seems to me that the nexus or connection found to exist between the transactions in *Rex v. Boyle and Merchant* (*supra*) is practically akin to the nexus or connection which exists between the act charged and the facts relating to the subsequent, *i.e.*, Mrs. Ludowyke's, transaction. In *Rex v. Fisher* (*supra*), where the prosecution led

evidence of other cases, in which the appellant was alleged to have obtained goods by false pretences, it is clear that the evidence was rejected on the ground that it was not proved that the appellant was the man concerned. If his identity had not been in question, the Court was of opinion that the evidence was material and admissible.

In support of this contention that, in view of the defence, evidence as to the intention or state of mind of the accused was not relevant, Mr. Sandarasegara appeared to rely strongly on *Rex v. Rodley* (*supra*), where accused was charged with burglary with intent to rape. Evidence was led that subsequently the same night accused had gained access to the bedroom of another woman about three miles away and had had connection with her with her consent. The suggestion of the prosecution was " that he was raging with lust, and that being foiled as regards the prosecutrix " he immediately went to gratify his passion upon the woman whom he knew would not be unwilling to yield. This evidence, the Court of Appeal held, was not admissible on any ground, and ought to have been rejected. I am unable to see that on the facts it is any guide to decide the admissibility or otherwise of the evidence on the case before us. It is a case on the other side of that dividing line to which I have already made reference.

It has been impressed upon us in the course of the argument that this Court is bound by the provisions of sections 5 to 16 of the Evidence Ordinance in respect of the relevancy of facts, and that evidence may be given of every fact in issue, and of such other facts only as are declared therein to be relevant. Hence we are asked not to place too much reliance on English authorities. But one need not do more at this point of time than state again that the Evidence Ordinance is itself an application of the principles of the English law. As pointed out in the *Law of Evidence* (Ameer Ali and Woodroffe), although not intended to be a servile copy, the Indian Evidence Act (the Ceylon Ordinance is practically the same) is little more than " an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order." Hence the recommendation in that work to consult English and also American authorities for the purpose of arriving at a correct determination of the questions that arise.

We have, however, in the course of the argument been referred to some Indian decisions on this question. In *Emperor v. Debendra Prosad* (*supra*) the question at issue before this Court was fully gone into, the English decisions up to 1909 being considered in detail. The connection between sections 14 and 15 of the Evidence Ordinance is pointed out, the latter being an application of the general rule laid down in section 14. The accused was charged with cheating by falsely representing that he was the dewan of an estate and could procure for the complainant the appointment to the vacant post of

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manager to the estate, and thereby obtained a sum of money as a pretended security deposit. Evidence of instances of similar but otherwise unconnected transactions with other persons both before and after the date of the offence charged was led, and accused was convicted. On appeal the conviction was set aside by the Sessions Judge, on the ground that this evidence was inadmissible. The Crown, therefore, appealed further, and it was then held that the evidence was admissible under sections 14 and 15, not to establish the fact of the offence, but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent. It was urged for the accused that on general principles the evidence of previous criminal acts is wholly irrelevant in a subsequent trial, and that attempts to cheat persons other than Boodrie, the person mentioned in the charge, could not be relevant. In support of this argument the old case of *Regina v. Holt*[1] was relied upon, but it was pointed out that the report of that case is so meagre and the judgment so worded, that it is difficult to say what were the points on which the decision was based. It is also remarkable that when mentioned in subsequent decisions it is either passed by without comment, or attempts are made to distinguish it. In *Emperor v. Debendra Prosad* (*supra*) the Court was unable to accept the argument put before it as sound, and held the evidence of the other frauds was admissible in Boodrie's case to prove the obtaining of money by accused from Boodrie was dishonest and fraudulent, that is, that the intention of the accused on the particular occasion set out in the charge was dishonest and fraudulent. This authority it seems to me is against Mr. Sandarasegara's argument, rather than in his favour. He seeks to distinguish it however on the facts by the argument that there are certain classes of offences where intention must be inferred from the act itself and is not therefore in issue, seeing that it is the act itself which must be proved. I am quite unable to agree that the act charged against the accused Seneviratne must necessarily come, or under the circumstances here does come, within that category of such offences. The defence was that the accused acted innocently, with permission, and without any guilty mind or intention. The existence of a state of mind was therefore relevant, and it seems to me that the evidence of the facts which has been objected to went to establish a state of mind in reference to the particular matter set out in the indictment. Just as *Emperor v. Abdul Wahid Khan*[2] has been distinguished from *Emperor v. Debendra Prosad* (*supra*) on the facts, so it seems to me can the facts of this case before this Court be distinguished from those of *Emperor v. Abdul Wahid Khan* (*supra*). And I think the same may be said of the facts in *Emperor v. Panchu Das* (*supra*), a case of murder and theft in which it appears that the charges were tried together.

[1] (*1860*) *Bell C. C. 280.*

[2] (*34*) *All. 93.*

Panchu Das and another were charged on seven counts with the murder of one Deho Bewa, a prostitute, conspiring to rob her, and theft of property from her house. Evidence was led that they had introduced themselves to other women, visited them, and suddenly disappered, after which money and ornaments were missing, and was admitted on the ground that it showed the accused " hunted in couples," and had followed a system. It should be stated here that it was not contended for the Crown that the evidence objected to was relevant to the charge of murder, hence a difficulty, from the procedure followed, might well have arisen had it been held the evidence was admissible on one charge, but not on another tried with it. It would be almost impossible for a jury to shut their minds to the effect of the evidence in the whole case. It was, however, held that the evidence was inadmissible, because there was no room for any doubt that the acts with which the accused were charged were intentional. The only real question was who was the person or who were the persons who committed the crime. The evidence of other acts which was led, therefore, came within that class of evidence which tends to show that the accused has been guilty of criminal acts other than those charged for the purpose of leading one to the conclusion that he was of such a character as would make it likely that he had committed the offence charged. As I have stated, the case before this Court can, in my opinion, be clearly distinguished from that case.

Local decisions have been referred to, but it is apparent that in some of them the matter has not been very fully argued, nor was the notice of the Court drawn in every case to the authorities to which we have been referred. The case of *Tennekoon v. Dingiri Banda* (*supra*), a decision of De Sampayo J., was mentioned. He held that the evidence admitted by the Magistrate, after the closing of the case and reservation of judgment be it noted, was not admissible under section 14 of the Ordinance. The defence (the charge being one of receiving bribes) was that the charge was the result of a conspiracy. It does not appear to have been argued that the evidence of the alleged bribery by three other persons was admissible under section 15, for it might well be in view of the defence relevant to the issue to show that the act charged formed part of a series of similar occurrences. I do not think that case, especially in view of the procedure followed by the Magistrate, is of assistance here.

King v. Wijeratne (*supra*), also decided by De Sampayo J., deals with the charge of receiving stolen property knowing it to be stolen. There evidence of other instances of the same kind was held to have been properly admitted under the provisions of section 14 of the Evidence Ordinance, and *Makin v. Attorney-General of New South Wales* (*supra*) is referred to. It is argued, however, by Mr. Sandarasegara that it is a

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case where the defence was that the possession of the stolen property was not intentional, and that the provisions of section 408 of the Criminal Procedure Code can also be relied on where a person is charged with this offence. What De Sampayo J. held, however, was that the evidence was admissible under section 14 to show that the accused possessed the tea, the stolen property, intentionally and with the knowledge that it was stolen property.

In *Rex v. Peiris* (*supra*) the facts do not appear to be so fully set out as to enable one to follow the case there for the prosecution and defence. Further, the only matter considered seems to have been whether the act of misappropriation was accidental or not, and it was held that evidence of two other similar occurrences was not admissible under section 15 of the Evidence Ordinance. The principle of that section, however, is, as is stated by Ameer Ali and Woodroffe (*The Law of Evidence*), that the facts are admitted as tending to show system, and therefore intention. It is an application of the rule laid down in section 14. Further, it is quite possible, that the case of *Rex v. Peiris* (*supra*) may be distingusihed from the present case on the facts, for the reason I have stated. In *Rex v. Wijesinghe* (*supra*) no English or Indian authority appears to have been referred to. It is a case dealing with the admission under section 15 of evidence showing the commission of other similar offences. On the facts the learned Judge (Ennis J.) came to the conclusion that there was no question of accident or intention involved, so that the evidence of other acts of a similar kind merely became evidence of the bad character of the accused, which was inadmissible. The facts are not fully set out, and hence it is difficult now to consider the application of section 15. It does appear to me, however, that it might have been argued, the section being an application of the rule laid down in section 14, that the existence of a state of mind, good faith, or guilty intention was relevant, and hence it was open to the prosecution to lead evidence of other acts forming part of a series of similar occurrences, having a sufficient and reasonable connection. Possibly that argument was not put forward for the reason that that connection was lacking.

I have thought it right to go into this matter at length, because it does not appear to have been so exhaustively argued before in any case arising in this Colony. As is admitted also, it is a matter by no means free from difficulty.

For the reasons I have given, I would hold that the evidence referred to in the case reserved which was admitted, but objected to, was admissible, under the provisions of section 14 of the Evidence Ordinance and was properly admitted. The conviction of the accused, and the sentence passed upon him, should therefore stand.

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The question reserved by me for the decision of a Bench of three Judges is one which affects the fair trial of accused persons, and requires careful consideration. The circumstances under which the question arises are fully stated in my order of reference and need not be repeated here. On behalf of the prisoner it is contended that the evidence in question is irrelevant and inadmissible, while the Crown contends that it is admissible under section 14, if not under section 15. At the trial the learned Crown Counsel argued that it fell under section 15 as indicating a system or course of conduct, and that the fact that there was only one other act in addition to the act complained of in the indictment did not prevent two acts being regarded as constituting a "series of similar occurrences" within the meaning of that section.

Section 15 runs as follows :—"When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

This section as originally enacted in the Indian Evidence Act of 1872 did not contain the words "or done with any particular knowledge or intention."

These words were inserted by an amendment made in the year 1891, but no illustrations were added to indicate the exact meaning and application of the words. When the Indian Evidence Act was adopted locally in 1895, section 15 was taken over *ipsissima verba* as amended.

Under the English law, evidence of other similar acts is relevent and admissible, and that sections 14 and 15 embody the principles of the English law is clear from the classical passage from the judgment of Lord Herschell L.C. in the Privy Council case of *Makin v. The Attorney-General of New South Wales* (*supra*) quoted in the order of reference, where the Lord Chancellor formulated and declared in clear terms the law on the point as it then existed. The learned Judge there stated that the statement of the general principle was easy, but that its application might not be always free from difficulty. This difficulty is illustrated by the numerous decisions of a conflicting character, which are reported in the English, Indian, and local Law Reports.

For the purposes of the present case, I need only refer to those cases which have a direct bearing on the points arising for decision here.

It seemed to me at the trial, when the objection was first taken that the evidence objected to was admissible under section 15, but it was contended at the argument before this Bench, that as there was only one other act proved in addition to the act charged, two

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similar acts might not be sufficient to constitute a series under section 15, and that the evidence was admissible under section 14. It is, however, not very material to consider whether the evidence in question is relevant under any particular section of the Evidence Ordinance, so long as it is relevant and admissible under our law, and the question reserved is not whether the evidence is admissible under section 14 or section 15, but whether it has been rightly admitted.

In the present case, as the accused was charged with criminal breach of trust, the prosecution had to prove that he acted dishonestly, that is to say, with the intention of making a wrongful gain for himself or causing a wrongful loss to another. Now, under section 22 of the Penal Code, a person who does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly." This intention the prosecution had to prove affirmatively. The defence was that the accused had not acted "dishonestly," inasmuch as he had taken the money for his own use with the permission of the borrower. The prosecution attempted to prove dishonest intention by the evidence of the borrower, who denied that he gave the accused permission to appropriate his money. It also tried to prove this by proof of facts showing the accused's state of mind, that is, by proving that within a few months after the commission of the offence charged, the accused had committed criminal breach of trust of money under similar circumstances, and asked the Court to infer therefrom that in the transaction from which the charge arose, he had acted dishonestly.

Now, under section 14, where it is necessary to prove the state of mind of an accused, such as intention, &c., the prosecution is entitled to lead evidence of facts which show the existence of such a state of mind. But the facts sought to be proved must show that the state of mind exists not generally but in reference to the particular matter in question, and the previous commission by the accused of an offence may become relevant for such a purpose. It is to be noted that explanation 2 to section 14 speaks of "previous" offence committed by the accused, not of any offence or a subsequent offence. In the present case the offence is subsequent. Section 15, it is said, "is an application of the general rule laid down in section 14, and the words of the section, as well as of illustration (*a*), show that it is not necessary that all the acts should form part of one transaction, but that such acts should form parts of a series of similar occurrences." *Emperor v. Debendra Prosad* (*supra*).)

Section 15 permits the proof of what is called in English law "system" or "systematic course of conduct" on the part of an accused person. This brings us to the crucial point in the present case. There is here proof of but one act in addition to the act charged, and that act is a subsequent one. Is such subsequent act relevant to prove

the accused's state of mind when he committed the previous act ? Before expressing any opinion, I would like to refer to some English decisions having a direct bearing on the question. The first of such cases is *Rex v. Bond* (*supra*). The question was elaborately discussed in that case, and disclosed much difference of opinion among the Judges. There the accused, who was a retired medical man, was indicted on a charge of performing an illegal operation in order to procure the miscarriage of a girl called Jones. The accused's plea was that he had performed the operation, but had done so for a lawful purpose. The evidence called for the prosecution consisted *inter alia* of that of another girl, called Taylor, who said (*a*) that the accused performed a similar operation on her, and (*b*) that the accused had told her at the time "that he had put dozens of girls right." The question raised was whether the evidence of the girl Taylor marked (*a*), that the accused had performed an illegal operation on her, was admissible to prove intent, that is, whether in the case under trial the accused acted " unlawfully," or " illegally," or " lawfully " as suggested by him. The case was argued before a Bench consisting of Lord Alverstone C.J. and Kennedy, Ridley, Jelf, Bray, Darling, and Lawrence JJ. The Chief Justice, with whom Ridley J. agreed, held that the evidence (*a*) and (*b*) was inadmissible, as it would be dangerous to admit it in the circumstances of the case. Kennedy J. and Bray J. held that statement (*a*) by itself was inadmissible, and that (*a*) and (*b*) taken together proved a systematic course of conduct on the part of the accused, and were therefore admissible. Darling J. considered both (*a*) and (*b*) together, and held the evidence was admissible. Lawrence J., if I read his judgment right, came to the same conclusion. Jelf J. thought that statement (*a*) by itself was admissible

In the course of his judgment Lord Alverstone C.J. said :

> " I have grave doubts whether the circumstances of this case are sufficient to render the evidence admissible upon the principle recognized in these cases."

(that is, *Makin v. Attorney-General of New South Wales* (*supra*), *Rex v. Wyatt*,[1] *Regina v. Rhodes* (*supra*), and *Regina v. Ollis*[2]).

> " *Primâ facie* there was no necessary connection between the act charged in the present indictment and the act alleged in the evidence admitted. It might possibly be suggested that, inasmuch as it was proved or admitted that the accused had improper intercourse with the two girls, Jones and Taylor, and that both of them, as the result of such intercourse, had become pregnant, the evidence tended to establish a system or course of conduct on the part of the prisoner in cases in which he had got girls into trouble. In my opinion, however, this ground is too dangerous and not sufficient to justify the admission of the evidence. I

[1] *(1904) 1 K. B. 188*

[2] *(1900) 2 Q. B. 758.*

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must not, however, be supposed to decide that there might not be cases in which the evidence would have been admissible on such grounds, but this does not appear to me to be one of them. Nor does it by any means follow that evidence will be inadmissible on the ground only that it goes to prove only one other criminal act, and not one of a number. There may be other circumstances showing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part. The mere fact that the evidence tendered pointed to only one act is not conclusive against the admissibility."

Kennedy J. said :

"In my opinion it does not follow that to prove a criminal intent it is competent to the prosecution to prove the occurrence of a single prior act of the like criminal nature. The admissibility, not merely the weight, of the evidence depends, in my view, upon the evidence which it is proposed to adduce being evidence of such conduct as would authorize a reasonable inference of a systematic pursuit of the same criminal object.

" In the present case, as it appears to me, there is not in strictness a question of accident or mistake. It was not disputed that the accused, a qualified surgeon, as I understand the facts, but not at the time in active practice, had used the surgical instruments upon Ethel Annie Jones.

" Did he use them for a lawful or for an unlawful purpose ? That was the sole issue. In other words, had he or had he not in using them the *mens rea ?* In my opinion, if the evidence here had consisted solely of the single act alleged by the witness Gertrude Taylor to have been done to her nine months before, it ought not to have been admitted. Such a single isolated act is not just ground for any inference, and an act from which no inference can justly be drawn ought not to be allowed to be before the jury. If such evidence were admissible, then in all cases involving the issue of *mens rea* (and most serious crimes do involve it), as it seems to me, it would be permissible to show that on any previous occasion within any measurable distance of time the prisoner had been guilty of an act of similar misconduct, and in effect we should be doing that which would be unfair to the accused, and which Lord Campbell condemned as proving one crime in order to raise a presumption that another crime had been committed by the perpetrator of the first."

Jelf J. said :—

" And upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones evidence that on any other occasion he had done the same thing with similar instruments under similar circumstances with that design upon another girl seems to me to have a distinct bearing. The fact that only one other case was brought forward, and that case nine months old, goes, in my mind, only to the weight, and not to the admissibility, of the evidence. The subject of inquiry is the state of mind of the prisoner when he used the instruments upon Ethel Jones, and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a miscarriage and on the other occasion should have another and an innocent object, would tend to show (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shown, it may be irresistible. But to my mind it is quite unnecessary to show a system which is only a question of degree. If it were necessary to go beyond the two instances, this can generally only be done by proving a series of instances, and if the opposite view prevails, it would be impossible to prove such series, as the first instance (besides the one charged) would be shut out *in limine*, or else the Court would have to decide according to the statement of counsel as to what he expected to be able to prove, and after it had admitted evidence of the first instance the rest might break down. In short, I cannot think that the admissibility of the evidence can depend upon the accuracy or astuteness of counsel's opening statement. If he tenders the evidence mainly on the right ground, the ultimate bearing of it must depend upon what it turns out to be. For instance, if it wholly fails to come up to the proof suggested, it ought to be expunged, and in some cases, owing to the prejudice created by its inadvertent admission, the jury might have to be discharged, and the case tried before a fresh jury. If the proof of the evidence afterwards given by Gertrude Taylor had been handed up to the Judge, he would, I think, have been bound to admit it."

Bray J. said :

" I have no doubt that, according to the principles laid down in cases of this class, it would be permissible to call evidence to show that the prisoner carried on the business of an abortionist ; but I think it would also be permissible to

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show something perhaps a little short of this, viz., that he was in the habit of treating women in a state of pregnancy with a view to procure abortion. I think this would be a system or course of conduct within the cases. But I do not think that the proof of but one similar act, without any special connection with the case charged in the indictment, would prove, or indeed would be evidence of, such a system. Of course, it may be said that if two cases will not do, how many will ? But this is a difficulty which always arises in such cases. To prove that a man was twice drunk and nothing more will not prove that he is an habitual drunkard. I think, when evidence of this class is tendered, the Judge should require an assurance from the counsel for the prosecution that in his opinion he has evidence of a sufficient number of cases to prove a system. In criminal trials no real difficulty can arise, because the Judge has before him the depositions of the witnesses called before the Magistrates and the proofs of any additional witnesses proposed to be called. He can, therefore, see for himself whether the evidence is sufficient ; and, in my opinion, before admitting evidence of this kind the Judge should satisfy himself that the evidence tendered will, if true, establish, or tend to establish, what I have called a system. If, therefore, all that Taylor proved was that the prisoner had attempted to procure abortion in her case, such evidence should not, in my opinion, have been admitted."

The differences of opinion disclosed in the judgments in this case make it impossible to rely on it in support of the proposition that, for the purpose of proving intention, proof of one single act of the same criminal nature as the act charged in the indictment is sufficient or admissible.

But there are subsequent cases in which one other act of a similar kind has been held admissible to prove intention. Thus in *Rex v. Boyle and Merchant* (*supra*), where the accused, who were the proprietors of a paper called " Rubber and Oil," were charged with demanding money by menaces from the proprietor of an oil company through their agent, one Carter, evidence of another act similar in all respects to that charged against them, and committed eight months earlier, was held admissible to prove the real intention of the accused, and to rebut the defence that " the paper was conducted in good faith and as a legitimate journalistic enterprise." Lord Reading, delivering the judgment of the Court of Criminal Appeal, referred to *Makin v. The Attorney-General of New South Wales* (*supra*), quoting the passage already referred to, remarked on the differences of judicial opinion which had arisen in the application of the principle in subsequent cases, citing *Regina v. Ollis* (*supra*) and *Rex v. Bond* (*supra*) as instances, and pointed out that such evidence was admissible, as it

was relevent to the question of the real intent of the accused in doing the act, in the passage which is reproduced in the referring judgment, and continued—

> " It would serve no useful purpose to discuss in detail the relevant facts in this particular case. It is sufficient to say that the prosecution's case was that the paper ' Rubber and Oil ' was carried on by the appellants for the purpose of making and enforcing such demands for money as were made in this case, and that it was not carried on as a legitimate journalistic enterprise, and that various devices were resorted to for the purpose of concealing the connection of the appellants with the operations of this paper ; whereas one of the defences was that ' Rubber and Oil ' was a financial newspaper existing for the purpose of dealing with undertakings connected with rubber and oil, and that one of its legitimate functions was to comment upon and criticise the affairs of the company in question and its management by the Chairman. Again, the case for the prosecution was that Carter, in demanding the payment of the money, in gold, was acting as the agent of the appellants, whereas the defence was a denial of this fact. Carter had acted as the agent of Boyle in demanding the £80 from Newberry in gold. It became of distinct importance to determine which of these views was correct, and we are of opinion that upon the above-mentioned principles of law evidence was admissible of the circumstances of the payment of the £80 in gold and of Carter's having acted as agent for the appellants in the matters relating thereto, as such evidence tended to rebut the defence of the accused. We are not attempting in this case to lay down any new principles of law. We are merely applying well-established principles to the particular facts of this case."

In my opinion the Court in this case held the evidence to be admissible, in view of the suggestion for the prosecution that the accused carried on their paper for the purpose of making and enforcing demands for money, that is, as proving a scheme, system. or plan of the accused for obtaining money by menaces. This judgment adopts the view of Jelf J., and seems to be in conflict with that of the other Judges in *Rex v. Bond* (*supra*). In another case, *Rex v. Armstrong* (*supra*), the same question arose. The accused was charged with the murder of his wife by administering arsenic to her. The defence was that the accused's wife had committed suicide. When the accused was arrested several months later arsenic was found in his possession, and he stated that he had bought the arsenic for use as a weed killer.

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The prosecution, in order to show that his possession of arsenic was not innocent, called evidence to prove that eight months after the death of his wife he had administered arsenic to another person called Martin. This evidence was held to be relevant, as tending to show that the accused's possession of the arsenic was not for the innocent purpose of destroying weeds. The Court of Criminal Appeal (Lord Hewart C.J., Avory and Shearman JJ.) held the evidence of the subsequent act to be admissible on the authority of *Regina v. Geering* (*supra*), which Lord Hewart said " was established as an unquestionable authority by the decision in *Makin v. The Attorney-General of New South Wales* (*supra*)."

The fact that in *Geering's case* (*supra*) two acts of poisoning were proved in addition to the act charged was evidently disregarded as being immaterial, and in the course of its judgment the Court said :

> " It was an essential part of the case for the prosecution here to prove that arsenic was designedly administered by the appellant to his wife, and any evidence that tendered to prove design must of necessity tend to negative accident and suicide " . . . .
>
> " With what design did he make that purchase and provide himself at that particular time with that poison ? "

(Arsenic was purchased on January 11, 1921, and the wife died on February 22 of the same year.)

> " Was it for the innocent purpose of destroying weeds, or for the felonious purpose of poisoning his wife ? The fact that he was subsequently found, not merely in possession of, but actually using for a similar deadly purpose, the very kind of poison that caused the death of his wife, was evidence from which the jury might infer that the poison was not in his possession at the earlier date for an innocent purpose, and such use of the same poison is more cogent than the mere fact of death from the same poison as in *Geering's case* (*supra*), see *Thompson v. The King*[1] and the illustrations there given. . . . .
>
> " In the opinion of the Court, *Geering's case* (*supra*) and *Garner's case*[2] are not so strong as the present case, and the facts of the present case are stronger in favour of the admission of the evidence complained of. There was the clearest possible evidence that the appellant on January 11, 1921, purchased a quarter of a pound of white arsenic, and that when he was arrested on December 31, 1921, he had in his pocket a packet containing a fatal dose of white arsenic.

[1] *(1918) A. C. 221.* [2] *4 F. & F. 346.*

> In those circumstances, so soon as he stated the defence, as he at once did, that he bought and was keeping the poison for the innocent purpose of destroying weeds, it was open to the prosecution to show by means of the evidence relating to Martin that the appellant neither bought nor kept the poison for that pretended innocent purpose."

The learned Judges concluded their judgment on this aspect of the case by quoting the words of Lord Sumner in *Thompson's case* (*supra*) that the question involved " raises no new principle of law, it elucidates no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case."

The decision in this case carries the principle laid down in *Makin v. The Attorney-General of New South Wales* (*supra*) to its extreme limit. It establishes the principle that to prove criminal intent the prosecution may prove the occurrence of a single act of the like criminal nature, proof which the majority of the Judges in *Rex v. Bond* (*supra*) were not prepared to admit, and it also does not insist on the requirement that such an act may be proved only if there are " other circumstances showing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part," to use the words of Lord Alverstone C.J., in *Rex v. Bond* (*supra*), which also was the ground for the reception of a single act to prove intention, in *Rex v. Boyle and Merchant* (*supra*), as is apparent from the passage I have quoted above from the judgment of Lord Reading C.J.

Rex v. Armstrong (*supra*) certainly justifies the admission in the present case of the subsequent conduct of the accused in connection with the Ludowyke transaction to prove his real intention in the transaction—the subject of the charge. So much for the relevant English cases.

In dealing with English cases, however, one fact must be borne in mind, that is, that while our law on the subject is codified the English law is not, and shows a tendency to expand and extend. See *Rex v. Ball*[1] and *Rex v. Rodley* (*supra*). A question might also be asked whether the statement of the law in *Makin v. The Attorney-General of New South Wales* (*supra*) when it uses the words " or to rebut any defence which would otherwise be open to the accused " does not go beyond the law as contained in sections 14 and 15. If the conjunction used had been " *and* " instead of " *or*," there would have been no difficulty, but the use of the word " *or* " creates in my mind some doubt. It is, however, not necessary to consider this aspect of the question in the present case.

[1] *(1911) A. C. 47.*

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In my order of reference I was inclined to the view that any English decisions not falling within the scope of sections 14 and 15 might be caught up by the provisions of section 100, which provides that "whenever in a judicial proceeding a question of evidence arises *not provided for by this Ordinance or by any other law in force in this Island*, such question shall be determined in accordance with the English Law of Evidence for the time being." But further consideration makes me doubt the correctness of that view. Our Ordinance by sections 14 and 15 specially provides for the admission of evidence of this kind, then, can an extension of those provisions be made by an appeal to the English law as if it were a *casus ommissus?* I doubt it. A code must be taken to be exhaustive on any point specifically dealt with by it, and the law must be ascertained by interpreting the language of the enactment. In India, where, however, there is no section corresponding to section 100, some Courts rely on section 11 of the Evidence Act, which is the same as our section 11, to admit all evidence regarded as relevant under English law. But in view of the reasons given by Mookerjee J. in *Emperor v. Panchu Das* (*supra*), it seems to me impossible to utilize that section for the purpose. Therefore, whenever an English decision is cited, it must be carefully examined to see whether it can be brought under the provisions of sections 14 and 15.

Then we have to consider the local and Indian decisions cited by counsel on either side. In many of the local cases this Court has based its decision on the statement of the law in *Makin v. The Attorney-General of New South Wales* (*supra*) without any reference to sections 14 and 15 of our Ordinance. It is perhaps necessary to refer to these cases briefly. The earliest case is that of *The King v. Pieris* (*supra*). There the accused was charged with forgery and criminal misappropriation. The accused had committed two other acts of the same kind, which were included in a separate indictment. At the trial evidence relating to these two acts was admitted on the authority of section 15, but on appeal this Court (Pereira J.) held that that evidence related to charges totally unconnected with the charge in the case, and as there was no pretence that the acts of misappropriation and forgery were accidental, the evidence was inadmissible. The report of the case does not disclose the defence set up by the accused, and whether it became necessary for the prosecution to prove any particular knowledge or intention on his part. In the absence of these further facts, it cannot be said that the judgment is one on which the accused is entitled to rely.

Jayawardene v. Diyonis (*supra*), *The King v. Senanayake*,[1] *The King v. Arnolis* (*supra*), and *Wickremesuriya v. Sayhamy* (*supra*) form the group of cases in which the decisions were based solely on *Makin v. The Attorney-General of New South Wales* (*supra*). But they are decisions

[1] (*1917*) *20 N. L. R. 83.*

which can be justified under sections 14 or 15, except, perhaps, the case of *The King v. Senanayake* (*supra*). There the accused was charged with housebreaking, &c., on June 4, 1915, during the riots of that year. Evidence that the accused was at the head of a mob which broke into houses two days later was admitted "in the circumstances of the case." Its admission was based on the decision of the House of Lords in *Rex v. Ball* (*supra*), which, according to the Court of Criminal Appeal, suggests an extension of the law as then existing (*The King v. Rodley* (*supra*).) However, *The King v. Senanayake* (*supra*) cannot be regarded as an authority, for Wood Renton C.J. ultimately based his decision on the facts relating to the act charged independently of the evidence afforded by the subsequent similar act. In *Tennekoon v. Dingiri Banda* (*supra*) the accused, a Gan-Arachchi, was charged with receiving an illegal gratification from certain accused in a Village Tribunal case. Certain other persons were called to prove that they had given similar gratifications to the accused. This evidence was held inadmissible under section 14. The attention of the Court does not appear to have been drawn to section 15. It is respectfully submitted that the evidence of the other persons would have been relevant under section 15 to prove a systematic course of conduct on the part of the accused. See *The King v. Arnolis* (*supra*). The other local cases cited, *The King v. Perera*,[1] *The King v. Wijeratne* (*supra*), and *The King v. Wijesinghe* (*supra*), do not call for any comment. As regards the Indian decisions, counsel for the accused relies on *The Emperor v. Vyapoory Modeliar* (*supra*), *King-Emperor v. Abdul Wahid Khan* (*supra*), and *Emperor v. Panchu Das* (*supra*), and the Crown on *Queen Empress v. Vaji Ram* (*supra*), *Emperor v. Debendra Prasad* (*supra*), and *Emperor v. Yakub Ali* (*supra*).

These judgments contain expressions of opinion which are not all reconcileable and reasons which are not entirely acceptable, but to my mind the cases relied on for the Crown represent the more correct exposition of sections 14 and 15 and of the English law on the point.

In the case of *The Empress v. Vyapoory Modeliar* (*supra*), Garth C.J. laid down a useful principle which is likely to be forgotten in the application of these sections, that is, that "we must be very careful not to extend the operation of the section (14) to other cases, where the question of guilt or innocence depends *on actual facts* and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions." See *The King v. Wijesinghe* (*supra*). The whole question here raised has been fully discussed in *Emperor v. Debendra Prasad* (*supra*), which has been followed locally in *The King v. Perera* (*supra*), and

[1] *(1916) 3 C. W. R. 382.*

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in India—see *Emperor v. Yakub Ali* (*supra*)—and its soundness has never been questioned : *Emperor v. Panchu Das* (*supra*). In *Yakub Ali's case* three persons were charged with cheating two others and obtaining from them various sums of money. The accused's defence was that they had received the money, but under totally different circumstances from those alleged by the prosecution ; the prosecution led evidence to prove that the three accused had cheated other persons in an exactly similar manner. This evidence was held to be admissible.. Walsh C.J. (then Walsh J.) said :

> " On the question of the admissibility of the evidence, this seems to me a perfectly plain case. In a case of this kind one question, which it is necessary for the prosecution to prove, is whether the untruth is honest or dishonest. In other words, whether it is accidental or intentional. Because if a man makes an honest misstatement, the untruth is, so far as he is concerned, accidental. I therefore think that section 15 of the Evidence Act applies to all these cases, the question being whether an untruthful statement is ' accidental or done with particular knowledge or intention.' I adopt in its entirety the Calcutta ruling (*Emperor v. Debendra Prasad* (*supra*)) with a slight addition. I think the test to be applied must include every *possible defence*, and not be confined merely to the actual defence raised by the accused."

To come to the question propounded by me earlier in the judgment. In my opinion section 15 of our Evidence Ordinance makes special provision for this class of cases, and when it is necessary to prove that an act was done with a particular knowledge or intention, that is, I presume, with the knowledge or intention attributed to the accused in the particular case, another similar act may be proved only if such act " formed part of a series of similar occurrences in each of which the accused was concerned." Then only does the other act become relevent. This means that the prosecution can prove what is called in the English law " system " or " course of conduct " on the part of the accused, and from such conduct ask the Court to draw an inference adverse to the accused, that is, that the act was done intentionally with a criminal intent and so rebut a defence of accident or mistake. In *Rex v. Bond* (*supra*), Bray J. stated the ground on which evidence of system or scheme is admitted :

> " The ground on which in cases of this class evidence is admitted of acts not charged in the indictment is, in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan (say) for obtaining money by fraud, that the act with which the

prisoner is charged is part of a planned fraud, and that the other acts of which evidence is sought to be given when proved will show the existence of the plan, and, therefore, the guilty mind of the prisoner."

Would one other act in addition to the act charged against the accused be sufficient to prove that the act charged formed part of a series of similar occurrences—that is, the existence of a system or plan ? That must depend on the circumstances of each case. Isolated cases of theft, for instance, which have no connection whatever between them, cannot be said to be part of a series of similar occurrences, and their proof would only show that the accused is a person disposed to the commission of crime and would not be admissible. From such isolated acts the existence of a system or plan cannot be inferred. The contention for the prosecution in this case was that the accused was acting on a plan or system, and was systematically using Mr. Welsh's money to commit frauds on his clients in the manner disclosed in the two instances proved in evidence in the case. Section 15 requires that the act charged against the accused should "form part of a series of similar occurrences."

So that the act charged must itself form one of the series. What is a series ? In Webster's Dictionary it is defined as a " number of things or events standing or succeeding in order and connected by a like relation, sequence, order, course, succession of things, a line or row of things."

In my opinion two acts amount to a number of acts, and would be sufficient to constitute a series. See the observations of Lord Alverstone C.J. and Jelf J. in *Rex v. Bond* (*supra*) cited above.

In *Rex v. Boyle and Merchant* (*supra*), where the suggestion was that the accused were carrying on their paper for making and enforcing illegal demands for money, that is, that they were working according to a plan or system, one other act was held to be sufficient to prove the guilty intention of the accused. Of course, these two acts must not only be of the like criminal nature, but must also be connected as the parts of a series are connected. As regards similarity, the two acts in the present case are entirely similar in every respect. As regards the *nexus* or connection between the acts, this is a requirement of the English law also. I think there is here a clear *nexus* or connection between the act charged and the evidentiary act. I have pointed this out in the referring judgment, and I might here add the words of Lawrence J. in *Rex v. Bond* (*supra*) :

" In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in

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evidence. In proximity of time, in method, or in circumstance there must be a *nexus* between the two sets of facts, otherwise no inference can be safely deduced therefrom." (p. 424.)

In my opinion, therefore, the evidence relating to the Ludowyke transaction is admissible under section 15.

If there is any doubt on the point, I would hold that it is also relevant under section 14 on the authority of the case of *Rex v. Armstrong* (*supra*), but I would prefer to base its relevancy and admissibility on section 15, which makes express provision for evidence of this kind.

As regards the objection to the constitution of the Bench, in that it included the Judge who reserved the question, I think the objection came too late. The Court had heard argument for more than half of a day when it was raised. The objection must be taken to have been waived. As to the merits of the objection I express no opinion ; it is based on section 90 of the Courts Ordinance of 1889. It is contended for the Crown that there is a *cursus curiæ* which authorizes the Bench to be constituted as it was. But if the objection is a sound one, no *cursus curiæ* which is in contravention of the law can justify a Court in construing an act of the Legislature in a manner contrary to its plain wording.

Conviction affirmed.