ing the evidence placing Cooke both in the area and the flat on that night, and hearing the evidence of Cooke's willingness to murder for the joy of killing—*all of which they could have heard at a retrial in March or April 1964*—have been satisfied, beyond a reasonable doubt, that Beamish was guilty?

In his Report[49] on the case of Timothy Evans, issued in October 1966, Mr Justice Brabin faced a similar question and answered it with a firm "No". Thereupon the English Government issued a free pardon (posthumously) to Evans.

Let us hope that Beamish will not have to wait until seventeen years after his conviction for a free pardon.

PETER BRETT*

A COMMENT ON PROFESSOR BRETT'S REJOINDER

Professor Brett's so-called "Rejoinder" is more a restatement or refurbishment of the arguments put forward in his pamphlet than a reply to my review of it.

There is no obscurity in my suggestion that he is disqualified by "interest" from discussing the Beamish case objectively. It is well established that a disqualifying interest need not be pecuniary and that professional association or other identification with one of the parties to a dispute may constitute bias.[1] The tea-party details we are now supplied with do not alter the fact that Brett was professionally involved in the case in the Beamish interest. Those familiar with the circumstances in which one lawyer signs an opinion commissioned from another may suspect that Brett's "some notes towards" the opinion he signed is a modest description of his contribution to it. His attempt to minimize his part in it shows that he in fact recognizes the meaning and force of my criticism. The irony remains that he is guilty of the very offence he charges the judges with.

It is difficult, moreover, to accept his statement that he has not attempted to conceal his association with the case. His pamphlet is an appeal to the Government and people of Western Australia to

49 Cmnd. 3101 (1966).

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1 DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 151-156 (1959).

accept his opinion on the case in place of the decision of the courts. He cannot have doubted when he wrote his pamphlet that the ordinary reader would be interested in knowing of his association with the case and that his legal readers, in assessing his pamphlet, would regard it as a critical piece of information. It is reasonable to infer that he thought his pamphlet would carry more weight if he described himself as Professor of Jurisprudence in the University of Melbourne. His publishers, a university press, assisted in this by puffing his pamphlet as 'an objective and dispassionate discussion' of the case.

Nor did he show much inclination to disclose his association with the case after his pamphlet appeared. Though the charge that he was professionally involved was first made in November 1966, it was not until I gave details of his part in the case in my review, which appeared five months later, that he came forward with a public explanation.

I commented in my review that he asks us to accept his own, not disinterested, opinion on the Beamish case in place of the outcome of a constitutional process in which a jury and twenty judges had taken part. I fail to understand how this comment can be described as "totally misleading". A constitutional process is prescribed for trying a man for murder and for hearing any appeal from conviction. A further process is prescribed, after the first is exhausted, for hearing an application for a new trial on the ground of fresh evidence and for hearing any appeal from the refusal to grant a new trial. In Beamish's case a jury and a total of twenty judges took part in these two processes. The jury and the judges at the various stages of appeal have different constitutional roles. I did not suggest that every judge who took part in the case affected to review the whole evidence.

To sustain his criticism of the West Australian judges, Brett minimizes the readiness of the High Court to interfere with the decisions of State courts in criminal appeals. Though the accepted formula requires special circumstances before the Court will intervene, the decisions show that it will do so whenever it is satisfied that some serious irregularity has occurred. This is sufficiently illustrated by the case of *Davies and Cody v. The King*,[2] which Brett himself cites in another connection. In that case the High Court's main reason for setting aside a conviction for murder and ordering a new trial was that the trial judge, in his summing up, had not sufficiently stressed the dangers of relying on a particular method of identification.

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2 (1937) 57 C.L.R. 170.

In his pamphlet Brett was disposed to argue that the credibility of Cooke's claim to have killed Miss Brewer should have been referred to a jury and that the Court of Criminal Appeal trespassed upon the jury's function in dismissing Beamish's application for a new trial on the ground that Cooke's story was obviously fabricated. In my review I pointed out that the English decision of *R. v. Jordan*,[3] cited by Brett, does not in fact support his argument and that *R. v. Flower*,[4] decided after Beamish's case, refuted it. (Brett's ignorance of *R. v. Flower* illustrates one of the dangers of basing a pamphlet on a professional opinion written some time earlier.) *R. v. Flower* and *Craig v. The King*[5] clearly establish that it is the duty of the court to refuse a new trial if, as in Beamish's case, it positively disbelieves the new evidence and is satisfied that the witness is not speaking the truth.

The right of the Crown, which Brett disputes, to test the fresh evidence by cross-examination and by calling evidence in rebuttal is a corollary of the Court's duty to refuse to order a new trial if it is satisfied that the witness is lying. If Brett's views were accepted, the Court would be obliged to order a new trial whenever a key witness for the prosecution can be induced, for whatever reason, to alter his testimony after the trial. Nor is there any conflict, as Brett suggests, between *R. v. Flower*[6] and the decision of the High Court in *Davies and Cody v. The King*.[7] Indeed, the High Court said in that case that 'a declaration by a witness that he has committed perjury cannot possibly be accepted as a ground in itself for setting aside the result of a trial in which the witness has given evidence. If the contrary were held, the whole administration of both civil and criminal justice would be undermined'.[8] A new trial was ordered in *Davies and Cody* because the witness's testimony at the trial, which he had since retracted, had been used to support evidence of identity which was open to objection on other grounds. And there was no question in *Davies and Cody* of the court being satisfied, as it was in *Craig, Flower* and *Beamish,* that the fresh evidence was untrue.

Once it is shown that there is no substance in Brett's argument that the Court, in Beamish's case, trespassed upon the jury's function, we are left merely with a difference of opinion between Brett and the Court as to the credibility of Cooke's story.

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3 (1956) 40 Cr. A.R. 152.
4 [1966] 1 Q.B. 146.
5 (1933) 49 C.L.R. 429.
6 [1966] 1 Q.B. 146.
7 (1937) 57 C.L.R. 170.
8 Id. at 183.

The comments in my review on the similar facts issue were directed to showing that Brett, in trying to convict the Chief Justice of ignorance, merely revealed his own. The simplest way of doing this was to show that the assumption (for which he cited no authority) on which he based his assertion that the Chief Justice 'completely misunderstood the law relating to evidence of similar facts' is flatly contradicted by a leading textbook on the law of evidence. He does not redeem his ill-mannered criticism of the Chief Justice by claiming in his rejoinder that passages from Wigmore could be cited to support a view opposed to Phipson, the text book I cited. Advocates and academic lawyers ordinarily manage to advance conflicting views of the law without charging their opponents with ignorance.

There is, incidentally, nothing obscure in the expression 'to introduce similar fact evidence in a self-serving way', which Brett affects to find ambiguous. The "self" served, as the expression indicates, is the person or party who introduces the evidence. In Beamish's case, the question was whether Beamish could introduce similar fact evidence of Cooke's other killings in a self-serving way in order to inculpate Cooke and so exculpate himself.

Brett is wrong in supposing that I 'wisely abandoned' the Chief Justice's view that Cooke's other killings would not have been admissible if he had been tried for the murder of Miss Brewer. I did not discuss the question, because it did not occur to me that the Chief Justice's view could be questioned. *R. v. Straffen,*[9] cited by Brett, certainly does not support the view that Cooke's other killings would have been admissible in order to prove that he killed Miss Brewer. In *Straffen,* the murder with which Straffen was charged and the two other killings to which he had confessed earlier had peculiarities which made it highly probable that the three crimes were committed by the same person. In each case the victim was a young girl, who was strangled. There was no sign, in each case, of any struggle, no sexual interference, and no attempt to conceal the body, though opportunity to do so was there. Later cases make quite clear that if the other crimes do not carry the same "hallmark" as the crime charged, they will not be admissible in order to establish identity.[10] By no stretch of the imagination could Cooke's other killings (one by stabbing, three by shooting and one by strangling) be said to exhibit the same "hallmark" as the killing of Miss Brewer. Brett's attempt to link the

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9 (1952) 36 Cr. A.R. 132.

10 Smith (1963) 47 Cr. A.R. 204; Blackledge (1965) V.R. 397.

Maddrill and Brewer murders hardly deserves serious consideration. There was no evidence before the Court that Cooke entered Miss Maddrill's flat with the intention of killing her and with the knowledge that she was not alone in the flat. The short account of the case filed by Sgt Neilson shows[11] that Miss Maddrill was awakened by Cooke rummaging through her flat and that he killed her to escape identification. Nor was there any evidence of a dog desisting from barking at Cooke, whatever relevance this might have.

In any event, the Court did in fact assume Cooke's responsibility for the other killings. It is reasonably plain, from Brett's complaint that the Court nevertheless did not attach sufficient importance to them, that he shares the popular belief that crimes of violence are usually committed by people with records of violence. There is no foundation for this belief. A study recently carried out in England revealed that eight out of ten crimes of violence were committed by people with no previous record of violence.[12] In passing, it may be worth noting, in view of Beamish's record of theft, that half of those convicted for the first time of crimes of violence had previous convictions for non-violent offences, such as breaking and entering and theft.[13] In the absence of any "hallmark" linking the killings, the Court, in Beamish's case, was fully justified in regarding Cooke's admitted killings as having little probative weight in considering whether his claim to have killed Miss Brewer was credible.

Brett is also mistaken in saying that there was no evidence before the Court that Miss Brewer would have been unconscious at the time when Cooke claimed that she said a few words. The medical evidence at Beamish's trial established that the initial hatchet blows on Miss Brewer's head, which were struck with severe force, fractured the skull and would have caused immediate unconsciousness.[14] Since the attack with the hatchet could not have taken more than a few seconds in all and Cooke, in cross-examination, abandoned his earlier statement that Miss Brewer spoke after being struck across the throat with the hatchet, the Court was fully justified in concluding that Miss Brewer would have been unconscious at the time when Cooke said she spoke. It is odd to find a lawyer scattering footnote references to medical textbooks in opposition to post-mortem evidence given at the trial.

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11 Appeal Book, p. 466.

12 F. H. McClintock, Crimes of Violence 104 (1963).

13 Id. at 105. In the case of violent sex offences, the proportion of first offenders in 1960 with previous convictions for non-violent offences was as high as 76.2 per cent.

14 Appeal Book, pp. 16, 22, 300-306.

As for the significance of Cooke's story of having seen a milk bottle, a frypan and the bus driver, Brett again tells us that Cooke, in his sworn statement, said that he found a *one-third pint* bottle of milk behind Miss Brewer's back door. This is not so. It was the milkman who said that he delivered a one-third pint bottle of milk through the flap in her back door.[15] Cooke said that he found 'a bottle of milk' behind the door.[16] Since all the flats in Brookwood Flats had flaps in the doors through which milk was delivered every night and Cooke knew the neighbourhood well, he was hardly, as Brett claims, taking a 'fantastic chance' in saying that he found a bottle of milk behind her door if he did not in fact enter the flat that night. It is also not true that Miss Brewer's electric frypan was found on the draining board of the sink: it was found on the bench top of some cupboards between the refrigerator and the end of the sink unit.[17] The bus driver Cooke claimed to have recognized that night in Stirling Highway had been driving buses on the Fremantle-Perth route for nine years.[18] With these corrections, taken from the record, and bearing in mind the many other details of Cooke's story which were shown to be false, the reader may be left to judge for himself whether Cooke's account of the milk bottle, frypan and bus driver leads, as Brett claims, inescapably to the conclusion that he was in Miss Brewer's flat on the night of the murder.

Cooke's story bore unmistakable signs of having been fabricated from newspaper accounts of Beamish's trial. One striking example of this was his claim that he saw Miss Brewer in bed with a man through the window of the flat earlier in the evening. Though evidence to this effect was given at Beamish's trial by the man in question, who left the flat at about midnight, Cooke's attempt to give verisimilitude to his account of the crime by including this detail made nonsense of his claim that he went back to the flat later in the evening with the intention of killing Miss Brewer, since he would have had no reason to suppose that a man would not still be in her bed. Cooke's intelligence was not equal to his memory. His written retraction of his claim to have killed Rosemary Anderson also revealed a knowledge of the details of the crime which could have been gleaned from accounts

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15 Id. at 337.

16 Id. at 327. Cooke said that he propped open the door with the bottle he found behind the door. In his first statement to the police it was 'a small bottle of milk or a carton or something'.

17 Appeal Book, p. 544.

18 Id. at 336.

of Button's trial, but which would not have been known at the time to the person who ran Miss Anderson down in the street.[19]

The case against Beamish rested mainly on the knowledge of the crime which his confessions revealed. This knowledge extended to details of the killing which had not been made public, such as the fact that the scissors used by the killer were found, not in the bedroom where Miss Brewer was killed, but on the room divider between the living room and the kitchen of the flat. As the judges pointed out in dismissing Beamish's appeal from his conviction, it is difficult to see how he could have known of these facts unless he was guilty of the murder. My chief criticism of Brett's pamphlet was that he did not disclose the incriminating nature of Beamish's confession, or indeed give any account of it all, though this did not prevent him from speaking of the 'complete and utter weakness' of the case against him.[20] In his Rejoinder Brett argues that it is reasonable to suppose that the police pointed out to Beamish where the scissors were found. There is no evidence to support this suggestion. According to the testimony of Sgt Leitch, Beamish, when asked what he did with the scissors, showed where he had put them. In cross-examination, it was never put to Leitch that he might have suggested this answer to Beamish, and Mrs Myatt, the interpreter, expressly denied that she suggested any answers to him.[21] The record shows that Beamish was quite capable of denying a suggestion put to him by the police, such as when he insisted that he found the tomahawk on the floor of the garage and not hanging on a nail, where the owner thought that he had left it.

Though it is understandable that people should be concerned about the interrogation of a deaf mute, it should not be overlooked that the mediation of interpreters, of irreproachable character, between Beamish and the police made it very difficult to impeach the police evidence. It will surprise no one who has read the transcript of evidence that the jury rejected his claim that he was threatened and teased into

19 Id. at 354. For example, Cooke gave the name and address of the doctor Miss Anderson was taken to after she was run down.

20 In his Rejoinder, Brett protests that these words do not express his own opinion, but rather an assessment of the strength of the case against Beamish when subjected by Brett to the kind of analysis which the Chief Justice subjected Cooke's confession to. Since Brett argues in his pamphlet that the Chief Justice went out of his way to highlight the discrepancies in Cooke's confession, it would seem to follow that Brett's analysis of the case against Beamish is, on his own admission, open to the objection of impartiality.

21 Appeal Book, pp. 49-51, 97-104.

making his confessions by the police and the interpreters. It will be noticed that Brett abandons Beamish's actual defence and suggests that another, in his view more plausible, defence might have been put forward at his trial. This reveals a curious conception of the duties of a legal adviser. It will also surprise no one who has read the cross-examination of Beamish's parents that the jury rejected the alibi which rested on their testimony.

Attitudes towards the Beamish case have understandably been influenced by the coincidence involved in accepting Beamish's guilt. The degree of coincidence depends, of course, on whether Cooke did in fact enter Miss Brewer's flat on the night of the murder, rather than on some other occasion.[22] The Court had no doubt that his story of how he entered the flat on the night of the murder with the intention of killing Miss Brewer (and believing that she was sharing her bed with a man) was false, and no responsible person who has read the full account of Cooke's various statements could say that the Court was not justified in coming to this conclusion. It seems likely, however, from his evidence about the electric frypan that he had at some time been in Miss Brewer's flat, just as he had certainly been in her mother's flat next door If we accept this, the degree of coincidence involved in accepting Beamish's guilt is that Miss Brewer was killed by Beamish in one of the flats that Cooke, a professional thief, had broken into in the Nedlands-Cottesloe-Peppermint Grove area, where he often operated.

The reluctance to accept a coincidental explanation has a proper place in both lay and legal reasoning. It reflects common experience, where extreme coincidences are rare. But it is a commonplace that coincidences do and must occur, and one is not entitled to reject a coincidental explanation out of hand. What may be called the coincidental factor needs to be balanced against the other evidence in the case.

The risk of attaching too much importance to the element of coincidence is illustrated by the English case of Timothy Evans, who was charged, in 1950, with the murder of his wife and baby daughter. Both had been strangled with a ligature and their bodies were found in the house which the Evans' shared with a man named Christie. Evans was convicted of the murder of his daughter, whereupon, in accordance with the practice then followed, the charge of murdering his wife was not proceeded with. He was later executed.

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22 Cooke told Detective Reed on 9th October 1963 that he had been in Miss Brewer's flat on several occasions to steal money: Appeal Book, p. 364.

Three years later, Christie was arrested and convicted of the murder of six women. Their bodies were found hidden in the same house. They had all been strangled with a ligature, and two had been killed before Evans' wife and daughter. Not surprisingly, the revelation that Christie was a multiple killer by strangling aroused wide disquiet about Evans' guilt, especially since Evans, after retracting his initial confessions, had in fact claimed that it was Christie who killed his wife and daughter. After a first inquiry had found that Evans was guilty, a second investigation, conducted by Mr Justice Brabin, has recently found that it is more probable than not that Evans did kill his wife, but that it was Christie who probably killed the child.[23] Since Evans was convicted only of the murder of his child, the Brabin Report left the English Home Secretary no alternative but to recommend that a posthumous free pardon should be granted to Evans.

Brett, in his reference to the Brabin Report, omits to mention that Mr Justice Brabin was himself prepared to accept the extraordinary coincidence that two men, each a strangler by ligature, lived in the same house at the same time. Instead, he fastens on Mr Justice Brabin's conclusion, at the end of his report, that on the evidence available to him (nearly seventeen years after the event) no jury could, in the face of the coincidence, be satisfied beyond reasonable doubt that Evans killed his wife. This conclusion hardly supports Brett's argument that the far lesser coincidence in the Beamish case shows that Beamish is in fact the victim of a miscarriage of justice.

The issue before the Court in Beamish's application for a new trial was not, as Brett suggests, whether the jury at Beamish's original trial would have found him guilty if Cooke's "confession" had been given in evidence. The task of the Court was to decide whether Cooke's evidence was sufficiently credible to entitle Beamish to a new trial, and it was the duty of the Court to refuse to order a new trial if it was satisfied that Cooke was lying. As I pointed out in my review, if the Court was satisfied that Cooke's story was fabricated from newspaper accounts of Beamish's trial, it is nonsense to argue that the Court should have speculated on whether the jury would have found Beamish guilty if Cooke's evidence had been available. Brett seems to be unable to grasp this point.

As regards his contention that the judges approached Beamish's application for a new trial with preconceptions about Beamish's guilt, I thought it sufficient in my review to point out that his charge that

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[23] The Case of Timothy John Evans (H.M.S.O. Cmnd. 3101/1966).

the Court was inconsistent in its treatment of the confessions of Beamish and Cooke was founded on a misconception of the Court's function when a new trial is sought on the ground of fresh evidence. The judges' remarks on the strength of the case against Beamish at this trial, which Brett referred to in his pamphlet, show no more preconception about Beamish's guilt than might be expected of any judge who had read the papers in a case before coming into court.

To support his charge that the Court was biased, Brett, in his Rejoinder, purports to give details of events in court and exchanges between judges and counsel which are not recorded in the printed Appeal Book on which his pamphlet was based. He cites no source for these details, and I therefore make no comment on them.

DOUGLAS PAYNE