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# Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence

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# ADMISSIBILITY IN CRIMINAL PROSECUTIONS OF PROOF OF OTHER OFFENSES AS SUBSTANTIVE EVIDENCE

"The general rule has been well established that on prosecution for a particular crime evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same character, is irrelevant and inadmissible." [1] This statement by the Tennessee court announces the basic rule regarding the matter of proof of other crimes as substantive evidence—a rule which is quoted and adhered to in virtually every American jurisdiction.[2] The evidence is not excluded because it has no probative value, but because its probative value is far outweighed by its prejudicial effect. The fact that a person has committed another crime clearly, under many circumstances, makes it more probable that he has committed the crime charged, but it is equally obvious that the natural and inevitable tendency of the judge and jury would be to give excessive weight to the accused's criminal record. The jurors would very naturally believe that a person is guilty of the crime charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally serious character. To guard against this evil the courts have unanimously adopted the general rule of exclusion stated above.

To this general rule, however, there are many equally well settled exceptions.[3] In fact, the scope of these exceptions is so broad as to have prompted the remark that "it is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions." [4] It is the purpose of this Note to consider these exceptions individually, with emphasis upon the law of Tennessee in this regard.

## MOTIVE

Motive has been defined as "an inducement, or that which leads or tempts the mind to indulge the criminal act." [5] It is always proper for the prosecution to offer evidence of the motive for the commission of the crime

1. Mays v. State, 145 Tenn. 118, 140, 238 S.W. 1096, 1102 (1921).
2. UNDERHILL, CRIMINAL EVIDENCE § 180 (4th ed. 1935); 1 WHARTON, CRIMINAL EVIDENCE § 343 (11th ed. 1935).
3. See generally the excellent discussion in People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).
4. Trogdon v. Commonwealth, 31 Grat. 862, 870 (Va. 1878). The general rule, together with its exceptions, is usually treated as a part of the common law of the particular jurisdiction. Michigan and Ohio appear to be the only states which have incorporated the rule and its exceptions into statutes. MICH. STAT. ANN. § 28.1050 (Henderson 1938); OHIO GEN. CODE ANN. § 13444-19 (1938), discussed in 5 OHIO ST. L.J. 232 (1939); and see LA. CODE CRIM. LAW & PROC. ANN. Arts. 445, 446 (1943) (applying only to intent and knowledge).
5. People v. Fitzgerald, 156 N.Y. 253, 50 N.E. 846, 847 (1898).

charged, and this is true even though the evidence tends to show the commission of another crime by the defendant.[6] An example of the application of this exception is found in the case of *Banks v. State*.[7] The defendant in that case was indicted for murder. A witness was allowed to testify that she and the deceased were seated in the woods, that defendant came upon them, shot the deceased, and then forced her to have sexual intercourse with him. The Arkansas court properly allowed the introduction of evidence of the subsequent crime for the purpose of proving defendant's motive for the murder for which he was then on trial.

A recent Tennessee case[8] reached a similar result. There defendant was on trial for procuring the burning of a house. The state was allowed to prove that defendant carried insurance on the house in an amount greater than the value of the property destroyed. Defendant objected to this evidence on the ground that it tended to show him guilty of a separate and distinct felony—procuring the burning of property insured against loss by fire, with intent to defraud the insurer.[9] The court held that the evidence was admissible to show motive, and expressly overruled *Roberts v. State*[10] insofar as that case held to the contrary. The Tennessee court had previously stated by way of dictum that "evidence is also admissible to show motive prompting the commission of the crime charged by the accused, and is admissible notwithstanding it also shows the commission by the accused of another crime of a similar character."[11] In regard to the phrase "of a similar character" in the quoted material, that factor is clearly not a prerequisite where the evidence is introduced to show motive. The case of *Banks v. State* definitely negates any such requirement.

### INTENT

"Intent" is the purpose to use a particular means to effect the result and accomplish the objective, whereas "motive" is the reason that moves the will and tempts the mind to indulge the criminal intent.[12] Testimony as to other similar offenses is admissible to show intent where there is or may be, from the evidence, an inference of mistake, accident, lawful purpose or innocent intent. Also, where an act is equivocal in its nature and may be

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6. Mays v. State, 145 Tenn. 118, 141, 238 S.W. 1096, 1103 (1921); Davis v. State, 213 Ala. 541, 105 So. 677 (1925); Banks v. State, 187 Ark. 962, 63 S.W.2d 518 (1933); People v. Peete, 28 Cal. 2d 306, 169 P.2d 924 (1946); Ellison v. Commonwealth, 225 S.W.2d 470 (Ky. 1949); 1 WHARTON, CRIMINAL EVIDENCE § 351 (11th ed. 1935); 35 CALIF. L. REV. 131, 134 (1947).
7. 187 Ark. 962, 63 S.W.2d 518 (1933).
8. Stanley v. State, 180 Tenn. 70, 171 S.W.2d 406 (1943).
9. TENN. CODE ANN. § 10901 (Williams 1934).
10. 47 Tenn. 359 (1870).
11. Mays v. State, 145 Tenn. 118, 141, 238 S.W. 1096, 1103 (1921).
12. Jones v. State, 13 Ala. App. 10, 68 So. 690, 694 (1915).

criminal or honest according to the intent with which it is done, other criminal acts of defendant may be shown, provided that they are offenses *of a similar character.*[13] Since in the usual case where evidence of another crime is introduced to show intent the underlying purpose is to establish the absence of accident or inadvertence, it is necessary that the other acts shown should be similar to the crime charged. A clear example of this type of situation is found in the Tennessee case of *Rafferty v. State.*[14] Defendant was on trial for an attempt to obtain money under false pretenses. He had insured against loss by fire certain chattels which were represented to be located in a certain building in Memphis. Seventeen days later the building burned, and defendant sued to collect on the policy. The insured articles were later found intact in defendant's possession. The state offered in evidence the fact that on thirteen different occasions defendant had had fires and collected insurance on these identical chattels. The supreme court approved the admission of this evidence to establish unlawful intent to defraud.

It should not be assumed that evidence of another similar offense is always admissible to prove intent—*i.e.,* that the mere fact of defendant's having committed another similar crime automatically makes evidence of that crime admissible. In order for it to be admissible, intent must be an issue in the case and, in addition, the evidence of the similar act must be calculated to throw some light on defendant's intent.[15] Also there is another restriction on the admissibility of evidence of other similar offenses in this regard: "Where the intent . . . is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible." [16] And in regard to the question as to whether a transaction is sufficiently similar in character to be admissible on the issue of intent, it has been stated that that is a matter in which the trial judge should be allowed a wide range of discretion.[17]

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13. "Acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near and so related in kind as to fairly throw light on the question of intent and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose." Schmeller v. United States, 143 F.2d 544, 551 (6th Cir. 1944).

14. 91 Tenn. 655, 16 S.W. 728 (1891); *accord,* Thompson v. State, 171 Tenn. 156, 101 S.W.2d 467 (1937); Dobson v. State, 73 Tenn. 271 (1880); Defrese v. State, 50 Tenn. 53, 8 Am. Rep. 1 (1870).

15. "[T]he fact that intent is in issue is not enough to let in evidence of similar acts, unless they are 'so connected with the offense charged in point of time and circumstances as to throw light upon the intent.'" Boyer v. United States, 132 F.2d 12, 13 (D.C. Cir. 1942); *see* State v. Baugh, 200 Iowa 1225, 206 N.W. 250, 251 (1925).

16. People v. Lonsdale, 122 Mich. 388, 81 N.W. 277, 278 (1899); *accord,* State v. Barker, 249 S.W. 75 (Mo. 1923); People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 296 (1901). "It is well settled that where an offense is of such a nature that proof of the act with which the defendant is charged is not in itself proof of the required criminal intent and where additional proof of such intent is necessary to prove the crime charged, evidence of other offenses of a similar nature committed by the defendant is admissible for the purpose of proving intent." People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161, 1164 (1936).

17. United States v. Feldman, 136 F.2d 394, 399 (2d Cir. 1943), *aff'd,* 322 U.S. 487, 64 Sup. Ct. 1082, 88 L. Ed. 1408 (1944).

IDENTITY

Another exception to the general rule involves the question of identity. In *Mays v. State* [18] the Tennessee court stated by way of dictum that "it has been said that evidence of other crimes committed by the accused is relevant to prove his identity; but it is more correct to say that, where the commission of a crime is proven, evidence to identify the accused as the person who committed it is not to be excluded solely because it proves or tends to prove that he was guilty of another and independent crime." [19] A typical example of the situation where such evidence is admitted to prove identity is the Tennessee case of *Warren v. State*.[20] Defendant was convicted of the crime of robbery. The victims of this robbery were parked on a road at night. Their car was approached by a person who had an impediment in his speech; he carried a flashlight in one hand and a pistol in the other, and had black grease smeared over his face. The lower court admitted testimony of *W* to the effect that a few nights later, at about the same locality and about the same time of night, his car was held up and he was robbed by a man carrying a pistol in one hand and a flashlight in the other, whose face was smeared with dark grease, and who had an impediment in his speech. On appeal the supreme court held that this evidence was properly admitted to prove defendant's identity as the perpetrator of the crime charged, particularly since defendant's guilt was denied and an alibi insisted upon.

In a very recent Tennessee case [21] this same point arose, and a similar result was reached. The three defendants were indicted for the rape of Miss *A* on Capitol Hill in Nashville. Evidence was introduced that the three defendants had encountered Miss *A,* Miss *B,* and a young man named Morris, and at gun point had robbed them of their money and jewelry; that defendant Scribner had held Morris off while the other two defendants raped Miss *A;* that defendant Scribner had then raped Miss *B*. Defendant Scribner objected to the admission of evidence of the rape of Miss *B* and robbery of the trio. The Tennessee Supreme Court, in affirming the conviction, stated that "the identification of the defendants was definitely put in issue on defendants' plea of an alibi, and the evidence of the assault on Miss "B" and of the robbery being relevant on the question of identification was not rendered inadmissible by the fact that incidentally it tended to prove a separate crime." [22]

In the last illustrative case noted above, the other crime was a part of the same transaction and probably would have also been admissible as part

18. 145 Tenn. 118, 238 S.W. 1096 (1921).
19. *Id.* at 141, 238 S.W. at 1102.
20. 178 Tenn. 157, 156 S.W.2d 416 (1941); *accord,* State v. Bock, 39 N.W.2d 887 (Minn. 1949); Brown v. State, 171 Miss. 157, 157 So. 363 (1934), 7 MISS. L.J. 432 (1935).
21. Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948).
22. *Id.* at 317, 213 S.W.2d at 284. See Note, 63 A.L.R. 602 (1929).

of the res gestae. In many other cases, however, in which evidence of other offenses was admitted to prove identity the second offense constituted a separate and distinct crime in no way connected with the offense charged. So long as the proof of the other crime is relevant on the question of identity it is wholly immaterial whether it is part of the same transaction or entirely separate from the crime for which the defendant is on trial.[23]

The general view is that evidence of another crime is not admissible for the purpose of proving identity where the identity of the accused is not in issue.[24] The rule has been stated by the Tennessee Supreme Court to be as follows:

> "The admission of such evidence should at all times be carefully guarded and restricted to cases in which its introduction is called for to establish more clearly the identity of the accused. If identity has been otherwise clearly made out, such evidence should not be introduced, since in such case it could have no other effect than to prejudice the defendant by establishing his guilt of an independent crime, and we do not intend to recognize or approve the admission of such evidence when this is its purpose and only effect." [25]

### Design or Plan

A fourth exception to the general rule of exclusion allows the admission of evidence of prior crimes to show design or plan. This design or plan is not an element of the crime charged but is the preceding mental condition which evidentially points to the doing of the act planned. In cases of intent the doing of the act by the defendant is conceded and the only object is to negative innocent intent; whereas in cases involving design the object is to show that since defendant planned to do the act the chances are very great that he actually did it.[26]

In the Tennessee case of *Caldwell v. State* [27] where the defendant had been indicted for a fraudulent breach of trust it was necessary for the state to prove that Caldwell, as President of the Bank of Tennessee, was criminally responsible for acts done in the name of the corporation by virtue of his directing the appropriation or knowingly permitting it to be done. The court stated that evidence of subsequent acts of the same nature would

23. *E.g.*, Johnson v. State, 242 Ala. 278, 5 So.2d 632 (1941); Thomas v. State, 132 Fla. 78, 181 So. 337 (1937); Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936); New v. State, 68 Ga. App. 86, 22 S.E.2d 192 (1942); Schwartz v. State, 194 Miss. 315, 12 So.2d 157 (1943); State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944). *But cf.* Harris v. State, 227 S.W.2d 8 (Tenn. 1950) (evidence of prior rape by defendant of witness held inadmissible in prosecution for rape on ground that the two crimes were not so similar in their circumstances as to warrant the reception of proof of one as relevant to prove the other).

24. Warren v. State, 178 Tenn. 157, 156 S.W.2d 416 (1941); Johnson v. State, 242 Ala. 278, 5 So.2d 632 (1942); People v. Filas, 369 Ill. 78, 15 N.E.2d 718 (1938); Kirby v. Commonwealth, 206 Ky. 535, 267 S.W. 1094 (1925); 20 Am. Jur., *Evidence* § 312 (1939).

25. Warren v. State, 178 Tenn. 157, 164, 156 S.W.2d 416, 419 (1941).

26. 2 Wigmore, Evidence §§ 300, 304 (3d ed. 1940).

27. 164 Tenn. 325, 48 S.W.2d 1087 (1932).

be admissible upon the issue of whether or not the specific breach charged was committed pursuant to a general plan or scheme fraudulently to appropriate bonds procured under trust agreements.[28]

### KNOWLEDGE

In many prosecutions, such as those for the uttering of forged or counterfeit paper and the receiving of stolen property, guilty knowledge is the gist of the offense to be established, and evidence of other criminal acts is admissible to establish that knowledge.[29] This exception seems to have been applied by the Tennessee court in cases involving six different offenses—uttering counterfeit coins, receiving stolen property, forgery, uttering forged bills, larceny and fraudulently making false entries in books.[30]

The earliest reported Tennessee case involving this exception is *Peek v. State*.[31] Defendant was indicted for passing counterfeit money. Over objection the state was allowed to introduce testimony to the effect that defendant had subsequently passed counterfeit coins to the witness, but had taken them back upon demand after the witness had become suspicious. The supreme court held the evidence to have been properly admitted. "There is no doubt but that evidence that other counterfeit money was passed by the prisoner, at other times, either before or after the offense for which he was indicted, is admissible, to show his guilty knowledge in the particular case." [32]

In the recent case of *Patterson v. State* [33] this exception was again recognized. In a prosecution for receiving stolen property the state was allowed to introduce proof that defendant had purchased the goods without a ration certificate; this act was a crime punishable under federal law. Since defendant maintained that he had no knowledge that the goods were stolen, as is usually the defense in such a prosecution, evidence regarding the ration certificate was clearly material and relevant as tending to show guilty knowledge, since an offer to sell without a certificate would operate to put an innocent buyer on notice that the goods were probably stolen.

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28. *Id.* at 341, 48 S.W.2d at 1092; *accord*, Singer v. State, 195 Ark. 345, 112 S.W.2d 426 (1938); People v. Dunn, 40 Cal. App. 2d 6, 104 P.2d 119 (1940); Sawyer v. State, 73 Okla. Crim. App. 186, 119 P.2d 256 (1941); State v. Smith, 117 W.Va. 598, 186 S.E. 621 (1936).

29. United States v. Fawcett, 115 F.2d 764 (3d Cir. 1940); People v. Lima, 25 Cal. 2d 573, 154 P.2d 698 (1944); Ball v. Commonwealth, 278 Ky. 52, 128 S.W.2d 176 (1939); 1 WHARTON, CRIMINAL EVIDENCE § 349 (11th ed. 1935); See Notes, 68 A.L.R. 187 (1930), 105 A.L.R. 1288 (1936).

30. Patterson v. State, 184 Tenn. 39, 195 S.W.2d 26 (1946); Dickson v. State, 166 Tenn. 300, 61 S.W.2d 661 (1933); Foute v. State, 83 Tenn. 712 (1885); Links v. State, 81 Tenn. 701 (1884); Garner v. State, 73 Tenn. 213 (1880); Peek v. State, 21 Tenn. 78 (1840).

31. 21 Tenn. 78 (1840).

32. *Id.* at 86.

33. 184 Tenn. 39, 195 S.W.2d 26 (1946).

As mentioned above, the Tennessee court has also admitted evidence of other crimes for the purpose of proving knowledge in prosecutions for fraudulently making false entries in books and for larceny. It is very doubtful, however, that the latter case represents a correct application of this exception. In that case [34] the property alleged to have been stolen was a ring belonging to Wiggers, a jeweler in Nashville. Defendant had come into the store and asked to be shown a ring. A tray of rings was placed before her. The store later discovered that an expensive ring had been removed from the tray and an inexpensive ring inserted in its stead. The state was then allowed to introduce the testimony of Allen to the effect that on the same day defendant had come into his store and taken a diamond ring in substantially the same manner. The supreme court held that this evidence was admissible to show guilty knowledge. But exactly what "knowledge" is the court referring to? The defense was not that the defendant picked the ring up by mistake or even that defendant thought the ring belonged to her, but rather that the defendant had never been in Nashville and knew nothing at all about the transaction. In other words the basic question was one of identity, and not of guilty knowledge. The evidence of the subsequent crime was clearly admissible, either to prove identity or to show design or plan, but it seems equally clear that it was not admissible to prove knowledge.

In a more recent case,[35] involving a prosecution for fraudulently making false entries, the court admitted evidence of similar manipulations of accounts of other customers. No evidence was offered by defendant in his own behalf. On appeal the supreme court held the evidence to have been properly admitted "as tending directly to charge [defendant] with knowledge of the entry in question, and with joint intent thereby to defraud the bank." [36] These prior manipulations appear to have been properly admitted in view of the fact that the circumstances surrounding them were such as to show that defendant had knowledge of their falsity. However it is essential, in cases where the commission of other similar acts is put in evidence to prove knowledge, that the other acts should be of such a nature as fairly to charge the person involved with guilty knowledge of their character.

## Res Gestae

"When a collateral offense, or, as it is sometimes called, an extraneous crime, forms part of the res gestae, evidence of it is admissible." [37] This statement, or its equivalent, is frequently found in the cases and treatises on criminal evidence. And by virtue of this exception evidence of many

34. Links v. State, 81 Tenn. 701 (1884).
35. Dickson v. State, 166 Tenn. 300, 61 S.W.2d 661 (1933).
36. *Id.* at 306, 61 S.W.2d at 663.
37. 1 Wharton, Criminal Evidence 496 (11th ed. 1935).

prior and subsequent crimes is admitted, seemingly without regard, in a great number of cases at least, to the question of whether its prejudicial effect will not greatly outweigh its probative value.[38] That this is so is not surprising when one considers the nebulous character of the "res gestae" concept. The true meaning of the term, however, as applied to the particular evidentiary problem under discussion, would seem to be that when the proof of an extraneous crime is so interwoven as to be inseparable from the crime for which defendant is being tried, so that the evidence of the two acts cannot be separated, then the evidence of the other crime is clearly admissible as part of the res gestae. As thus interpreted this exception is entirely logical and is in accord with the statement of the Tennessee court that evidence "material to the issue under investigation in a criminal case is never rendered incompetent because it tends to show that the accused has committed other crimes." [39]

The Tennessee court appears to have relied on this exception as the basis for its holding in only two cases.[40]

### TO REBUT A SPECIAL DEFENSE

In many criminal cases the defendant seeks to avoid conviction by interposing a special or affirmative defense. Under such circumstances the state is allowed to rebut this defense, even though the evidence offered will tend to show the commission of a prior or subsequent crime by the defendant. This is in accord with the oft-repeated statement that this general rule of exclusion "does not apply where the evidence of another crime tends directly to prove defendant's guilt of the crime charged." [41]

In *Rowe v. State* [42] defendant was indicted on a charge of obtaining money under false pretenses in violation of a special statute. The defense was that the fraudulent representations were not such as were calculated to deceive a man of ordinary prudence and caution, and that unless they were of such a character they would not justify a prosecution under the statute. The state was permitted to introduce proof of similar transactions between the defendant and other individuals, whereby defendant obtained money upon the faith of similar representations, on the theory that this proof directly reflected on the care and prudence exercised by the prosecuting witness.

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38. See cases cited in 1 WHARTON, CRIMINAL EVIDENCE § 347, n.20 (11th ed. 1935).
39. Woodruff v. State, 164 Tenn. 530, 539, 51 S.W.2d 843, 845 (1932).
40. Links v. State, 81 Tenn. 701 (1884); Sartin v. State, 75 Tenn. 679 (1881); *see* Wrather v. State, 179 Tenn. 666, 675, 169 S.W.2d 854, 857 (1943); Mays v. State, 145 Tenn. 118, 141, 238 S.W. 1096, 1102 (1921).
41. Mays v. State, 145 Tenn. 118, 140, 238 S.W. 1096, 1102 (1921).
42. 164 Tenn. 571, 51 S.W.2d 505 (1932).

In other jurisdictions this exception has been resorted to in order to rebut defenses of insanity,[43] justifiable homicide,[44] and physical inability.[45]

### Sexual Crimes

In cases involving sexual offenses, such as adultery, fornication, seduction, rape and incest, the courts have been much more liberal in permitting the admission in evidence of other criminal acts of a sexual nature, and for that reason it is desirable, in any discussion of the admissibility of evidence of other offenses as substantive proof in a criminal trial, to place cases involving sexual offenses in a separate category. While the courts have been liberal in admitting such evidence in sexual cases, it does not follow that evidence tending to prove another offense by the defendant is regarded as admissible when it plainly will not aid in proving defendant guilty of the offense charged. The liberality arises from the general feeling that the mere fact of the commission of a similar offense has more probative value in proving the commission of the offense charged in cases involving sexual crimes than it does in cases involving any other type of crime. For example, evidence of similar sexual offenses has frequently been admitted solely to show inclination or lustful disposition.[46] While the character of the offense charged is of importance in determining the question of its admissibility, "of greater importance, generally, are questions as to whether the offered proof related to an offense occuring prior or subsequent to the offense charged, whether the offered proof related to an offense in which the prosecutrix was involved, and whether the related offense was of the same character as the offense charged." [47]

The clear Tennessee holdings in this particular category seem to have

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43. People v. Lane, 101 Cal. 513, 36 Pac. 16 (1894) (prosecution for murder; previous incest of defendant with his daughter admissible to rebut defense of insanity induced through fear that deceased would debauch daughter); Hall v. State, 31 Tex. Crim. Rep. 565, 21 S.W. 368 (1893).

44. People v. Morales, 143 Cal. 550, 77 Pac. 470 (1904) (previous escape by defendant from deceased police officer admissible to rebut defense defendant did not know deceased was police officer).

45. Snead v. State, 243 Ala. 23, 8 So.2d 269 (1942).

46. *E.g.*, People v. Troutman, 187 Cal. 313, 201 Pac. 928 (1921); People v. Hall, 25 Cal. App. 2d 336, 77 P.2d 244 (1938); McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749 (1940); Tuttle v. Commonwealth, 287 Ky. 371, 153 S.W.2d 931 (1941); 30 Ky. L.J. 433 (1942); Williams v. Commonwealth, 277 Ky. 227, 126 S.W.2d 131 (1939); State v. Cupit, 189 La. 509, 179 So. 837 (1938); State v. Elijah, 206 Minn. 619, 289 N.W. 575 (1940). *Contra:* Harris v. State, 227 S.W.2d 8 (Tenn. 1950).

"[I]t is the weight of authority in other states that evidence of other offenses of a similar nature committed by the accused on the same alleged victim are admissible in the trial of sexual offenses, if not too far remote, for corroboration purposes and to show the lustful disposition of the accused. . . . I have no doubt that but for the abhorrence and deep-rooted contempt with which all sex crimes are viewed this additional exception to the general rule would never have found its way into the jurisprudence of the courts of the land." State v. Ferrand, 210 La. 394, 27 So.2d 174, 179 (1946) (dissenting opinion), noted in 25 Texas L. Rev. 421 (1947).

47. Note, 167 A.L.R. 565, 569 (1947).

been confined to two types of offenses, assault with intent to commit rape and violation of the age-of-consent law. In *Williams v. State*,[48] a prosecution for assault with intent to rape, the state was allowed to introduce into evidence proof of other violent attempts on the person of the prosecutrix previous to that charged. The supreme court affirmed the conviction, stating that such evidence has direct relevancy to the question of intent. In the leading case of *Sykes v. State* [49] defendant was indicted for statutory rape. The state was allowed, over objection, to introduce testimony tending to show other acts of intercourse between the parties, such other acts occurring both prior and subsequent to the act in question. On appeal the supreme court affirmed the conviction, stating that "in a case like the one before us other acts of intercourse do illustrate and tend to prove the commission of the particular act of intercourse which the State has elected to try the prisoner on, because they show the relations—the state of intimacy—existing between the prisoner and the girl and tend to make very probable the commission of the crime charged." [50]

### DEGREE OF PROOF

In introducing evidence of another crime the prosecution is not required to prove the elements of the asserted crime beyond all reasonable doubt. It is only the ultimate material facts to which the rule of reasonable doubt applies.

> "[T]he state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment and the guilt of the defendant. . . . If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt." [51]

The Tennessee court has stated its position on this point as follows: "Without going so far as to hold, with some of the Courts, that the proof of the independent crime must be 'beyond a reasonable doubt,' we approve the rule that, to render evidence of an independent crime admissible, the

48. 27 Tenn. 585 (1848); *cf.* McKenzie v. State, 250 Ala. 178, 33 So.2d 488 (1947), 39 J. CRIM. L. & CRIMINOLOGY 485 (1948).

49. 112 Tenn. 572, 82 S.W. 185 (1903).

50. *Id.* at 576, 82 S.W. at 185. For an exhaustive treatment of the problem of admissibility of other similar offenses in prosecution for sexual offenses see Note, 167 A.L.R. 565 (1947).

51. Scott v. State, 107 Ohio St. 475, 141 N.E. 19, 26 (1923), *overruling* Baxter v. State, 91 Ohio St. 167, 110 N.E. 456 (1914); *accord,* People v. Lisenba, 14 Cal. 2d 403, 94 P.2d 569 (1939), 13 So. CALIF. L. REV. 511 (1940); 1 WHARTON, CRIMINAL EVIDENCE § 360 (11th ed. 1935).

proof of its commission, and of the connection of the accused on trial therewith, must be not 'vague and uncertain,' but clear and convincing." [52]

In regard to the length of time over which an inquiry as to other crimes may extend, the general view seems to be that it is a matter entirely within the discretion of the trial court.[53]

## CONCLUSION

The law on the subject of admissibility of evidence of other offenses has developed in the form of a general rule excluding evidence of other crimes with numerous specifically designated exceptions thereto.[54] As so developed it has resulted in inescapable confusion among the cases and an understandable uncertainty among lawyers and judges. As a result of this uncertainty the proffered evidence is generally excluded or admitted, not as a result of weighing relevancy against prejudice, but solely on the basis of mechanical reasoning—*i.e.*, can it be fitted into one of the well settled exceptions? And even that question all too often fails to receive any merited consideration. Consider, for example, the case of *Holmes v. Commonwealth*,[55] in which the court enumerated seven exceptions, and concluded: "Clearly the evidence complained of comes within one or more of the enumerated exceptions." [56]

In an attempt to bring order out of chaos the suggestion has been advanced that the rule regarding this evidence should be stated affirmatively rather than as a rule of exclusion.[57] The proposed rule is to the effect that all evidence of other criminal acts of defendant is admissible whenever relevant to any material issue raised upon his trial for a specific crime, except when such evidence is relevant only as showing the defendant's disposition to do criminal acts. The adoption of this suggested view, in addition to simplifying the law of evidence on this point would accomplish two important objectives: (1) it would enable courts to admit relevant evidence in a jurisdiction which has not recognized a particular exception to the general rule of exclusion under which the offered evidence could be

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52. Wrather v. State, 179 Tenn. 666, 678, 169 S.W.2d 854, 858 (1943); *accord*, Weiss v. United States, 122 F.2d 675 (5th Cir. 1941); State v. Porter, 229 Iowa 882, 294 N.W. 898 (1941); State v. Patterson, 347 Mo. 802, 149 S.W.2d 332 (1941).

53. *E.g.*, Weiss v. United States, 122 F.2d 675 (5th Cir. 1941); State v. Semmens, 105 Mont. 113, 71 P.2d 913 (1937); People v. Rutmer, 260 App. Div. 784, 24 N.Y.S.2d 334 (2d Dep't 1940); State v. Lewis, 57 S.E.2d 513 (W.Va. 1949).

54. It should be noted that these categories are not mutually exclusive. In some cases evidence of another crime will be admitted for but a single purpose, while in other cases it may be admitted for several purposes.

55. 241 Ky. 573, 44 S.W.2d 592 (1931).

56. 44 S.W.2d at 598.

57. Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

classified; and (2) it would focus the attention of the courts upon the real point in issue, the relevancy of the offered evidence to a material issue and the particular nature and force of that relevancy.[58]

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58. For a discussion of the admissibility of evidence of prior crimes in murder trials see Note, 25 IND. L.J. 64 (1949).