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Criminal Law -- Evidence -- Admissibility of Evidence of a Collateral Offense of Defendant to Prove the Offense Charged

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In the principal case the view that a gift and not a trust was intended is perhaps justified by the fact that if a trust were intended only the income on the $1,000 would be available for the use specified, and such income would be a negligible amount; whereas if a gift were intended, the full $1,000 would be available. However, the court discusses at length the validity of the bequest as a trust, and indicates that it is void as such. In so doing in the light of the considerations mentioned in the foregoing discussion, the court unnecessarily confuses the law of charitable trusts in North Carolina. The statute of 1925 and its effects upon the earlier decisions relied on are not mentioned. The opinion gives the impression that it is still legally impossible for the trustee of an otherwise valid charitable trust in this state to be given discretionary powers to select the particular objects and individuals to be benefitted. And it betrays unawareness of the extent to which the courts may, upon contests such as that in the principal case, or upon a petition for instructions, or at the suit of the Attorney General, supervise the administration by the charitable trustee.[22]

WM. R. DAWES.

Criminal Law—Evidence—Admissibility of Evidence of a Collateral Offense of Defendant to Prove the Offense Charged.

D was indicted with state's witness for conspiracy to rob by means of assault with firearms or other dangerous weapons, and for robbery in pursuance of the conspiracy. As proof of the conspiracy the lower court admitted in evidence testimony that a week after the alleged robbery state's witness and *D* conspired to burn, and did burn, an automobile to defraud an insurance company. This evidence was admitted to show identity and guilty knowledge,[1] and the Supreme Court affirmed the lower court ruling.[2]

It is the general rule that a particular crime cannot be proved by evidence of a distinct, substantive, unconnected collateral offense.[3] The strict application of this rule is obviously desirable. Not only does evidence of other crimes committed by *D* tend to prejudice and mislead the jury, but also *D* might be taken by surprise and be unprepared to answer the accusation, if innocent, or, if guilty, be unable to mitigate its effect upon the outcome of the trial for the offense charged in the

[22] N. C. CODE ANN. (Michie, 1935) §§4033, 4034; Tillinghast v. Council at Narragansett Pier, 47 R. I. 406, 133 Atl. 662, 46 A. L. R. 827 (1927) (court set up a trust until council incorporated).

[1] Record on Appeal, pp. 57, 351, State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937).

[2] State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937).

[3] People v. Molyneaux, 168 N. Y. 264, 61 N. E. 286 (1901), 62 L. R. A. 193 (1904).

indictment.[4] There are, however, certain well recognized exceptions to this general rule. If a collateral offense of *D* will tend to show guilty knowledge, intent, identity, malice or motive, plan or design, or if the collateral offense is part of the *res gestae* of the crime charged, evidence of the collateral crime is admissible.[5] In all cases, however, there must be a sufficient connection between the two crimes so that evidence of the collateral crime will tend to establish *D*'s guilt of the one charged.[6] The North Carolina Court follows the general rule and its exceptions.[7]

[4] State v. Beam, 184 N. C. 730, 115 S. E. 176 (1922).

[5] See note 3, *supra;* 1 WIGMORE, EVIDENCE (2d ed. 1923) §§300-306.

[6] See cases cited *infra* note 7. Each of these cases supports this statement either expressly or impliedly.

[7] A—Evidence of a collateral offense by *D* has been held inadmissible:

State v. Shuford, 69 N. C. 486 (1873) (where in a trial of *D* for murder of her newly born baby evidence of a similar previous offense was offered); State v. Norton, 82 N. C. 629 (1880) (where in a trial of *D* for assault and battery, supposedly with a pistol, evidence that two weeks prior *D* had exhibited a pistol, and made threatening remarks about prosecuting witness, was offered); State v. Jeffries, 117 N. C. 727, 23 S. E. 163 (1895) (where *D* was tried for pledging a bicycle already covered by a mortgage, and evidence was offered that he attempted to pledge a wagon, five months later, also covered by the same mortgage); State v. Frazier, 118 N. C. 1257, 24 S. E. 520 (1896) (where in a trial of *D* for larceny of money he had given prosecutrix, evidence was introduced that he had previously seduced prosecutrix, as it was not shown that the money had been given to her because of the seduction); State v. Graham, 121 N. C. 623, 28 S. E. 409 (1897) (where in a trial of *D* for burning his lessor's house, after taking out insurance on the furniture therein, evidence of a similar previous offense was offered); State v. Beam, 184 N. C. 730, 115 S. E. 176 (1922) (where in a trial of *D* for selling liquor evidence that *D* had sold liquor eleven years before was offered); State v. Smith, 204 N. C. 638, 169 S. E. 230 (1933) (where in a trial for breaking into a store and stealing therefrom evidence was offered that a store in another county, but belonging to the same people, was broken into, and goods found in *D*'s place seemed to be those taken from the stores); State v. Jordan, 207 N. C. 460, 177 S. E. 333 (1934) (where in a trial of *D* for knowingly receiving stolen goods evidence was offered that *D* sold liquor).

B—Evidence of a collateral offense has been held inadmissible because of lack of connection between *D* and the collateral offense:

State v. Freeman, 49 N. C. 5 (1856) (where in a trial of a servant for setting a house on fire evidence was offered of two previous fires with which *D* was not shown to be connected); State v. Alston, 94 N. C. 930 (1886) (where in a trial of *D* for burning a barn evidence merely intimating that *D* was connected with another barn fire was offered); State v. McCall, 131 N. C. 798, 42 S. E. 894 (1902) (where in a trial of *D* for burning a church evidence was offered concerning the burning of a mill by *D*'s father just previously); State v. Fowler, 172 N. C. 905, 90 S. E. 408 (1916) (where on a charge of breaking into a building and stealing therefrom evidence of other similar crimes in the same neighborhood was offered, but no connection was shown between *D* and the other crimes); State v. Deadmon, 195 N. C. 705, 143 S. E. 514 (1928) (where in a trial of *D* for burning a barn to collect insurance evidence was offered that another barn of *D*'s had burned).

C—Evidence of a collateral offense by *D* has been held admissible as part of the *res gestae:*

State v. Murphy, 84 N. C. 742 (1881) (where in a trial of *D* for stealing prosecutor's pig evidence was offered that someone else found his stolen pig in *D*'s pen at the time prosecuting witness found his there); State v. Mace, 118 N. C. 1244, 24 S. E. 798 (1896) (where in a trial of *D*

for murder evidence was offered that *D* prevented witness from notifying deceased's family by means of an assault with a gun); State v. Adams, 138 N. C. 688, 50 S. E. 765 (1905) (where *D* was tried for murder and evidence was offered of serious injury inflicted on deceased's children at the same time).

D—Evidence of a collateral offense by *D* has been held admissible to show intent:

State v. Parrish, 104 N. C. 679, 10 S. E. 457 (1889) (where *D* was indicted for rape of his daughter and evidence of previous forcible intercourse was introduced); State v. Register, 133 N. C. 747, 46 S. E. 21 (1903) (where in a trial for murder committed in an alleged attempt to rob evidence of the conspiracy to rob was offered); State v. Hight, 150 N. C. 817, 63 S. E. 1043 (1909) (where *D* was tried for embezzlement of watches and evidence of similar offenses over a period of the preceding two years was offered); State v. Plyler, 153 N. C. 630, 69 S. E. 269 (1910) (where in a trial of *D* for murder evidence that he had shortly before shot at deceased was offered. The court held this was admissible to show *motive.*); State v. Boynton, 155 N. C. 456, 71 S. E. 341 (1911) (where in a trial of *D* for selling liquor evidence that he habitually kept liquor on hand for purpose of sale was offered); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911) (where *D* was tried for assault with intent to rape and evidence of another assault on prosecuting witness, on the same day, was offered); Gray v. Cartwright, 174 N. C. 49, 93 S. E. 432 (1917) (where in a trial of *D* for malicious prosecution of *P* for stealing a cow evidence of other thefts of cattle by *P* was offered); State v. Simons, 178 N. C. 679, 100 S. E. 239 (1919) (discussed in body of comment); State v. Stancill, 178 N. C. 683, 100 S. E. 241 (1919) (discussed in body of comment); State v. Haywood, 182 N. C. 815, 108 S. E. 726 (1921) (where on indictment for keeping liquor for purpose of sale evidence of previous sales of liquor was offered); State v. Crouse, 182 N. C. 835, 108 S. E. 911 (1921) (where in a trial of *D* for possession of liquor for purpose of sale evidence that a still, which had been worked the preceding night, was found ninety days prior on *D*'s land was offered); State v. Pannil, 182 N. C. 838, 109 S. E. 1 (1921) (where in a trial of *D* for stealing oats, and receiving same, evidence that other stolen goods from prosecutor's place were found in *D*'s place was offered); State v. Dail, 191 N. C. 231, 131 S. E. 573 (1926) (where in a trial of *D* for stealing an auto, and receiving same with felonious intent, evidence that the car was used by *D* and his friends, who were staying at his home, in preconceived burglaries was offered); State v. Hardy, 209 N. C. 83, 182 S. E. 831 (1935) (where *D* was tried for receiving, possessing, and transporting liquor for the purpose of sale, and evidence that liquor was found in a previous search of *D*'s premises was offered); State v. Batts, 210 N. C. 659, 188 S. E. 99 (1936) (discussed in body of comment).

E—Evidence of a collateral offense by *D* has been held admissible to show system or design:

State v. Wilkerson, 98 N. C. 696, 3 S. E. 683 (1897) (where *D*, a county official, was tried for wrongfully obtaining money from the county for a pauper, and evidence that *D* continued to get the money after the pauper had moved out of the county and had died was offered); State v. Hight, 150 N. C. 817, 63 S. E. 1043 (1909) (facts given *supra* D); State v. Winner, 153 N. C. 602, 69 S. E. 9 (1910) (where in a trial of *D* for selling liquor evidence of other sales in the same place in a similar manner was offered); State v. Stancill, 178 N. C. 683, 100 S. E. 241 (1919) (discussed in body of comment).

F—Evidence of a collateral offense has been held admissible to show identity:

These cases are discussed in the body of the comment.

G—Evidence of a collateral offense has been held admissible to show guilty knowledge:

State v. Twitty, 9 N. C. 248 (1822) (where in trial of *D* for passing counterfeit money evidence of previous possession of counterfeit bills on many occasions was offered); State v. Murphy, 84 N. C. 742 (1881) (facts given *supra* C); State v. Wilkerson, 98 N. C. 696, 3 S. E. 683 (1887) (facts given *supra* E); State v. Walton, 114 N. C. 783, 18 S. E. 945 (1894) (where in a trial of *D* for obtaining money under false pre-

In the opinion in the principal case the general rule with its exceptions is set forth, and then the Court merely holds[8] that the evidence of the state "comes well within the exceptions to the general rule, as recognized and applied in *State v. Batts* . . .,[9] *State v. Ray* . . .,[10] *State v. Stancill* . . .,[11] *State v. Simons*. . . ."[12] The Court does not indicate under which exception(s) the evidence is admitted, but a reference to the lower court record shows that the evidence was admitted to show identity and guilty knowledge in the conspiracy charge.[13] It is difficult to see just how the question of guilty knowledge is involved, because if *D* were shown to have conspired to rob it would be unnecessary to prove that he knew of the wrongful nature of the act. Use of the term "guilty knowledge" seems to have been a terminological slip on the part of the Court, and in all probability the testimony was allowed only to show the identity of the *D* as one of the conspirators.

However, the above-mentioned cases on which the Court relied for its holding do not seem to support the Court's decision. In *State v. Batts*[14] *D* was tried for criminal conspiracy to wreck and damage his automobile with intent to defraud an insurance company. Evidence that a witness had seen *D* deliberately damage another of his automobiles and put in a claim therefor was held admissible on the question of intent. In *State v. Ray*,[15] wherein *D* was charged with knowingly receiving stolen cigarettes, evidence was admitted to show that shortly before and after the transaction charged in the indictment *D* received other stolen cigarettes. This evidence was held competent to show

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tenses evidence of other similar offenses was offered); State v. Winner, 153 N. C. 602, 69 S. E. 9 (1910) (facts given *supra* E); State v. Boynton, 155 N. C. 456, 71 S. E. 341 (1911) (facts given *supra* D); Greensboro Life Ins. Co. v. Knight, 160 N. C. 592, 76 S. E. 623 (1912) (where in a trial of *D*, an insurance agent, for fraudulent misrepresentation, evidence that he had made the same representations to others was offered. Apparently there was no prior indictable offense, yet in admitting the evidence the court treated the problem as if there were.); State v. Mincher, 178 N. C. 698, 100 S. E. 339 (1919) (where in a trial of a prison guard for receiving stolen goods from a "trusty" under his supervision evidence was offered that *D* allowed the "trusty" to overstay his leave, that the "trusty" stole the goods, and that *D* subscribed to a newspaper which carried the story and description of the stolen articles. Again apparently there was no prior indictable offense, yet in admitting the evidence the court treated the problem as if there were.); State v. Dail, 191 N. C. 231, 131 S. E. 573 (1926) (facts given *supra* D); State v. Hildebran, 201 N. C. 780, 161 S. E. 488 (1931) (where in a trial of *D* for conducting a bawdy house evidence that the inmates had previously been lewd and boisterous in their actions was offered); State v. Ray, 209 N. C. 772, 184 S. E. 836 (1936) (discussed in body of comment).

[8] State v. Flowers, 211 N. C. 721, 724, 192 S. E. 110, 112 (1937).

[9] 210 N. C. 659, 188 S. E. 99 (1936).

[10] 209 N. C. 772, 184 S. E. 836 (1936).

[11] 178 N. C. 683, 100 S. E. 241 (1919).

[12] 178 N. C. 679, 100 S. E. 239 (1919).

[13] Record on Appeal, pp. 57, 351, State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937).

[14] See note 9, *supra*.

[15] See note 10, *supra*.

guilty knowledge. In *State v. Stancill*[16] *D* was tried for stealing tobacco, and evidence that he had previously stolen tobacco in the same neighborhood was admitted to prove intent and design or plan. In *State v. Simons*[17] *D* was indicted for having whiskey for sale in violation of law. Evidence that about a month later *D* was caught working on a new still was held admissible to show intent. In not one of the above cases is the question of identity involved. In each of these cases there was no question about *D*'s having done the acts involved in both the collateral offense and the offense charged, and the only question was the intention or state of mind of the accused at the time of the crime charged. This differs from the principal case in which the evidence of the collateral crime was for the purpose of proving that *D* was connected or identified with the crime charged, and because of this difference, cases under the exceptions for intent and guilty knowledge do not logically support cases involving the exception for identity.

In those North Carolina cases which have dealt with the admissibility of evidence of another distinct offense to prove identity there has been a fairly obvious connection between the collateral crime and the one charged which indicated strongly that if *D* were engaged in the commission of the collateral crime he was also involved in the one charged. This connection is illustrated in the following situations: (1) In the trial of *D* for setting fire to an outhouse evidence that a dwelling house fifteen feet away was fired at the same time, in the same manner, and by faggots bound with *D*'s rope, was held admissible.[18] (2) In a trial of *D* for breaking and entering a house and stealing therefrom, evidence of the possession of the stolen goods soon after the robbery was held admissible.[19] (3) Evidence was admitted, in a trial of *D*'s for burning a barn, that their footprints led from the barn to the site of a mill fire which occurred the same night, and with which the *D*'s were connected by other evidence.[20] (4) In a trial of *D* for secret assault evidence was admitted that a short time prior to the offense charged *D* had shot at the prosecuting witness' home, and had threatened to shoot the prosecuting witness.[21] (5) In a trial of *D* for murder, committed in the course of a robbery, evidence that *D* had previously ridden around often with those known to have been involved, and had committed several robberies with them, was held competent.[22]

In the principal case the connection between the collateral offense and the one charged is not as strong, and the relevancy is questionable. The two conspiracies are so fundamentally different that evidence of

[16] See note 11, *supra*. [17] See note 12, *supra*.
[18] State v. Thompson, 97 N. C. 496, 1 S. E. 921 (1887).
[19] State v. Weaver, 104 N. C. 758, 10 S. E. 486 (1889); State v. Hullen, 133 N. C. 656, 45 S. E. 513 (1903).
[20] State v. Griffith, 185 N. C. 756, 117 S. E. 586 (1923).
[21] State v. Miller, 189 N. C. 695, 128 S. E. 1 (1925).
[22] State v. Ferrell, 205 N. C. 640, 172 S. E. 186 (1933).

complicity in one is extremely weak evidence of identity with the other. The principal case, then, is apparently unsupported by the cases cited by the court, and seems definitely out of line with prior decisions involving the use of testimony as to other offenses to prove identity.

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Declaratory Judgments—Insurance.

Plaintiff, insurer, issued life policies to defendant, the insured, providing for waiver of premiums and payment of benefits in the event of the insured's becoming disabled. Having refused to allow repeated claims for disability benefits, the insurer sought declaratory relief in a federal court to the effect that the insured was not disabled and that the policies were void for non-payment of premiums. *Held,* by the Supreme Court, the Federal Declaratory Judgment Act[1] is constitutional, and a controversy was presented in which the insurer was entitled to declaratory relief.[2]

In spite of three adverse Supreme Court dicta,[3] it has been assumed generally that the Federal Declaratory Judgment Act, if invoked in an actual controversy,[4] is valid. This assumption has found support in numerous decisions of state courts sustaining similar legislation,[5] in the Supreme Court's apparent change of attitude in *Nashville, Chattanooga, and St. Louis Ry. v. Wallace,*[6] and in favorable decisions in the lower federal courts.[7] The principal case is, however, the first square holding by the Supreme Court that the Federal Act is constitutional. The decision is equally significant as an indication of the increasing utility of the declaratory judgment in insurance cases.[8]

[1] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (Supp. 1936). Compare with North Carolina Declaratory Judgment Act, N. C. CODE ANN. (Michie, 1935) §628.

[2] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. ed. Adv. Ops. 394 (1937).

[3] Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282, 71 L. ed. 541 (1927); Liberty Warehouse Co. v. Burley Tobacco Growers' Coöperative Marketing Ass'n, 276 U. S. 71, 88, 48 Sup. Ct. 291, 294, 72 L. ed. 473, 479 (1928); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 289, 48 Sup. Ct. 507, 509, 72 L. ed. 880, 884 (1928). Cases criticized, Borchard, *The Supreme Court and the Declaratory Judgment* (1928) 14 A. B. A. J. 633, 635.

[4] U. S. CONST. Art. III, §2; Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246 (1911). The Federal Act, cited *supra* note 1, limits the power to grant declaratory judgments to "cases of actual controversy."

[5] State v. Grove, 109 Kan. 619, 201 Pac. 82 (1921); Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. Supp. 297 (1922); Carolina Power and Light Co. v. Iseley, 203 N. C. 811, 167 S. E. 56 (1933); Petition of Kariher, 284 Pa. 455, 131 Atl. 265 (1925).

[6] 288 U. S. 249, 264, 53 Sup. Ct. 345, 348, 77 L. ed. 730, 736 (1933) (declaratory judgment under Tennessee Statute held to be entitled to review in the Supreme Court).

[7] Commercial Casualty Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935); Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936).

[8] For a more extended treatment of the declaratory judgment and the insurance contract see: Morrison, *Availability of the Federal Declaratory Judgment Act for Life Insurance Cases* (1937) 23 A. B. A. J. 788; comment (1936) 46 YALE L. J. 286.