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Evidence -- Criminal Prosecutions -- Rule Excluding Other Crimes

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Evidence—Criminal Prosecutions—Rule Excluding Other Crimes

Defendant was indicted for murder. Evidence was admitted, over objection, that the defendant had confessed that he was an escaped prisoner from the South Carolina Penitentiary where he was under life sentence for murder. The trial judge charged the jury to consider such evidence only as it might bear on the motive and intent of the defendant in relation to the alleged killing. The defendant offered no evidence. Upon conviction and appeal, *held*, error to admit such evidence because "the record is barren of any evidence to connect the offense charged with the defendant's past criminal record"; judgment reversed, case remanded for new trial.[1] *State v. Kelly*,[2] where evidence of previous escape was held properly admitted, was expressly modified although the court suggested that "distinguishing differences" existed.[3]

In the principal case the court states the rule excluding evidence of other crimes or acts of misconduct in criminal prosecution as a broad rule of exclusion[4] with certain "well recognized" exceptions.[5] The exceptions, upon close analysis, prove to be the criteria in the determination of the relevancy of the previous offense to the offense charged; that is, design or plan, knowledge or belief, intent, motive, identity, or other acts which are an inseparable part of the whole deed.[6] The basic rule of relevancy favors the admissibility of all facts affording any reasonable inference to the act charged with the exception of the character rule which excludes conduct tending and offered to show bad moral character or disposition.[7] Obviously, the court has inverted the criteria of relevancy through which the basic rule operates into categories of exceptions to a broad rule of exclusion. In place of the inquiry, "Is this evidence relevant otherwise than merely through propensity (to

[1] State v. Fowler, 230 N. C. 470, 53 S. E. 2d 853 (1949). The State contended that this evidence shows or reasonably infers that defendant's *motive* was his fear that the deceased knew about his escape from the South Carolina prison. See Brief for the State-Appellee, p. 6. On second trial, defendant's plea of guilty to accessory before the fact was accepted by State. Minute Docket 30, p. 405, August 1949 Criminal Term of the Superior Court of Moore County.

[2] 216 N. C. 627, 6 S. E. 2d 533 (1940). See note 15 *post*.

[3] State v. Fowler, 230 N. C. 470, 475, 53 S. E. 2d 853, 857 (1949).

[4] "We start with the general rule that evidence of one offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other." *Id.* at 473, 53 S. E. 2d at 855.

[5] "To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions." *Ibid.*

[6] 1 WIGMORE, EVIDENCE §§217, 218 (3d ed. 1940). The six criteria listed in the text are the most common ones; for others, see *ibid.* See also STANSBURY, NORTH CAROLINA EVIDENCE §92 n. 62 (1946 ed.).

[7] 1 WIGMORE, EVIDENCE §§10, 194, 216 (3d ed. 1940).

commit a similar crime)?" there is substituted the inquiry, "Does this evidence fall within any exceptions to the rule of exclusion?" In so doing, the court's statement of the rule has, in the past, tempted judges to dispense altogether with the test of relevancy, even though the question still must be asked under the latter inquiry, "Is the evidence offered *relevant* to show intent, etc.?"[8] The resulting confusion has admittedly beclouded the rule itself by making its application more difficult and uncertain.[9] The premise upon which the rule was founded is directed toward the prevention of proof of guilt by proof of propensity to commit similar crimes.[10] Yet this very object of the rule excluding evidence of similar crimes in criminal prosecutions when relevant merely to show propensity is forgotten and the test of relevancy is by-passed when courts pay too close attention to the list of exceptions.[11] The courts are prone to use the categorical exceptions as catch-alls where it is felt that substantial justice has been accomplished in the light of the accused's character: "He's a bad character anyway!" Such a disposition on the part of the courts is assuredly not in accord with what has been called one of the distinguishing features of the Anglo-American criminal law—the recognition and avoidance of the deep tendency of human nature to punish, not because the victim is guilty of the crime charged, but because he is a bad man, and may as well be condemned now that he is caught.[12]

Although Mr. Chief Justice Stacy, in the principal case, formulates the rule of exclusion in its troublesome context, he has rendered a distinguished service toward the clarification of the confusion that existed in the application of the rule by recalling that, "The exception requires a more relevant base than the mere disposition of the accused to commit such crimes. . . . The touchstone is logical relevancy as distinguished from certain distraction."[13] Thus, he reinstates the principles of relevancy and the doctrines of auxiliary policy[14] in the rule excluding evidence of other crimes offered in criminal prosecutions in North Carolina.

At the same time he recognizes with admirable frankness that a number of North Carolina cases have been inconsistent in the application of the rule. The four cases[15] selected by the Chief Justice for this

[8] Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938).
[9] *Ibid.*; State v. Fowler, 230 N. C. 470, 473, 53 S. E. 2d 853, 855 (1949).
[10] 1 WIGMORE, EVIDENCE §194 (3d ed. 1940).
[11] Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1006 (1938).
[12] 1 WIGMORE, EVIDENCE §§57, 194 (3d ed. 1940).
[13] State v. Fowler, 230 N. C. 470, 473, 53 S. E. 2d 853, 855 (1949).
[14] 2 WIGMORE, EVIDENCE §1906 (3d ed. 1940).
[15] State v. Edwards, 224 N. C. 527, 31 S. E. 2d 516 (1944) (defendant charged with incest and carnal knowledge of his daughter; evidence that defendant had

criticism are striking reminders of that jurisprudential reasoning which blindly applies the exceptions to a broad rule of exclusion as though the exceptions were nothing more than well worn cliches used to cloak the particular court's personal estimate of the defendant. Relevancy is ignored; the object of the rule defeated.

Approximately seventy cases in North Carolina have involved the rule excluding evidence of other crimes in criminal prosecution; of that number fifty-two cases admitted the evidence and eighteen cases held the evidence inadmissible.[16] One might wish that the Chief Justice had mentioned several other North Carolina decisions that confuse the pic-

made improper advances of a similar nature to older daughter on prior occasions admitted by trial court to show "intent or guilty knowledge"; affirmed by Supreme Court as evidencing "intent *as well as the unnatural lust of the defendant* in attempting to commit the crimes charged in the bill" [emphasis supplied]; State v. Biggs, 224 N. C. 722, 32 S. E. 2d 352 (1944) (defendants charged with murder in commission of robbery; evidence tending to show that the three defendants on a date twenty-seven days after the homicide perpetrated a hold-up and robbery in same manner and same method as used in first robbery admitted by trial court on the question of "intent, guilty knowledge and identification"; affirmed by Supreme Court as "competent for the purpose to which limited . . . to show the identity of the persons . . ."; evidence of an attempt of one of the defendants to escape from jail while awaiting trial was admitted by trial court and not questioned by Supreme Court); State v. Kelly, 216 N. C. 627, 6 S. E. 2d 533 (1940) (defendants charged with murder in commission of robbery; evidence that one of the defendants was an escaped prisoner and that he had escaped with a co-conspirator killed in the robbery admitted by trial court and approved by Supreme Court to "show *quo animo*, intent, design, or guilty knowledge . . ."); State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937) (defendants charged with conspiracy to rob by means of assault with firearms; evidence that a week after the alleged robbery the state's witness and defendant conspired to burn and did burn an automobile to defraud insurance company admitted by trial court to "show identity or guilty knowledge"; affirmed by Supreme Court without specifying which exception to rule of exclusion applicable).

[16] The following cases represent decisions applying the rule of exclusion in North Carolina and supplement those cases cited in Note, 16 N. C. L. REV. 24 (1937):

A. Evidence held inadmissible:

State v. Choate, 228 N. C. 491, 46 S. E. 2d 476 (1948) (abortion and murder; evidence tending to show commission by defendant of other distinct and independent offenses of similar nature admitted originally by trial judge but subsequently jury instructed to disregard; reversible error); State v. Godwin, 224 N. C. 846, 32 S. E. 2d 609 (1945) (conspiracy to murder; evidence: defendant's profane comments on previous fire); State v. Wilson, 217 N. C. 123, 7 S. E. 2d 11 (1940) (embezzlement; evidence: statements by judge and foreman of grand jury suggesting irregularities in public guardianship account and order of court removing defendant as public guardian on grounds of mismanagement); State v. Lee, 211 N. C. 326, 190 S. E. 234 (1937) (maliciously burning a barn; evidence: indictment of defendant on previous occasion for assault with a deadly weapon).

B. Evidence held admissible:

State v. Davis, 229 N. C. 386, 50 S. E. 2d 37 (1948) (fornication and adultery; evidence: similar attempts on another person); State v. Biggs, 224 N. C. 722, 32 S. E. 2d 352 (1944) (facts stated in note 15 *supra*); State v. Edwards, 224 N. C. 527, 31 S. E. 2d 516 (1944) (facts stated in note 15 *supra*); State v. Harris, 223 N. C. 697, 28 S. E. 2d 232 (1947) (murder; evidence: that defendant shot and killed three people at same place in a matter of seconds); State v. Batson, 220 N. C. 411, 17 S. E. 2d 511, 139 A. L. R. 614 (1941) (attempt to commit barratry; evidence: testimony that defendant had urged others to enter into suits); State v. Kelly, 216 N. C. 627, 6 S. E. 2d 533 (1940) (facts stated in note 15 *supra*);

ture and becloud the application of the broad rule of exclusion;[17] but an even more commendable desire is that the principal case may be used as a precedent for the reaffirmation in principle of the basic rule favoring the admissibility of all relevant facts, with the character rule exception, unhampered by the illogical and inconsistent applications of the so-called exceptions to a broad rule of exclusion. The result would merely be the adaptation of the court's understanding of the present phraseology of the rule of exclusion to that statement of the basic rule already accepted by many state courts,[18] the federal courts,[19] the *Model Code of Evidence*[20] and by leading text-writers on evidence:[21]

> *"Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime."*[22]

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State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938) (murder of highway patrolman in process of escaping from him; evidence: subsequent escapes by defendants from highway patrolmen involving a shooting duel, weapons taken from defendant's car 4½ months after murder exhibited to jury piece by piece); State v. Smoak, 213 N. C. 79, 195 S. E. 72 (1938) (murder of daughter by strychnine poisoning; evidence: insurance on life of daughter, defendant had insured lives of first and second wives successively and had collected insurance after second wife died of strychnine poisoning, first wife in last illness stated in defendant's presence that she had been poisoned, a third person upon whose life defendant had taken out insurance policy had serious but not fatal attack of strychnine poisoning); State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937) (facts stated in note 15 *supra*); State v. O'Higgins, 178 N. C. 708, 100 S. E. 438 (1919) (elopement with married woman; evidence: abandonment of motherless child by defendant to elope with woman); State v. Wade, 169 N. C. 306, 84 S. E. 768 (1915) (fornication and adultery; evidence: previous sexual intercourse); State v. Broadway, 157 N. C. 598, 72 S. E. 987 (1911) (incest; evidence: other acts of intercourse); State v. White, 89 N. C. 462 (1883) (larceny of hogs; evidence: neighbors of defendant lost hogs about same time that defendant had sold dressed hogs, defendant had denied and admitted the sale in same conversation).

[17] *E.g.*, State v. Davis, 229 N. C. 386, 50 S. E. 2d 37 (1948) (fornication and adultery; evidence: testimony of another child in orphanage of which defendant was superintendent that he had made similar attempts on her admitted by trial court to show "attitude, animus and purpose." Affirmed by Supreme Court); State v. Batson, 220 N. C. 411, 17 S. E. 2d 511, 139 A. L. R. 614 (1941) (attempt to commit barratry; evidence: incitements to litigation other than those specifically charged held admissible to show "intent, motive and scienter"); State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938) (murder of a highway patrolman in process of escaping from him; evidence: subsequent escapes from highway patrolmen involving a shooting duel admitted as "tending to show the state of mind of the defendants at the time of the killing." Evidence of weapons captured in car with defendants 4½ months after killing admitted, weapon by weapon, before jury).

[18] *E.g.*, cases collected in Note, 22 TEMP. L. Q. 459 (1949); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

[19] Lovely v. United States, 169 F. 2d 386 (C. C. A. 4th 1948); Note, 22 TEMP. L. Q. 459 (1949).

[20] MODEL CODE OF EVIDENCE, Rule 311 (1942).

[21] 1 WIGMORE, EVIDENCE §216 (3d ed. 1940); STANSBURY, NORTH CAROLINA EVIDENCE §91 (1946 ed.).

[22] STANSBURY, NORTH CAROLINA EVIDENCE §91 (1946 ed.).