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Admissibility of Evidence of Prior Crimes in Murder Trials

CRIMINAL LAW

ADMISSIBILITY OF EVIDENCE OF PRIOR CRIMES IN MURDER TRIALS

Thomas Kallas, a homosexual, was indicted for the first-degree murder of George Stocks, age 23. The deceased met Kallas for the first time in a hotel barroom, accepted an invitation to go to the latter's room above for drinks, and was found dead fifteen minutes later, having been stabbed eight times. The plea was self-defense to an attempted robbery. The prosecution, being unable to disprove such an attempt directly, was allowed to introduce evidence of prior solicitations of sodomy and actual acts of pederasty committed by Kallas with other adults on the ground that such evidence tended to negative the plea. On appeal, the Indiana Supreme Court affirmed a conviction, holding that evidence of prior crimes is admissible to show intent, malice, common scheme, and motive even though it shows the accused to be guilty of a separate crime. *Kallas v. State,* 83 N. E.2d 769 (Ind. 1949).

Very early in the criminal law there was found a real danger in the admission of evidence of prior offenses committed by the accused due to the great weight which it undoubtedly had with the jury.[1] In such a case it was easy to presume a proclivity of the defendant to commit the crime charged and not demand independent and conclusive evidence of guilt.[2] Because of this threat the "rule of exclusion" arose, by which it became incompetent to prove the commission of one offense with evidence of another.[3] Finding that this rule often prevented society from convicting actual

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1. In 1695, Parliament passed a treason statute which provided: "No evidence shall be admitted or given of any overt act that is not expressly laid in the indictment . . .", 7 Will. III, c. 3, § 8. Early authorities on criminal law contended that this enactment was aimed at the tendency of both prosecutors and courts to overstep the rule that evidence must be relevant to be admissible. A discussion of similar statutes covering other crimes is found in Rex v. Bond (1906) 2 K. B. 389.

2. Regina v. Farris, 1 Q. B. 129, 131 (1841):

> Place a man's bad record before the jury and it is almost impossible for them to take an impartial view of the case brought against him. Slight evidence becomes magnified. Every defence is liable to appear suspicious. Every defendant, when all else has failed him, is entitled to stand before a jury unprejudiced by incompetent evidence and appeal to them to spare his life. It is impossible to say what they would have done had not the incompetent evidence been admitted.

3. Rex v. Cole, Mich. T. (1810) and Rex v. Ody, 5 Cox C. C. 210, 20 L. J. (M. C.) 198 (1851) are considered as being the two cases from which the rule originated. In both instances evidence was rejected which would have been admissible today. For an excellent discussion of the origin of the rule, see Stone, *Exclusion of Similar Fact Evidence: England,* 46 HARV. L. REV. 958 (1933). Early Indiana cases following the rule are Redman v. State, 1 Blackf. 96 (1817); McIntire v. State, 10 Ind. 26 (1857); Bonsall v. State, 35 Ind. 460 (1871).

wrongdoers, the courts quickly riddled it with exceptions.[4] This attempt to balance these two conflicting interests led to considerable confusion in the field of admissibility of evidence of prior crimes, much of which remains today.[5] Because this confusion is particularly apparent in cases involving murder,[6] and because the case under consideration concerns that crime, the discussion will be restricted to the problem of admissibility of evidence of prior crimes in murder trials.[7]

A modern statement of the "rule of exclusion" would seem to be that evidence of prior crimes may be introduced by the state in a murder trial only when that evidence is *relevant* to the proof of the guilt of the accused.[8] The relevance of such evidence is determined by three restrictions upon its admission. First, it can be introduced only for a purpose or for purposes which the courts recognize as proper: *e.g.,* to prove motive, intent, etc.[9] Second, the purpose for which the evidence is introduced must be one which

4. Regina v. Geering, 18 L. J. N. S. (1849) and Makin v. Attorney General for New South Wales, A. C. 57, 63 L. J. P. C. N. S. 41 (1894) offer early expressions in disfavor of a strict application of the rule and hold that there are exceptions to it. See also Strong v. State, 86 Ind. 208 (1882) in which the rule was applied strictly, one justice dissenting, however, whose opinion expressing dislike of the rule without exceptions was later approved in Crum v. State, 148 Ind. 401, 47 N. E. 833 (1897). For a complete list of exceptions to the rule generally recognized in most jurisdictions today, see Note, 29 MICH. L. REV. 988 (1931). It is often said that a rule that has become burdened with exceptions ceases to be the rule, being necessarily replaced by the exceptions. See Cook, *The Present Status of the Mutuality Rule,* 36 YALE L. J. 897 (1927). While this may be true of rules adopted by early courts through ignorance or lack of experience, it does not apply with equal effect to such a rule as the "rule of exclusion." True the rule under consideration is burdened with many and varied exceptions and a complete restatement of the law in this field would be welcomed. In spite of this, however, the spirit behind the "rule of exclusion" remains; and although the exceptions may today be the rule, the rule still stands as a warning to the courts that sacred rights of human beings are involved and that the exceptions must be applied with caution.

5. See Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* 51 HARV. L. REV. 988 (1938).

6. In Boyd v. United States, 142 U. S. 450 (1892) the accused was on trial for murder; evidence that he had committed several robberies in the past and that the deceased was attempting to arrest him for those crimes was excluded. The court failed to take into consideration the various exceptions to the "rule of exclusion." For other examples, see People v. King, 276 Ill. 138, 114 N. E. 601 (1916) and Barber v. Commonwealth, 182 Va. 858, 30 S. E. 2d 565 (1944).

7. The considerations entering into the admissibility of evidence of prior crimes are practically the same for all criminal trials; any differences which exist will be ones of degree only, and caused chiefly by the nature of the crime for which the trial is being held.

8. Anderson v. State, 205 Ind. 607, 186 N. E. 316 (1933); Perkins v. State, 207 Ind. 119, 191 N. E. 136 (1934); Crickmore v. State, 213 Ind. 586, 12 N. E.2d 266 (1938). In general, see 1 WIGMORE, EVIDENCE § 216 (3d ed. 1940).

9. The most important exceptions to the "rule of exclusion" which involve the crime of murder are found in the following cases: Goodwin v. State, 96 Ind. 550 (1884) (intent); Benson v. State, 119 Ind. 488, 21 N. E. 1109 (1889) (malice); Sanderson v. State, 169 Ind. 301, 12 N. E. 525 (1907) (premeditation); Lawson v. State, 171 Ind. 431, 84 N. E. 974 (1908) (motive); Peats v. State, 213 Ind. 560, 12 N. E.2d 210 (1938) (common scheme); Perkins v. State, 207 Ind. 119, 191 N. E. 136 (1934) (knowledge); Crickmore v. State, 213 Ind. 586, 12 N. E.2d 266 (1938) (identity). For a discussion of the general problem, see 2 WIGMORE, EVIDENCE §§ 300, 306 (3d ed. 1940).

is properly in issue—one which the state necessarily must prove in order to make out its case.[10] And third, the evidence of the prior offense must be logically conducive to the proof of the purpose or purposes in issue.[11] Although no one of these restrictions can be said to be more important than any of the others, the latter seems to be the most productive of difficulty so as to warrant emphasis being placed upon it.[12]

It is impossible to formulate a test which will draw an unerring line between relevant and irrelevant evidence, since the admissibility of evidence falling close to such an arbitrary demarcation is so subtle as to rest in the discretion of the trial judge.[13] Beyond this area, however, it is possible to set up a test that will be helpful in eliminating the obviously irrelevant evidence which should never receive the trial judge's discretionary treatment. It is imperative that such a test take into consideration the fundamental principle underlying the use of circumstantial evidence to prove the existence of a fact; viz., that when inferences are used as a method of proof, they must be reasonable and rational.[14] The quest then becomes one of discovering what evidence, under what circumstances, will give rise to a reasonable and rational inference. For this determination two sources are drawn upon: (1) The doctrines or formulas upon which are based the proof of the various elements of murder by evidence of prior crimes,[15] and (2) the existing appellate cases passing upon the relevance of prior crimes as evidence in a

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10. It is usually understood that when a defendant admits the existence of a fact, that fact cannot be considered as being in issue; however, there are facts which the state must affirmatively prove even though they may have been admitted by the accused. *Accord,* Schneider v. State, 220 Ind. 28, 40 N. E.2d 322 (1942).

11. *Accord,* Keifer v. State, 199 Ind. 10, 154 N. E. 870 (1927). In general, see 2 WIGMORE, EVIDENCE §§ 301, 302 (3d ed. 1940).

12. See McKusick, *Other Crimes To Show Guilty Knowledge and Intent,* 24 IOWA L. REV. 471 (1939).

13. Marshall, J. in Spick v. State, 140 Wis. 104, 106, 121 N. W. 664, 665 (1909):

> The factors involved in determining the relevancy of evidence offered for admission are many and varied. So much depends upon the facts of the individual case that such determination must be for a large part left to the discretion of the trial judge who is guided only by his sense of justice and by whatever rules that can be drawn from the precedents.

Examples of the considerations lying within the discretion of the trial judge are: the effect which the lapse of time between the prior crime and the crime charged will have upon the relevancy of the evidence of the prior crime; the difference between the methods used in committing the prior crimes and the crime for which the defendant was indicted. See Note, 11 CORN. L. Q. 89 (1925).

14. See 2 WIGMORE, EVIDENCE § 300 (3d ed. 1940).

15. These doctrines or formulas are, in effect, pragmatic processes of determining relevancy, founded upon intuition, and in turn based upon experience. For a discussion of their effect and operation, see 2 WIGMORE, EVIDENCE § 302 (3d ed. 1940).

murder trial.[16] The doctrines used are found to be but individual working formulas of the principle underlying "proof through inference." Likewise, the existing cases are merely applications of the same broad principle to specific sets of facts. Both sources are helpful in showing the consistency of results reached by judicial application of an otherwise seemingly vague principle.

It would be possible to construct a test so that it would apply to all of the purposes in a murder trial for which evidence of prior crimes may properly be used;[17] however, because of the frequency with which such evidence is introduced to prove intent, malice, common scheme, and motive, and because these were the purposes for which the Indiana Supreme Court approved admission of the evidence of the prior offenses of sodomy and attempted sodomy, the test will be set up to apply only to those four purposes. When thus restricted, the test is found to rest upon three considerations:

(1) *The degree of similarity in the result or likely result of the prior crime to the result of the crime of murder; i.e.,* looking at the result of the prior crime, is it similar (one resulting in death or injury likely to cause death, such as a previous killing, mayhem, battery, etc.) or dissimilar (one in which the injury is not likely to cause death, such as adultery, incest, theft crimes, etc.) to the result of murder?[18] This consideration is of primary

16. An examination of the cases passing upon the relevance of prior crimes as evidence in a murder trial reveals consequences of twofold significance: first, the doctrines or formulas prescribe certain types of evidence to be relevant and other types of evidence to be irrelevant. The existing cases support the first half of this prescription, in that there are cases holding the same types of evidence relevant which are declared relevant by the formulas. There are, however, no cases passing upon those types of evidence which the formulas declare to be irrelevant; in this fact lies the second significant consequence. Why is there a lack of reported cases passing upon the relevancy of these types of evidence? One explanation might be that the field is undeveloped and the evidence has never come before a court for determination as to relevancy. This is highly unlikely in a field so old as evidence. Another explanation is that the evidence is so clearly irrelevant that it has been consistently rejected by the trial court, from which there has been no appeal. If this latter explanation can be accepted, and it certainly receives support from the principle underlying proof through inference, then a lack of cases on this point has the same effect as numerous cases would have declaring the evidence irrelevant.

17. In order for a test to encompass all of the purposes it would be necessary to examine all of the cases passing upon the admissibility of evidence of prior crimes in murder trials in order to determine the area in which cases are lacking, and then examine the individual doctrines used in the proof of each of the purposes, so as to compile a list of the circumstances which go to make up the broader principle of proof through inference. Those areas which coincide and support each other would constitute the test. For a discussion of all the doctrines used in proof of elements with prior crimes, see 2 WIGMORE, EVIDENCE Ch. 10-14 (3d ed. 1940).

18. 2 WIGMORE, EVIDENCE § 363 (3d ed. 1940). There are no doubt crimes which exist so close to the line between similar and dissimilar that with the addition or subtraction of one of many circumstances, they will be placed on one side and then the other. The determination, of course, lies with the trial court, and at times will be a difficult one to make; but, as will be seen *infra,* it is one which must be made before theory can be applied with reason. *See* People v. Molineaux, 168 N. Y. 264, 297, 61 N. E. 286, 296 (1901).

importance in the proof of all four of the above purposes or exceptions to the "rule of exclusion."

(2) *The relationship existing between the deceased and the prior crime.* Was the prior crime perpetrated directly against the deceased or against a class of which he was a member?[19] This relationship figures only in the proof of the purposes of common scheme and motive.

(3) *The relationship existing between the deceased and the accused.* Was the deceased in such a position in respect to the accused as to constitute a threat to his safety or a hindrance to his desires?[20] This relationship bears only on the proof of motive. An understanding of the test can best be gained by an examination of the purposes of intent, malice, common scheme, and motive in the light of both the doctrines used in their proof and the existing cases passing upon the admissibility of evidence to prove them.

Proof of intent and malice in a murder trial with evidence of prior crimes committed by the accused is an application of the so-called "doctrine of chances."[21] The prosecutor, being unable to prove affirmatively the requisite state of mind, may be allowed to show that the killing was not caused by accident, inadvertence, or other justifiable cause.[22] The chance that the harmful conduct resulted from an innocent state of mind becomes increasingly less with each repetition. An accused's explanation that his first killing[23] was

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19. For an example of such a relationship, see Perkins v. State, 207 Ind. 119, 191 N. E. 136 (1934) (prior assault and battery upon the deceased by the accused). *Accord,* 2 WIGMORE, EVIDENCE § 390 (3d ed. 1940).

20. Examples of this relationship are found in Goodwin v. State, 86 Ind. 550 (1884) (deceased threatening to have accused arrested for prior assault) and in Peats v. State, 213 Ind. 560, 12 N. E.2d 10 (1938) (previous assaults on other non-union truck drivers, showing deceased's desire to stamp out "scab" labor).

21. 2 WIGMORE, EVIDENCE § 302 (3d ed. 1940) and cases cited.

22. One of the questions upon which the courts do not seem to have agreed is whether when there is other evidence of intent in the cases, evidence of another crime may be given. Some of the authorities hold that if the evidence is admissible at all the fact that there is other evidence of intent will not render it incompetent. Crum v. State, 148 Ind. 401, 47 N. E. 833 (1897). Others decide that the exceptions to the general rule forbidding the receipt of this kind of evidence are ones of necessity, and the introduction of the evidence should only be permitted when the exigency of the case demands it. People v. Lonsdale, 122 Mich. 388, 81 N. W. 277 (1899).

23. According to Dean Wigmore, the "doctrine of chances" involves "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the *same* result until it is perceived that this element cannot explain them all . . ." In order to apply the process, ". . . it is at least necessary that the prior acts be similar . . . to the one charged." 2 WIGMORE, EVIDENCE, 196 (3d ed. 1940). A controversy exists as to the effect of a single act committed in the past, as to whether or not it can ever logically negative innocent intent. Actually there can be no satisfactory answer to the question, since the number of offenses required will vary with each kind of offense according to the probability that the act could be repeated within a limited time and under given circumstances with an innocent intent. The problem is discussed in State v. Lapage, 57 N. H. 245, 294 (1876). The Indiana court does not seem to have considered the problem directly, as there are cases holding both ways: Keifer v. State, 199 Ind. 10, 154 N. E. 870 (1927) (a single prior assault on deceased rejected); Benson v. State, 119 Ind. 488, 21 N. E. 1109 (1889) (single prior assault on deceased admitted).

accidental may be accepted without question; but with each killing thereafter, doubt as to his innocence in the present homicide will logically increase.[24] Thus the conclusion, one which is supported by the cases, may be drawn that evidence of prior murders or other crimes considered to be similar to murder committed by the accused tends to be relevant toward proving his intent or malice for a subsequent killing.[25] However, from the very nature of the doctrine of chances it is apparent that prior crimes which are dissimilar to murder can have no relevancy upon a defendant's intent or malice, even though they were perpetrated upon the deceased himself. The mere fact that an accused had previously stolen property or money from the person he was charged with killing could supply no inference that the killing was not committed by accident, etc.[26] This point is also revealed by the absence of cases admitting crimes dissimilar to murder, to prove an intent to kill.[27]

In the case under discussion, the attempts and actual acts of sodomy committed by Kallas must be considered as being dissimilar to the crime of murder; for the result of neither crime can be considered as similar to death. Sodomy as an act of sexual intercourse is no more likely to cause injury or death than any other such act.[28] When accompanied with violence, of course, the possible result changes, just as would the result of a normal act of sexual intercourse; but merely because the act itself is unlawful offers no justification for an assumption of accompanying violence without proof.[29] Being dissimilar crimes, then, they are therefore disqualified under the test of irrelevancy for the purpose of proving Kallas' intent or malice in killing Stocks.[30]

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24. The classic example is found in the case of a landowner who is charged with the murder of a trespasser. Evidence that he had killed one or more trespassers in the past would tend to negative any claim that he only intended to frighten the deceased. For a modern application of the doctrine, see People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569 (1939), *aff'd* 313 U. S. 539 (1941).

25. Sanderson v. State, 169 Ind. 301, 82 N. E. 525 (1907) (prior assaults on deceased admitted); Benson v. State, 119 Ind. 488, 21 N. E. 1109 (1889) (prior assaults and batteries on deceased admitted); Peats v. State, 213 Ind. 560, 12 N. E.2d 10 (1938) (prior assaults upon non-union truck drivers, a class of which deceased was a member).

26. See note 23 *supra.*

27. See note 16 *supra.*

28. Jelliffe, *Homosexuality and the Law,* 3 J. CRIM. L. & CRIMINOLOGY 95 (1912).

29. An exception would be where the act is committed upon a child so small that injury resulting in death becomes highly possible. Commonwealth v. Winter, 289 Pa. 284, 137 Atl. 261 (1927). However, there was no proof that Kallas had been guilty of perpetrating the act upon children, nor was there any evidence that his acts with adults were accompanied with violence.

30. None of the Indiana cases cited by the Supreme Court in the instant case support the admissibility of evidence of dissimilar crimes to prove intent or malice. In Goodwin v. State, 96 Ind. 550 (1894) (accused indicted for murder; evidence of prior assault on deceased admitted) and Peats v. State, 213 Ind. 560, 12 N. E.2d 210 (1938) (accused indicted for murder; evidence of prior assaults upon a class of which deceased was a member admitted) the evidence admitted was of offenses similar to murder. In State v. Markins, 95 Ind. 464 (1884), Borolos v. State, 194 Ind. 469, 143 N. E. 360 (1924), Shneider v. State, 220 Ind. 28, 40 N. E.2d 322 (1922), and Card v. State, 109 Ind. 415,

To allow the admission of such evidence, in effect, sanctions the transfer of a state of mind which accompanied one act to an entirely separate and distinct act, bringing about a result wholly repugnant to the criminal law.[31]

Only when the accused in a murder trial denies the commission of the act charged, and it cannot be proved directly by the state, is it proper to show through evidence of previous actions of the accused, which may include criminal conduct, the probable existence of a common scheme,[32] design, or plan which probably included the crime charged.[33] It may readily be seen that this method of proof involves a probability built upon a probability, and should naturally be applied with great caution; for there is here involved a far greater amount of uncertainty than is found in the "doctrince of chances."[34] Thus for the purpose of showing that the accused in a murder trial committed the act which killed the deceased, this doctrine of "probable probability" would seem at least to require that the evidence tend to reveal a scheme on the part of the defendant which could lead logically to the killing of the deceased, or which could be comprised logically of such killing; and that the crimes making up the scheme be highly similar and highly related, not only to the crime of murder, but also to each other.[35] The precedents completely support such conclusions; for cases are found holding prior crimes similar to

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9 N. E. 591 (1886) the indictments were all for lesser offenses (incest, sodomy, forgery, and filing a false claim); but even so, in each case the evidence admitted was not of dissimilar prior crimes but ones identical to the one charged. Likewise, none of the cases drawn from other jurisdictions support the admissibility of dissimilar crimes to prove intent or malice for murder. In State v. Rediker, 214 Minn. 470, 8 N. W.2d 527 (1943), State v. Odonnel, 176 Iowa 337, 157 N. W. 870 (1916), and Wever v. State, 121 Neb. 816, 157 N. W. 870 (1916) the evidence admitted in each instance was that of prior crimes similar to murder (assaults on deceased). Six other out-of-state cases involved indictments for rape and other less serious crimes, and in each instance the evidence admitted involved crimes identical to the one charged.

31. This would amount to an outrageous extension of the felony-murder doctrine—not only to misdemeanors and felonies not included in the statute—but also to acts which occurred in the past entirely unconnected with any killing, instead of only to a limited number of felonies in the *perpetration of which* death occurs, as the statute requires.

32. If the commission of the act be admitted by the accused through his plea or otherwise, then it is not proper to prove the existence of a common scheme with evidence of prior crimes, ". . . for the peculiarity of design or plan is that the act is not assumed to be proved." 2 WIGMORE, EVIDENCE § 300 (3d ed. 1940).

33. 2 WIGMORE, EVIDENCE § 363(3) (3d ed. 1940); see especially the poisoning cases listed therein.

34. See note 23 *supra*.

35. 2 WIGMORE, EVIDENCE 202 (3d ed. 1940).

> Where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than mere similarity, which suffices for evidencing intent. The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan, or scheme directed forwards to the doing of that act. . . . The added element, then, must be . . . such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.

murder to be admissible to show a plan to kill, but only if they were perpetrated upon the deceased or upon a class of which he was a member.[36] However, as in the case of intent and malice, there are no cases declaring dissimilar crimes relevant to prove a common scheme, even when the required relationship between the deceased and the prior crimes exists.

In the case under discussion, the commission of the killing was not in issue because of the plea of self-defense. Thus the court should not have even allowed the attempt to prove a common scheme. Aside from this fact, however, the only probable preconceived plan which was shown to exist was one to commit acts of sodomy; and there could be no logical inference from the showing of such a plan that murder was a probable part of the plan or the probable result of it.[37] Being crimes dissimilar to murder, the acts of sodomy and attempted sodomy committed by Kallas are declared by the test to be improper for the purpose of proving a common scheme.[38]

It is often said that proof of motive in a murder trial is never required;[39] and while as a matter of theory this may be true, such proof becomes indispensable to the prosecution's case when the accused claims the homicide to have been justified.[40] Where it is necessary, proof of a defendant's motive with evidence of prior crimes is nothing more than a process of inferring, from the defendant's previous conduct, that there existed in him some desire or emotion from which, in turn, the doing of the act charged can be inferred.[41] Like the speculative processes involved in proving intent, malice, and common scheme, the method of proving motive, which involves the extracting of an inference from an inference, must also be applied with great caution.[42] Al-

36. Crickmore v. State, 213 Ind. 586, 12 N. E.2d 266 (1938); Peats v. State, 213 Ind. 560, 12 N. E.2d 10 (1938).

37. A different result would be possible if the acts and attempts of sodomy committed by Kallas had been accompanied with violence. See note 29 *supra.*

38. None of the cases cited by the Indiana Supreme Court support the relevancy of dissimilar crimes to prove a common scheme. In Peats v. State, 213 Ind. 560, 12 N. E.2d 210 (1938), the only Indiana case cited for the proposition, the evidence admitted was of prior assaults on a class of which the deceased was a member—clearly crimes similar to murder. People v. Morani, 196 Cal. 154, 236 Pac. 135 (1925) and People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569 (1939) *aff'd* 313 U. S. 539 (1941) (prior murders) also involved the admissibility of similar crimes.

39. *See* Reynolds v. State, 147 Ind. 3, 7, 46 N. E. 31, 32 (1897).

40. *See* Osbon v. State, 213 Ind. 413, 425, 13 N. E.2d 223, 228 (1938).

41. 2 WIGMORE, EVIDENCE §§ 385-389 (3d ed. 1940) and cases cited.

42. The search here is not so much for similarity or concurrence of common features as for just what circumstances will tend to excite a given emotion. Obviously, it cannot be said beforehand that a certain circumstance will always be without the power of exciting any one emotion; and, in general, any circumstance may be offered which can possibly be conceived as tending toward the emotion in question. However, the word "possibly" does not include wild imagination nor the assumption of other facts which have not been proven to exist. If by examining the circumstance offered, it can only produce the emotion in question if other facts exist, then the relevancy of the circumstance to prove motive will depend upon the proof of these facts. For a discussion to the same effect, see Ware v. State, 91 Ark. 555, 558, 121 S. W. 927, 928 (1909).

though the motives for murder are many and varied, they are roughly classified by the authorities into the following groups of desires or emotions: (1) jealousy, (2) hostility, (3) self-preservation, and (4) self gain.[43] Thus to prove a motive falling within one of these broad categories with evidence of prior crimes, it is imperative that only those criminal acts be used which tend[44] to show the existence of an emotion or desire capable of explaining the death of the deceased by the defendant on trial. The cases are in complete harmony with these observations, and show similar prior crimes to have a tendency to be relevant to prove motive (1) when there existed some connection between the deceased and the prior similar crime, such as its perpetration upon him or upon a class of which he was a member,[45] or (2) when there existed some relationship between the deceased and the accused with respect to the prior similar crime, such as knowledge of its commission so that the deceased would constitute a hindrance to the accused's safety or desires.[46] No cases declare similar prior crimes to be relevant without one of these relationships. Dissimilar prior crimes have been held to be relevant when there is present the relationship between the accused and the deceased with respect to the prior dissimilar crime as explained above;[47] there are no cases admitting the introduction of dissimilar crimes to prove motive without the existence of this relationship.

Lacking in the Kallas case is the required relationship between the deceased and the accused for the proof of motive with dissimilar crimes.[48]

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43. In general, see 2 WIGMORE, EVIDENCE § 390 (3d ed. 1940) and cases cited.

44. One explanation of what is meant by the use of the word "tendency" was given by Dale, C. J. in Son v. Territory, 5 Okla. 526, 49 Pac. 923 (1897):

> A motive cannot operate to influence until the facts which create the motive exist. The facts upon which a motive is based cannot operate upon the mind until they are known by the party against whom the motive is assigned.

45. Sanderson v. State, 169 Ind. 301, 82 N. E. 525 (1907); Benson v. State, 119 Ind. 488, 21 N. E. 1109 (1889).

46. Perkins v. State, 207 Ind. 119, 191 N. E. 136 (1934).

47. Porter v. State, 173 Ind. 694, 91 N. E. 340 (1910); Lawson v. State, 171 Ind. 431, 84 N. E. 974 (1908); Hinshaw v. State, 147 Ind. 334, 47 N. E. 157 (1897).

48. None of the authorities cited by the court in the instant case support the admission of dissimilar crimes to show motive without the existence of the special relationship between the accused and the deceased. In Hinshaw v. State, 147 Ind. 334, 47 N. E. 157 (1897) and Lawson v. State, 171 Ind. 431, 84 N. E. 974 (1908) the indictments in each case were for the murder of the accused's wife, and the prior crimes admitted were dissimilar (adultery); but in both cases the deceased stood in the way of the defendant's desire to marry another. In Sanderson v. State, 169 Ind. 301, 12 N. E. 525 (1907) the crime admitted was similar (assault on deceased). In Anderson v. State, 205 Ind. 607, 186 N. E. 316 (1933) the prior crime was dissimilar (theft), but the deceased (a policeman) stood between the accused and freedom. Two cases drawn from other jurisdictions, Commonwealth v. Winter, 289 Pa. 284, 137 Atl. 261 (1933) and Frank v. State, 141 Ga. 243, 80 S. E. 1016 (1914) appear at first glance to support the Indiana Court in its decision. In the former the indictment was for the murder of two small boys (sodomy had been the "cause" of their death). Evidence was admitted that the accused had previously solicited an act of sodomy (a dissimilar crime) from an older brother of the deceased

Stocks and Kallas were total strangers on the night they met; thus it could not be inferred from the prior dissimilar offenses of sodomy that the deceased constituted a threat to the safety of the accused. Could Stocks be considered as constituting a hindrance to the achievement of a desire possessed by Kallas? The theory of the state was that he resisted Kallas' advances, and for that reason was killed;[49] but to support such a theory it would be necessary to show that Stocks actually resisted advances, or the prior crimes must have shown that in the past Kallas had resented such resistance to such an extent that he either became violent or threatened violence. On the contrary, the evidence failed to show that the deceased had resisted Kallas' advances; but it did show that his advances had been resisted on numerous previous occasions, several of which had resulted in his arrest and conviction, and not once was there any indication of violence. Actually the only motive shown by the evidence to have existed was Kallas' desire to commit sodomy, to satisfy his sexual hunger, and not such a motive as would tend to explain the death of Stocks.

In light of the foregoing analysis, it is apparent that the prior offenses which were allowed to be used as evidence against Kallas were irrelevant as such, since they lacked entirely any tendency to prove that which they were introduced to prove.[50] Moreover, the evidence admitted was of a most damaging and prejudicial sort,[51] making the case an excellent example of the

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children. However, the case is distinguishable in the fact that there was *competent* evidence that the accused was a sadist, thus causing the existence of the required relationship, since the deceased boys, while alive, constituted a hindrance to the accused's desire to torture or kill. In the latter case the indictment was for murder and the prior crimes admitted were dissimilar (sex crimes). However, there was evidence that the deceased resisted the accused and that the accused customarily became violent when resisted.

49. Another theory advanced by the court in its opinion (not a part of the prosecution's case) was that the jury was warranted in finding Kallas a sadist and the killing of the deceased sadistic. *See* Kallas v. State, 83 N. E.2d 769, 776. Of course if Kallas were proved to have been a sadist, then the relationship between himself and the deceased would assume a different character; the deceased, while alive, would clearly have constituted a hindrance to a man with sadistic tendencies. However, it is submitted that a jury of 12 inexperienced laymen would need more evidence than this case disclosed to be able to understand intelligently the various sexual abnormalities recognized as existing in individuals today. One does not become a sadist overnight, but leaves a trail of brutal and violent acts as evidence of his abnormal and brutal nature. See Jelliffe, *Homosexuality and the Law,* 3 J. CRIM. L. & CRIMINOLOGY 95 (1912); Glover, *The Social and Legal Aspects of Sexual Abnormality,* 13 MEDICO-LEGAL AND CRIMINOLOGICAL REV. 133 (1945); Riddel, *A Case of Supposed Sadism,* 15 J. CRIM. L. & CRIMINOLOGY 32 (1924); Mackwood, *Male Homosexuality,* 15 MEDICO-LEGAL AND CRIMINOLOGICAL REV. 14 (1947).

50. This does not mean that this evidence would have been irrelevant for the proof of *all* of the accepted purposes; for, as has been pointed out, the test was set up only for the four purposes of intent, malice, common scheme, and motive.

51. In speaking of the admission of irrelevant evidence of prior crimes, the court, in Boyd v. United States, 142 U. S. 450, 455 (1890) said:

> . . . proof of them [the prior crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives

primary reason for the origin of the "rule of exclusion."[52] It is extremely difficult to offer any explanation for this decision of the Indiana Supreme Court; yet the occasion is sufficiently serious to warrant at least an attempt. The basic mistake made by the court was in the assumption that any and all evidence of prior offenses, when offered by the state to prove one of the exceptions to the "rule of exclusion," becomes automatically "clothed" with relevancy.[53] The court seemed impressed with the discovery that the "rule of exclusion" had exceptions, some of which could be applied in this case, and in its desire to point this out, omitted the primary consideration of the *relevancy* of the evidence offered to prove those exceptions. Even a cursory glance at the doctrines underlying the proof of intent, malice, common scheme, and motive would have revealed the fallacy of considering relevancy to come so cheaply.

The authorities cited by the court, and its treatment of them, show also an entirely improper approach to the problems involved in the field of admissibility of evidence of prior crimes. Greatly emphasized were numerous cases which allowed prior offenses to be used for the very purposes for which they were offered here; the importance again being placed on the existence of the exceptions rather than on an analysis by the Court of the precedents to discover why the evidence was relevant in those instances.

The proposed test will not alleviate any of the difficult problems involved in passing upon the relevance of prior crimes as evidence. It declares *no* evidence to be relevant. It does declare certain evidence to be irrelevant in certain situations, but its primary value is not found in this fact since in most of those instances the evidence is obviously irrelevant anyway. The chief utility of the test rests in its approach to the determination of relevancy, in its use of accepted principles and doctrines, and in its application of them to both existing and non-existing cases on the subject. Under the test the rights of the state are protected in that no relevant evidence is excluded; but more important, the rights of the accused are also protected since irrelevant evidence is less likely to get to the jury. The possible threat to the right of the accused

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were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.

52. See Pickett, *Criminal Law and Admissibility of Evidence as to Separate and Distinct Crimes*, 18 NEB. L. BULL. 336 (1939).

53. See Stone, *Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 998, 1007 (1938).

to a fair and impartial trial through improper admission of evidence is just as great today as when the courts were forced to adopt the "rule of exclusion."[54]

54. Kennedy, J. in Rex v. Bond (1906) 2 K. B. 389, 398:

> Nothing can so certainly be counted upon to make a prejudice against an accused upon his trial as the disclosure to the jury of other misconduct of a kind similar to that which is the subject of the indictment, and indeed, when the crime alleged is one of a revolting character, and the hearer is a person who has not been trained to think judicially, the prejudice must sometimes be almost insurmountable. Therefore, if, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained without disclosure of prior offenses, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the crminal law which excludes evidence of prior offenses is not broken or frittered away by the creation of novel and anomalous exceptions.