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EVIDENCE SHOWING ABSENCE OF MOTIVE

Pollard was charged with conspiracy to commit perjury by having witnesses falsely testify that they saw the deceased execute a note upon which Pollard founded a claim against the deceased's estate. The lower court excluded evidence that the note was genuine. Held, the exclusion was reversable error. The evidence was competent as tending to establish that no motive for the crime alleged existed. *Pollard v. State*, 29 N.E. (2d) 956 (Ind. 1940.)

Where direct evidence is in conflict as to whether the accused committed a crime, or the evidence is circumstantial upon that issue, motive is material. *Hardin v. State*, 211 Ala. 656, 101 So. 442 (1924); *People v. Lewis*, 275 N. Y. 33, 9 N. E. (2d) 765 (1937). In such cases, evidence tending to substantiate the existence or nonexistence of motive is relevant and admissible as circumstantially bearing upon the intent or identity of the offender. *People v. Durkin*, 330 Ill. 394, 161 N. E. 739 (1928); *Hall v. State*, 37 Okla. Cr. 4, 255 Pac. 716 (1927). The relevancy of facts so adduced hinges upon the general character of the motive prompting the crime. 2 WIGMORE, EVIDENCE (3d ed. 1940) §§ 389-392. The fact submitted, however, must be within the probable knowledge of the accused since it otherwise could not have effected his motives. *Potter v. State*, 60 N. D. 183, 233 N. W. 650 (1930); *Marabile v. State*, 89 Ga. 425, 15 S. E. 453 (1892) (apparent oportunity to know); *cf. Cheek v. State*, 35 Ind. 492 (1871) (actual knowledge). The basis for the admission of this kind of evidence is

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[22] Indiana follows the majority view. South Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901). From the language used there it seems very unlikely that Indiana courts would refuse to order blood tests.

[23] Richardson v. Nelson, 221 Ill. 254, 77 N.E. 583 (1906); Stack v. N.Y., N.H. & Hartford R.R., 177 Mass. 155, 58 N.E. 686 (1900).

[24] Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891). Subsequent to the decision in the principal case the Supreme Court in Sibbach v. Wilson Co., 9 U.S.L. Week 4131 (U.S. 1941), cited *supra* note 20, held that to compel a party to submit to physical examination is not an invasion of a substantive right and, therefore, federal rule 35(a) does not transcend the enabling act.

[25] Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891).

[26] See cases cited *supra* note 15; 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2220.

the rational connection between motive and action of which the jury is presumed to have sufficient knowledge to infer the probability of one from the other. *Vaughn v. Commonwealth*, 85 Va. 671, 8 S. E. 584 (1889). The absence of motive raises the inference that action is improbable. *People v. Kepford*, 52 Cal. App. 508, 199 Pac. 64 (1921); *State v. Santino*, 186 S. W. 976 (Mo. 1916). Thus, if the note in the principal case was in fact genuine, the jury might well infer that Pollard probably would not conspire to produce perjured testimony to that effect. The excluded evidence seems to have sufficient probative value to justify a holding that its exclusion was error.

N. C. B.