Marquette Law Review

Volume 36
Issue 2 *Fall 1952*

Article 8

Evidence - When Is Fact of Prior Criminal Offense Admissible to Show Common Scheme

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real estate there are many factors such as schools, roads, parks, and surrounding property which may be properly considered although there is no right in the property owner to have them maintained in the condition then prevalent. Therefore, if evidence is introduced that the availability of the permit land would effect market value, the increase in value due to the permit must be determined. Thus in the *Jaramillo Case* the trial court instructed the jury that it should give to the fee land such additional value due to the availability of the permit land as it thought necessary to be given. However, witnesses for the ranchers were permitted to separately value the permit land and add this to the value of the fee land. Because of this, the judgment was reversed, it being improper to separately appraise the different elements constituting the whole.[29] However, the court held that the instructions given were proper and directed the trial court to proceed in accordance with the views expressed in the opinion, that is, to consider the availability of the permit land as an element of value of the fee land provided that consideration be also given to the fact that the permits could be withdrawn at any time without obligation to compensate therefor.

Thus back in the district court Jaramillo will have to show the value of the land as an economic unit. This could be done by showing the carrying capacity of the ranch with the permit land and multiplying this figure by a peranimal unit value and then adding the estimated value of the improvements. This was the method used in the *Cox Case.* Then to show how much of this value he could get in the open market because of the revocability of the permits he would have to produce witnesses who could estimate the effect of the availability of the permit land on the value of the fee land in the open market. Apparently the permits were usually not revoked and were considered valuable in the open market because the dissenting opinion in the *Cox Case* points out that the availability of permit lands had been taken into consideration by buyers and sellers in that region for many years.

Thus while these two cases did not place a value on the effect of a revocable license on the land benefited thereby, the ruling in the *Jaramillo Case* laid the groundwork for future cases doing so.

JOHN GROGAN

Evidence—When Is Fact of Prior Criminal Offense Admissible to Show Common Scheme—Defendants, members and employees of Union Local No. 65, were charged with obstructing an officer who

[29] United States v. Meyer, 113 F. 2d 387, 397 (7th Cir. 1940).

was attempting to make an arrest, and for assaulting and beating an officer. The crimes charged occured during the picketing, by Local #65, of a retail store. In the trial court evidence was received, without objection by the defendants, to the effect that Local #65 was communist dominated, and, for that reason, had been expelled from the C.I.O.; that two of the five defendants were connected with various communist activities. On appeal the defendants contended that this evidence was incompetent, irrelevant, highly prejudicial and caused severe antagonism against them. The State contended that even if the defendants had objected to the evidence in the trial court, that it would have been admissible to prove motive, design, plan, or scheme; and that their acquiescence to the evidence in the trial court prevented their raising the question on appeal. *Held:* Whether the defendants are members of the communist party, or adhere to its doctrines is a matter entirely foreign to the issue of guilt or innocence on a charge of affray, assault and battery, and obstructing an officer while attempting to make an arrest. *Commonwealth v. Peay, 85 A. 2d 425 (Pa. 1951).*

The majority opinion in the instant case seems to base its decision on the theory that the evidence regarding the communist issue was completely irrelevant and foreign to the issue; i.e. that such evidence could in no way be of probative value in determining whether the defendants actually did or did not assault the officer. The majority opinion also concerns itself with the fact that the testimony in question undoubtedly created undue prejudice against the defendants.[1] It was said that the tendency of human nature to punish the defendant because he is a bad man generally, regardless of the merits of the case, is a tendency which cannot fail to influence the jury.[2] The majority opinion disposes of the State's primary contention by holding that the law pertaining to design, pattern, system, and common scheme could not come into play until there was proof that the Union Local #65, and the two individual defendants, were guilty in other instances of committing assault and battery as communists.

The minority in the instant case held that evidence tending to prove motive, design, plan, or scheme of criminal conduct is always admissible; that the Pennsylvania court had previously taken judicial notice of the fact that the Communist Party is a subversive organization which conspires to teach and advocate the overthrow of the government of the United States by force and violence;[3] that, therefore, the evidence should be admissible as tending to show a design

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[1] 1 WHARTON, CRIMINAL EVIDENCE §227 (11th ed. 1935), for an interesting discussion of the principle of undue prejudice.
[2] 1 WIGMORE, EVIDENCE §57 (3rd ed. 1940).
[3] Milasinovich v. Serbian Progressive Club, Inc., 84 A.2d 571 (Pa. 1951).

or plan to do the act in question. It is established law that when the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it.[4] A defendant's situation, conduct, speech, silence, and motives may be considered if they have some connection with each other, as a part of the same plan or induced by the same motive.[5]

It would appear from the majority opinion that they are basing their decision on the assumption that the evidence in question does not logically "tend" to prove the conclusion for which it was admitted. For evidence of another crime to be admissible to prove motive it is necessary that it fairly[6] and directly[7] tends to prove a motive growing out of the collateral crime;[8] there must be a "natural reasonable sequence"[9] or a "visible connection"[10] between the two. At this time a distinction should be made between intent and design. "In proving intent the act is conceded or assumed; what is sought is the state of mind that accompanied it. In proving design the act is still undetermined, and the proof is of a working plan, operating towards the future with such force as to render probable both the act and the accompanying state of mind."[11] Mere similarity of acts is admissible to prove intention, or to negate an innocent intention, but when the effort is to establish a definite prior design or system, then an additional element must be satisfied, namely, that there must be not merely a similarity in the results, but 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 the individual manifestations.[12] With this in mind it would appear that the evidence in question does not adequately "tend" to convince the human mind that defendants actually assaulted the officer. The case might have been different if the cause of action was for unlawfully picketing, since in such a case the connection between the two factors would be more closely allied.

On the other hand, however, there is some authority for the proposition that evidence is admissible to show that a defendant is a

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[4] 2 WIGMORE, EVIDENCE §304 (3rd ed. 1940).
[5] Commonwealth v. Robinson, 146 Mass. 571, 16 N.E. 452 (1888); People v. Stout, 4 Park.Cr.Cas. 127 (N.Y., 1858).
[6] State v. Hakon, 21 N.D. 133, 129 N.W. 234 (1910).
[7] People v. Cook, 148 Cal. 334, 83 P. 43 (1906).
[8] People v. Glass, 158 Cal. 650, 112 P. 281 (1910) where the court said that, "The motive for the commission of the crime charged must grow out of the collateral crime. . . . It is not sufficient that both crimes spring from the same motive."
[9] Commonwealth v. Vardelle, 70 Pa.Super. 241 (1918).
[10] Shaffner v. Commonwealth, 72 Pa. 60 (1873). On p. 65 the court said, "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish."
[11] 2 WIGMORE, EVIDENCE §300 (3rd ed. 1940).
[12] 2 WIGMORE, EVIDENCE §304 (3rd ed. 1940).

member of a secret organization dedicated to the attainment of unlawful objectives.[13] The underlying theory for this rule is to allow the jury to draw the inference that since the defendant is a member of such an organization it is reasonably probable that he would have a motive or purpose for committing the crime charged, and therefore the conclusion to be drawn would be that the defendant, with reasonable probability, was guilty of the crime charged.[14]

In Wisconsin the general rule of law is followed disallowing evidence of a prior offense by the accused,[15] ostensively submitted to show guilt of the crime charged, but such evidence is admissible when the prior offense directly tends to prove some element of the crime charged.[16] The test to determine the competency of the evidence was given in the *Spick* case where the court said that the trial court must admit the evidence if (1) the evidence logically and reasonably tends to prove a fact in issue, and (2) there is a reasonable probability of the truthfulness of the evidence to be admitted;[17] and the fact that the evidence is circumstantial,[18] or may be prejudicial,[19] is no ground for its exclusion. If there is a connection between the two acts so as to show "plan, design and intent" the evidence is admissible.[20]

In this writer's opinion it would appear that the Wisconsin court, if confronted with an analogous situation, would follow the principle of the *Spick* case[21] and would concur with the majority in the instant case.

FINTAN M. FLANAGAN

Future Interests—Construction of Conveyance to "A and His Children"—Rule in Wild's Case—Certain land had been deeded by a grantor to his wife and their children. At the time the deed took effect the grantor and his wife had five living children, but another child was subsequently born. After the wife's death, condemnation proceedings

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[13] Jenkins v. Commonwealth, 157 Ky. 544, 180 S.W. 961 (1915); Carroll v. Commonwealth, 84 Pa. 107 (1877); Campbell v. Commonwealth, 84 Pa. 187 (1877); Hester v. Commonwealth, 85 Pa. 138 (1877); McManus v. Commonwealth, 91 Pa. 57 (1879).

[14] Commonwealth v. Fragassa, 278 Pa. 1, 122 A. 88 (1923).

[15] Ablricht v. State, 6 Wis. 74 (1857); Schaser v. State, 36 Wis. 429 (1874); State v. Miller, 47 Wis. 530, 3 N.W. 31 (1879); McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901); Malone v. State, 192 Wis. 379, 212 N.W. 879 (1927); State v. Henger, 220 Wis. 410, 264 N.W. 922 (1936).

[16] Zoldoske v. State, 82 Wis. 580, 52 N.W. 778 (1892); Fossdahl v. State, 89 Wis. 482, 62 N.W. 185 (1895); Paulson v. State, 118 Wis. 89, 94 N.W. 771 (1903); Dietz v. State, 149 Wis. 462, 136 N.W. 166 (1912); Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925); State v. Meating, 202 Wis. 47, 231 N.W. 263 (1930).

[17] Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909).

[18] *Ibid.*; Schwantes v. State, 127 Wis. 160, 106 N.W. 237 (1906).

[19] Herde v. State, 236 Wis. 408, 295 N.W. 684 (1941).

[20] *Ibid.*