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Other Crimes Evidence in Louisiana - I. To Show Knowledge, Intent, System, Etc. in the Case in Chief

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COMMENTS

OTHER CRIMES EVIDENCE IN LOUISIANA—

I. TO SHOW KNOWLEDGE, INTENT, SYSTEM, ETC. IN THE CASE IN CHIEF

The Theory Behind the Rule

In general, all relevant evidence is admissible unless a specific rule of policy forbids its use.[1] If, in the case in chief, the state offers proof of other crimes committed by defendant, the question arises whether this evidence is relevant to prove the crime at issue.[2] The fact that a defendant has committed another crime has logical relevancy;[3] it tends to show that he has a "criminal disposition" and thus is more likely to have committed this particular crime than a defendant without such a propensity. If the evidence indicates that defendant has committed the same type of crime, *e.g.*, proof of another theft in a prosecution for theft, the evidence has even greater relevancy.

Having determined that defendant's other crimes are relevant, the next question is whether an existing policy forbids its use. Evidence relevant *solely* to show a defendant's criminal disposition is termed *character evidence*, and the state's use of character evidence has generally been deemed to create an inordinate risk of unjust convictions because of these factors: the strong possibility of the jury convicting defendant merely because he is a bad man; the injustice of attacking defendant on an issue for which he is probably unprepared; and the danger of confusing the jury by proof of collateral issues.[4] Since the common law placed greater emphasis on protecting the innocent accused rather than convicting the guilty, the rule early developed forbidding the state's proof of defendant's other crimes if the

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1. C. McCORMICK, EVIDENCE § 184 (Cleary ed. 1972) [hereinafter cited as McCORMICK]; J. WIGMORE, EVIDENCE § 10 (3d ed. 1940) [hereinafter cited as WIGMORE]; *see also* Rule 402 of the *Proposed Federal Rules of Evidence.*

2. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

3. "Relevant evidence" as used here means evidence having any tendency in reason to prove any material fact. 2 WIGMORE § 216; UNIFORM RULE OF EVIDENCE 1.

4. 1 WIGMORE § 194; Stone, *Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) [hereinafter cited as Stone, *England*]; Thomas, *Looking Logically at Evidence of Other Crimes in Oklahoma*, 15 OKLA. L. REV. 431 (1962).

evidence is relevant only to show defendant's character.[5] With minor variations, this rule has been adopted in all United States jurisdictions.[6]

Evidence inadmissible for one purpose may be admitted when offered for another, proper use.[7] Thus, while other crimes evidence is inadmissible when relevant only to show defendant's criminal disposition, it may be admissible if it bears some relevancy independent of character.[8] The majority of jurisdictions have formulated a rule prohibiting any use of evidence referring to a defendant's other crimes *except* when such evidence bears the special relevancy of motive, intent, plan, knowledge or identity.[9] A minority of jurisdictions phrase the rule so as to admit all relevant evidence unless its sole relevance is to show the defendant's criminal disposition.[10] Regardless of the approach used,[11] it is generally recognized that the admissibility of defendant's other crimes turns on the independent relevancy *vel non* of the evidence to some material issue other than defendant's character.[12]

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5. McCORMICK §§ 188, 190; 2 WIGMORE § 217; Stone, *Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 991 (1938) [hereinafter cited as Stone, *America*]; Stone, *England*, at 959.

6. McCORMICK § 190; 2 WIGMORE § 216; Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 326 (1956); Stone, *America*, at 996.

7. 1 WIGMORE § 13; LA. R.S. 15:442 (1950).

8. McCORMICK § 190; 1 WIGMORE § 217.

9. Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 326 (1956). The leading case articulating the majority rule is *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). For a historical development of both forms of the rule see Stone, *England* and Stone, *America*. Generally, the listed exceptions to exclusionary rule are considered illustrative, not exhaustive. *See* McCORMICK § 190, at 448. Louisiana has codified the majority rule in LA. R.S. 15:445, 446 (1950).

10. *See* Comment, 7 U.C.L.A. L. REV. 463 (1960) for an explanation of the minority rule and its accompanying judicial approach. This minority approach has been adopted in UNIFORM RULE OF EVIDENCE 55 and MODEL CODE OF EVIDENCE rule 311 (1942).

11. For a critical analysis of the majority approach to the rule see Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 214 (1965) [hereinafter cited as Gregg, *Sexual Offenses*]; Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267, 272 (1952); Slough, *Other Vices, Other Crimes, An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 413 (1972); Stone, *America*, at 1007; Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 393 (1952); Comment, 70 YALE L.J. 763, 767 (1961). These authorities contend that courts tend to use the enumerated exceptions of the majority rule as mechanical solutions to the question of relevancy, thus omitting a sound inquiry into the actual relevance of the other crime to a material issue in the case.

12. McCORMICK § 190, at 447; 2 WIGMORE § 217.

The Requirement of Independent Relevancy

As with any relevancy problem, there are few concrete rules. Analysis of the more commonly used exceptions reveals the following factual relationships which have been deemed necessary to constitute independent relevance.[13]

The state's proof of a *plan or scheme* is generally not an essential element of the crime charged.[14] However, the fact that a defendant planned to commit the crime in question, as evidenced by a plan and action upon it, certainly renders more probable the conclusion that defendant did commit that crime. If the plan contemplated the commission of another crime, the state's proof of this plan thus becomes a problem of other crimes evidence. It is generally held that unless this alleged plan contemplated *both* the other crime and the act charged in the indictment, it is inadmissible.[15] These crimes need not be identical, nor even similar, provided they were both part of a plot which included the completion of the crime in question.[16]

Knowledge signifies an awareness of a fact. In some crimes, it may be an element of the crime. For example, a prosecution for receiving stolen property requires that defendant know the property was stolen. Evidence that defendant knowingly bought stolen property from the *same* person on a prior occasion is generally admissible. The connection between transactions (same thief, similar circumstances) renders more probable the fact that defendant was aware of the nature of the property at the later transaction. Such evidence is independently relevant and admissible to prove knowledge.[17] However, many authorities state that even if knowledge is an element of the crime, where knowl-

13. Since Louisiana utilizes the majority approach, the writer has chosen to discuss the permissible uses of other crimes evidence as *exceptions* to a broad prohibition against *any* use of defendant's other crimes in the state's case in chief.

14. Conspiracy is not considered here.

15. If the two crimes were *not* included in a single plan and are otherwise unrelated to the crime charged, the only relevance of the evidence is to show that defendant has committed other crimes and has a criminal disposition. A mere similarity between offenses has not been understood to show a plan. 2 WIGMORE § 300; Gregg, *Sexual Offenses*, at 229.

16. 2 WIGMORE § 304; Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 419 (1972); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 330 (1956); Comment, 36 TENN. L. REV. 515, 521 (1969); Comment, 7 U.C.L.A. L. REV. 463, 473 (1960).

17. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 419 (1972).

edge is implicit in the act itself, proof of knowledge should be inadmissible.[18] Of course, if the defendant's evidence disputes this presumption of knowledge, the state may offer *rebuttal* evidence.[19] Where knowledge is not an element of the crime, proof of it is irrelevant unless used to show some other material fact.[20]

Although *motive* is never an essential element of a crime, it is usually relevant. If the defendant had a particular reason to accomplish a crime and the crime was effected, proof of defendant's motive renders more probable the fact that he was the actor.[21] In order to have independent relevance, the motive reflected by other crimes should be factually peculiar to the victim and the crime charged.[22]

Intent refers to the state of mind with which an act is done and is usually an essential element of the charge. Thus, other crimes evidence may be admissible to prove this material fact. It is conceivable that an act could have been innocently done once, but where defendant is proved to have committed other similar acts, the likelihood of innocent intent is considerably diminished.[23] For evidence of another crime to be admissible, it is generally held that it must have been similar to the crime in question.[24] Although intent is a material fact, where the requisite

18. If knowledge (or any other issue) is apparent from the act, proof of knowledge is entirely cumulative and unnecessary. 1 UNDERHILL'S CRIMINAL EVIDENCE § 208 (5th ed. 1956); 1 WIGMORE § 27. The preceding authorities offer support for the interesting assertion that such evidence is *immaterial*. If an otherwise pertinent fact is proved and undisputed it remains a factual element of the case, but cannot be considered *material* because it is no longer in *question*. It becomes material if disputed. *See* Comment, 7 U.C.L.A. L. REV. 463, 466 (1960). It is clear that a plea of not guilty does not put everything essential to the crime at issue. MCCORMICK § 190, at 452 n.54; Comment, 70 YALE L.J. 763, 772 (1961).

19. MCCORMICK § 190, at 452.

20. If evidence that defendant was aware of a fact would tend to prove the intent with which he did the act, it may be admissible to prove his intent. 1 WIGMORE § 13.

21. 2 WIGMORE § 306.

22. A defendant's prior attack upon the victim is generally admissible to prove his motive for the victim's subsequent murder. Such evidence shows that defendant has an active hostility *toward this particular victim*. In contrast, a more general motive, *e.g.*, drug addiction as a motive for armed robbery, is generally inadmissible. *See* Comment, 36 TENN. L. REV. 515, 517 (1969). For a case holding heroin addiction too tenuous to show motive see People v. Bartlett, 256 Cal. App. 2d 787, 64 Cal. Rptr. 503 (1967).

23. 2 WIGMORE § 302; Comment, 36 TENN. L. REV. 515 (1969); Note, 50 MARQ. L. REV. 133 (1966).

24. 2 WIGMORE §§ 302, 304; Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956).

intent is an inescapable conclusion from the act, it is uniformly held that other crimes evidence is inadmissible.[25] However, if defendant's evidence disputes the element of intent, the state may use the other crimes evidence in rebuttal.[26]

Another recognized exception to the exclusionary rule is the use of other crimes to prove *identity*. If it is proved that the crime charged and another crime both possess such peculiar distinguishing facts which mark them as the handiwork of one person, the evidence tends to prove that the perpetrator of the other crime also committed the act in question.[27] Thus, if it can be proved that defendant committed the other act, then it should be admissible as evidence that he committed the crime charged.[28] Although there has been some confusion about the ambit of the identity exception, the overwhelming majority of jurisdictions restrict its use to crimes as unique to the individual as his signature; consequently, this exception is seldom applicable.[29]

Although the other crimes exclusionary rule is uniformly applicable to all types of crimes, the courts have generally phrased one important exception to the rule with regard to sex offenses. It is well settled that prior sexual acts with the victim (or prosecutrix) in the crime charged are admissible to prove *defendant's lustful disposition for the victim.*[30] Comparable to the

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25. No distinction should be drawn between crimes requiring specific criminal intent and those requiring only general criminal intent. The concept is properly applicable to either provided that the requisite intent is apparent from the act. For example, if defendant is proved to have committed the act of armed robbery, it is a safe assumption that he intended the consequences of the act. In such a case, evidence of his other crimes to prove intent in the crime charged is inadmissible. *See* 2 WIGMORE § 357.

26. *See* note 19 *supra*. *See also*, Comment, 18 BROOKLYN L. REV. 80 (1952); Comment, 36 TENN. L. REV. 515, 518 (1969).

27. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 420 (1972); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 330 (1956); Comment, 7 U.C.L.A. L. REV. 463, 474 (1960).

28. 2 WIGMORE § 306; Thomas, *Looking Logically at Evidence of Other Crimes in Oklahoma*, 15 OKLA. L. REV. 431, 448 (1962).

29. Proof that defendant has previously picked up barmaids, driven to a secluded area and committed rape, is generally inadmissible to prove identity in a subsequent similar act. Such a common *modus operandi* is not deemed sufficient to mark both crimes as the work of one criminal. MCCORMICK § 190, at 449. For two interesting cases involving the use of other crimes to prove identity see People v. Peete, 28 Cal. 2d 306, 169 P.2d 924 (1946) and People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).

30. MCCORMICK § 190, at 449; 2 WIGMORE § 398; Gregg, *Sexual Offenses*, *supra* note 11, at 218; Comment, 40 MINN. L. REV. 694, 701 (1956); Note, 46 TUL. L. REV. 336 (1971).

proof of motive, repeated acts with the *same person* have such particular significance to the crime charged that this proof is deemed to be more than mere character evidence.[31]

The preceding enumeration is certainly not exhaustive of the potential legitimate uses of other crimes evidence. The great weight of authority holds that other "exceptions" can and have been created.[32] However, the authorities make it clear that courts must follow the same procedures in handling the well established exceptions or in creating new ones. In each case the court must analyze the proffered evidence by examining the inferences which would follow from its use. If this inquiry reveals a significant relevance apart from the inference that defendant has a disposition to commit this type of crime, the evidence may be admissible.

It is important to recognize that a finding of independent relevance does not automatically mandate the admission of this evidence. The court clearly should exclude independently relevant other crimes evidence if its probative value is outweighed by its prejudicial effect.[33] Thus, the trial judge should balance all the pertinent factors, and, in a close case, he should exclude the evidence.[34]

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31. Gregg, *Sexual Offenses*, at 220; McCORMICK § 190, at 449. The great majority of jurisdictions recognize that the independent relevance lies in the defendant's attraction to this particular victim (in consensual crimes, the *mutual* attraction is even more probative). Consequently, only acts between the same parties are admissible. *See, e.g.*, State v. Mason, 79 N.M. 663, 448 P.2d 175 (1968); People v. Askar, 8 Mich. App. 95, 153 N.W.2d 888 (1967). A few jurisdictions admit a defendant's acts with persons other than the prosecutrix. However, since the only inference drawn from such evidence is that defendant has a propensity for illicit sexual relations, this view is a deviation from traditional theory. Statistical studies prove that sex offenders as a class are *less* likely to repeat their crime than ordinary criminals. Thus disposition evidence in this area actually has *less* probative value than in other crimes. This liberal use of other sexual offenses has been criticized in Gregg, *Sexual Offenses*, at 231 and Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 422 (1972).

32. *See* McCORMICK § 190 for other uses. That authority specifically states that no listing could be complete because an appropriate fact situation will create a new exception to the exclusionary rule.

33. *See, e.g.*, Rule 403, *Proposed Federal Rules of Evidence*; State v. Goebel, 36 Wash. 2d 367, 218 P.2d 300 (1950).

34. McCORMICK § 190, at 452-54. Pertinent factors include: the prejudicial effect of evidence; the cumulative nature of the evidence; the existence of any real dispute over the issue; the desirability of delaying the use of the evidence until after defendant disputes the issue; the strength or weakness of the evidence in actually elucidating the issue; the convincing quality of the evidence that the other crime was committed and that defendant committed it.

The Standard of Proof

Inherent in the concept of independent relevancy is a showing that the other crime did occur and that the defendant actually committed it. Thus, the court must satisfy itself that the state's proof of this other crime is sufficient before the ultimate decision of admissibility is reached.[35] Since the specific circumstances of the other crime rather than the mere fact of its occurrence give it independent relevance, the underlying facts are usually shown by detailed physical and testimonial evidence.[36] Because such evidence is potentially confusing and prejudicial,[37] the courts have generally required the state to make a preliminary showing that the evidence meets a high standard of proof.[38] The great majority of jurisdictions require that the state prove the other crime and defendant's commission of it by "substantial evidence" or "clear and convincing evidence."[39] Although not easily defined, these terms clearly require more than a mere preponderance of the evidence but less than proof beyond a reasonable doubt.[40] If the sufficiency of the state's proof is ques-

35. The sufficiency of proof is an important factor to be considered by the court in its balancing process which ultimately decides the admissibility *vel non* of the evidence. MCCORMICK § 190, at 452.

36. Use of a conviction based on a jury verdict to prove that defendant committed the other crime is technically hearsay-opinion evidence. Such evidence is, however, highly trustworthy and such convictions are used both to show the act and to corroborate the witness' testimony. Comment, 24 OKLA. L. REV. 372 (1971). Rule 803(22) of the *Proposed Federal Rules of Evidence* would allow such a use of prior convictions to prove any fact *essential* to sustain the judgment. Facts *not* essential to the prior judgment would have to be proved at the present trial by original evidence. If the conviction is based on a guilty plea, it would not be subject to the hearsay-opinion objection because it is an *admission*. *See* People v. Formato, 286 App. Div. 357, 143 N.Y.S.2d 205 (1955).

37. In effect, this evidence tends to prove defendant's character by showing specific acts. Where character is properly put at issue, the risk of prejudicing and confusing the jury is deemed so great that proof of character is limited to relatively inoffensive reputation evidence. *See* MCCORMICK § 186.

38. *See, e.g.*, U.S. v. Broadway, 477 F.2d 991 (5th Cir. 1973) which adopted the "plain, clear, and conclusive" test and required a preliminary examination of the evidence out of the jury's presence; Kraft v. U.S., 238 F.2d 794 (8th Cir. 1956); State v. Hughes, 102 Ariz. 118, 426 P.2d 386 (1967); People v. Edwards, 159 Cal. App. 2d 208, 323 P.2d 484 (1958); Shepard v. State, 143 Tex. Crim. 387, 158 S.W.2d 1010 (1942).

39. *See* MCCORMICK § 190, at 451-52. *See generally* 29 AM. JUR. 2d *Evidence* § 333 (1967); 22A C.J.S. *Criminal Law* § 690 (1961).

40. People v. Albertson, 23 Cal. 2d 550, 145 P.2d 7 (1944); People v. Lisenba, 14 Cal. 2d 403, 94 P.2d 569 (1939); State v. Carvelo, 45 Hawaii 16, 361 P.2d 45 (1961); Commonwealth v. Robinson, 146 Mass. 571, 16 N.E. 452 (1888); Caruthers v. State, 219 Tenn. 21, 406 S.W.2d 159 (1966). In civil cases, "clear and convincing" is defined as "highly probable." MCCORMICK § 340, at

tionable, it is generally recognized that any doubt should be resolved in favor of defendant by excluding the evidence.[41]

The Louisiana Jurisprudence

The early Louisiana cases reveal that the courts employed the rule as formulated by the majority of jurisdictions, that is, all evidence which referred to defendant's other crimes was to be excluded unless it came within such exceptions as knowledge, intent, system, plan, or motive.[42] The decisions recognized the prejudicial quality of other crimes evidence, and thus the evidence was inadmissible unless it was "directly connected" (independently relevant) to the crime in question.[43]

State v. Bates,[44] a prosecution for theft, offers an excellent example of the early judicial approach. In order to prove system and intent, the trial court admitted the state's evidence which tended to show that defendant had committed a similar theft the day before the crime in question. The supreme court noted that this evidence raised a great danger of "uniting evidence of several offenses in order to produce conviction for a single one" and further stated:

> "From the nature and prejudicial character of such evidence, it is obvious that it should not be received unless the mind

796. Since the fact of another crime is usually not an essential element of the charge, but like any other evidence is only proof from which the existence of an essential element may be inferred, it is not necessary that the other crime be proved beyond a reasonable doubt. *Cf. In re* Winship, 397 U.S. 358 (1970). However, sound considerations of fundamental fairness require that the state meet a high standard of proof when using other crimes evidence. Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966).

41. Labiosa v. Canal Zone, 198 F.2d 282 (5th Cir. 1952). Because the clear and convincing standard is less than proof beyond a reasonable doubt, most jurisdictions will allow proof of a prior crime even though defendant was tried and acquitted of the charge. However, this practice raises constitutional questions in view of *Ashe v. Swenson*, 397 U.S. 436 (1970), and some courts have rejected the evidence for this reason. *See, e.g.*, Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972). This constitutional attack based on *Ashe* has been rejected in Louisiana in *State v. Boudoin*, 257 La. 583, 243 So.2d 265 (1971).

42. *See, e.g.*, State v. Anderson, 45 La. Ann. 651, 12 So. 737 (1893); State v. Thomas, 30 La. Ann. 600 (1878); State v. Patza, 3 La. Ann. 512 (1848).

43. *See* State v. Johnson, 38 La. Ann. 686 (1886) (other crimes evidence excluded as "not pertinent to the crime"); State v. Palmer, 32 La. Ann. 565 (1880) (wanting in direct connection).

44. 46 La. Ann. 849, 15 So. 204 (1894).

> plainly perceives that the commission of the one tends by a visible connection to prove the commission of the other . . . ."[45]

It was found that there was no such connection between these two distinct acts, and, therefore, the conviction was reversed.[46]

In *State v. Norphlis*,[47] another theft prosecution, the defendant had been apprehended for shoplifting. At trial, for the purpose of proving system and intent, the state was allowed to introduce fruits of prior thefts from the same store which were discovered at the defendant's residence. On appeal, the supreme court reversed the conviction, finding that the prior thefts and the crime in question were isolated events which were not encompassed within a single plan; therefore, they were not admissible to show system. Since the facts of the act in question left no doubt concerning the intent with which it was done, the supreme court held the prior crimes evidence inadmissible to prove intent.[48]

In the landmark case of *State v. Rives*,[49] the supreme court found that the pertinent provisions of the 1928 Code of Criminal Procedure[50] were not intended to upset the jurisprudence in this area, and the admission of such evidence was still to be determined by the principles applied in the earlier cases. In this prosecution for cattle theft, the trial court allowed the state to show that two months before the crime in question, defendant was planning to steal cattle from a *different* farm. The trial court had admitted the evidence for the purpose of showing intent

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45. *Id.* at 853, 15 So. at 206, *quoting from* Shaffner v. Commonwealth, 72 Pa. 60, 65 (1872). The court further stated that the benefit of any doubt must be given to the defendant. On application for rehearing, the court recognized that the prior act did no more than establish defendant's tendency to steal and thus was inadmissible.

46. *Accord*, State v. Ard, 160 La. 906, 107 So. 617 (1926); State v. Johnson, 38 La. Ann. 686 (1886).

47. 165 La. 893, 116 So. 374 (1928).

48. *See also* State v. Brown, 185 La. 1023, 171 So. 433 (1936); State v. Ward, 166 La. 806, 118 So. 26 (1928); State v. Fontenot, 48 La. Ann. 305, 19 So. 111 (1896). In *State v. Colombo*, 171 La. 475, 131 So. 464 (1930), a prosecution for receiving stolen property (a car), the state introduced evidence showing that defendant had forged the bill of sale to his car. The court held that this evidence was relevant to show that defendant knew the property was stolen when he received it; therefore, it was admissible.

49. 193 La. 186, 190 So. 374 (1939).

50. La. Code Crim. P. arts. 445, 446 (1928). These are now expressed in LA. R.S. 15:445, 446 (1950).

and that defendant had a "mind bent on mischief."[51] The supreme court reversed stating that the prosecution could not attack the defendant's character in its case in chief, and in no event could it show character by specific acts. Further, the supreme court found that whoever had committed the crime in question clearly had the requisite intent, and the proffered evidence could not be admitted for this purpose in the state's case in chief.[52]

With respect to sex offenses, the Louisiana courts early admitted other similar acts between the defendant and the prosecutrix as tending to show a subsequent act.[53] However, the admissibility of this evidence was generally measured by the standards applied in most other jurisdictions. Thus, in *State v. Alexander*,[54] the court held that defendant's offenses with persons other than the prosecutrix were inadmissible.[55]

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51. Although the court did not specifically rule on the use of the evidence to show *plan*, the court did state that defendant's plan to steal from a different victim two months prior to the crime charged simply did not indicate a scheme to steal from this particular victim. Thus the opinion strongly implied that such evidence is inadmissible for that purpose, which is in accord with the majority of jurisdictions. *See* text at note 15 *supra*.

52. The court expressly distinguished between a rebuttal use of this evidence from the state's use in its case in chief. Since no defense of lack of intent was asserted, the evidence was inadmissible in rebuttal also. *See* text at note 19 *supra* and State v. Prieur, 277 So.2d 126 (La. 1973), for a similar distinction. *Accord*, State v. Alexander, 216 La. 932, 45 So.2d 83 (1950); State v. Wilde, 214 La. 453, 38 So.2d 72 (1948); State v. Gardner, 198 La. 861, 5 So.2d 132 (1941); State v. Norphlis, 165 La. 893, 116 So. 374 (1928).

53. State v. Wichers, 149 La. 643, 89 So. 883 (1921) (carnal knowledge); State v. De Hart, 109 La. 570, 33 So. 605 (1903) (incest). In *State v. Ferrand*, 210 La. 394, 27 So.2d 174 (1946), the supreme court upheld the state's use of evidence showing that defendant had raped the prosecutrix eight days prior to the act in question. Although the court phrased this exception to the exclusionary rule as "showing defendant's lustful disposition," thus omitting the crucial words "for the victim," the holding of the case is within the traditional exception. *See* text at note 31 *supra*.

54. 216 La. 932, 45 So.2d 83 (1950). The court also held that intent was immaterial to the crime of incest, thus defendant's acts with other parties were inadmissible to show intent. The court distinguished *State v. Cupit*, 189 La. 509, 179 So. 837 (1938), because it was a charge of *attempted* rape. *See* note 55 *infra*.

55. The case of *State v. Cupit*, 189 La. 509, 179 So. 837 (1938) is the one significant deviation in the early jurisprudence. In a prosecution for attempted rape, the state was allowed to show that defendant had raped two other victims, eleven and two years ago respectively, prior to the act in question. The supreme court upheld the admission of this evidence for the purposes of showing defendant's lustful disposition and intent. Although this evidence clearly showed lustful disposition, the rule was designed precisely to prevent such a showing, and the great weight of authority excludes offenses committed with persons other than the prosecutrix. *See* note 31 *supra*. As to the other justification for admission—intent, *Cupit* involved an *attempted* rape and specific intent to rape is an essential element. Since the requisite intent was not apparent from the act, most

Prior to 1950, the jurisprudence strictly applied traditional considerations of relevancy to each fact situation in order to prevent unwarranted character attack. However, post-1950 cases deviated from this precedent, and until the recent decision of *State v. Prieur*,[56] the more modern jurisprudence exhibited a liberal approach toward the state's use of other crimes evidence and expanded the traditional exceptions to the exclusionary rule. These intervening decisions often admitted other crimes evidence to prove knowledge or intent in cases where these elements were apparent from the act itself,[57] and where no defense was interposed placing such elements in dispute.[58]

Under the label of system, these cases developed a new exception to the exclusionary rule. The decisions defined crimes of a system as crimes which are of like nature and exhibit similar methods of operation.[59] Thus in a prosecution for armed robbery, evidence has been admitted that defendant committed a similar robbery reasonably close in time and location to the act in question.[60] Although this use of defendant's other crimes was not generally recognized in the earlier cases,[61] it may well be

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jurisdictions would allow evidence of other similar crimes for this purpose. However, the state's evidence tending to show these other crimes was extremely tenuous, distant in time, and should have been excluded for failure to meet the traditional standard of proof.

56. 277 So.2d 126 (La. 1973).

57. *See, e.g.*, State v. Evans, 249 La. 861, 192 So.2d 103 (1966); State v. Howard, 243 La. 971, 149 So.2d 409 (1963); State v. Blankenship, 231 La. 993, 93 So.2d 533 (1957). *Compare* State v. Rives, 193 La. 186, 190 So. 374 (1939), which rejected the contention that defendant's other crimes are *always* admissible to show intent. In possession of narcotics cases, *e.g.*, State v. Skinner, 251 La. 300, 204 So.2d 370 (1967) and State v. Johnson, 228 La. 317, 82 So.2d 24 (1955), it has been held that knowledge is an essential element of the crime, and that other offenses are always admissible to show this knowledge. Under general authorities such knowledge is presumed from the fact of possession unless defendant contests the issue. *See* note 18 *supra*.

58. *E.g.*, State v. Pesson, 256 La. 201, 235 So.2d 568 (1970) and State v. Reese, 250 La. 151, 194 So.2d 729 (1967), allowing other acts of abortion to show intent in a subsequent act. Most jurisdictions reject such evidence unless the defendant asserts a defense (*see* notes 19 & 26 *supra*), *i.e.*, the act was done to save the prosecutrix's life. State v. Cragun, 85 Utah 137, 38 P.2d 1071 (1934).

59. State v. Spencer, 257 La. 672, 243 So.2d 793 (1971). In this prosecution for armed robbery, the state was allowed to prove that the defendant had robbed the same victim a second time nine days later. Both crimes were armed robberies committed at night in the same parking lot.

60. State v. Carney, 260 La. 995, 257 So.2d 687 (1972); State v. Modelist, 260 La. 945, 257 So.2d 669 (1972); State v. Montegut, 257 La. 665, 243 So.2d 791 (1971).

61. Although the word *system* is used in LA. R.S. 15:446, it was apparently equivalent to *plan*, as evidenced by the phrase, "continuity of the offense" in the statute. The early courts clearly considered system to be synonymous

justifiable if there is a close nexus in time, place, and *modus operandi* between the two crimes;[62] however, some of these recent cases admitted other acts which were not closely related to the crime in question.[63]

In sex offense cases, post-1950 decisions expanded the state's use of defendant's other crimes far beyond the narrow exception recognized in the early jurisprudence. Defendant's offenses with persons other than the prosecutrix have been admitted for the purpose of showing intent and licentious disposition.[64] Further, dissimilar acts[65] and acts distant in time[66] have been admitted for these purposes.

The trend of the recent jurisprudence and its broad expansion of the traditional exceptions to the other crimes exclusionary rule has been reversed by *State v. Prieur*.[67] The defen-

with plan. *See* State v. Norphlis, 165 La. 893, 116 So. 374 (1928) and State v. Bates, 46 La. Ann. 849, 15 So. 204 (1894).

62. The relevance of this evidence lies in the inference that because defendant has recently committed similar crimes in this area, it is more likely that he committed the crime in question. This is mere *disposition* evidence, albeit more probative than most because of the proximity in time, place, and manner. For this reason, the use of system evidence has been criticized. *See* Justice Dixon dissenting in State v. Bradford, 259 La. 381, 250 So.2d 375 (1971); Comment, 7 U.C.L.A. L. REV. 463, 473 (1960). Apparently the court considers the probative value of such evidence to justify its use even though it is highly prejudicial disposition evidence.

63. State v. Morris, 259 La. 1001, 254 So.2d 444 (1971); State v. Bradford, 259 La. 381, 250 So.2d 375 (1971); State v. Hurst, 257 La. 595, 243 So.2d 269 (1971); State v. White, 247 La. 19, 169 So.2d 894 (1964). In these cases, the other crimes used as system evidence were months distant from the crime charged. Whatever probative value this evidence possesses is seriously diminished when the crimes are separated by such a time span.

64. State v. Whitsell, 262 La. 165, 262 So.2d 509 (1972); State v. Smith, 259 La. 515, 250 So.2d 724 (1971); State v. Hills, 259 La. 436, 250 So.2d 394 (1971); State v. Bolden, 257 La. 60, 241 So.2d 490 (1970); State v. Crook, 253 La. 961, 221 So.2d 473 (1969). *Intent* is not an element of these crimes; thus proof of intent is immaterial and should be excluded. *See* LA. R.S. 15:444 (1950). *See* State v. Alexander, 216 La. 932, 45 So.2d 83 (1950), and Justice Tate's dissent in State v. Bolden, 257 La. 60, 241 So.2d 490 (1970). Proof of defendant's *licentious disposition* is clearly prohibited by the exclusionary rule. *See* note 4 *supra*. These decisions are based on *State v. Cupit*, 189 La. 509, 179 So. 837 (1938), a case involving an attempted rape which is distinguishable from these recent cases. *See* Justice Barham's dissent in State v. Crook, 253 La. 916, 221 So.2d 473 (1969).

65. State v. Hills, 259 La. 436, 250 So.2d 394 (1971). *See also* Justice Tate concurring in State v. Dimopoullas, 260 La. 874, 257 So.2d 644 (1972).

66. In *State v. Bolden*, 257 La. 60, 241 So.2d 490 (1970), the court allowed the use of a rape committed two years prior to the act in question.

67. 277 So.2d 126 (La. 1973). In *State v. St. Amand*, 274 So.2d 179 (La. 1973), rendered the same day as *Prieur*, evidence of defendant's drug addiction was admitted in a prosecution for armed robbery. There is language in the opinion to the effect that since many armed robberies are associated with drug addicts trying to support their habit, evidence of drug addiction

dant was charged with the armed robbery of a bus driver. Over objection, the trial court allowed the state to elicit testimony which implicated the defendant in two other robberies. The first of these was a similar armed robbery of a bus driver committed two weeks prior to the crime charged, and the second was the armed robbery of a service station committed a week after the crime in question.

Justice Barham, writing for the majority, recognized the great risk of prejudice inherent in other crimes evidence and stated that such evidence should be inadmissible unless its probative value exceeds its prejudicial effect upon the jury. Thus, defendant's other crimes are inadmissible unless they come within certain exceptions to the exclusionary rule, that is, unless they are independently relevant. Further, it was held that the unwarranted use of prejudicial other crimes evidence is repugnant to the concept of fundamental fairness.[68]

The court found that the Louisiana statutes[69] reflected a conscious intent to adopt a limited approach toward the use of other crimes evidence. To implement this legislative intent, the court carefully analyzed the facts of the extraneous crimes to determine the applicability of the statutory exceptions. There was not sufficient similarity between the service station robbery and the crime charged to justify its use under the system excep-

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is admissible to show a motive for armed robbery. However, this evidence was admitted in the state's case in chief without objection and the issue was not squarely presented to the court; thus this language is clearly dictum. It is unsupported by general authorities and is clearly irreconcilable with the judicial attitude expressed in *Prieur*. *See* note 22 *supra*.

68. "Clearly, introduction of the testimony as to the service station robbery is unwarranted by the statutes cited, and further, sound notions of fundamental fairness embodied in our State's constitution necessitate its exclusion." 277 So.2d at 128. There is support for the contention that the unwarranted use of such evidence is violative of due process. *See* Spencer v. Texas, 385 U.S. 554, 571 (1967) (Stewart, J., concurring). However, the narrow holding of *Prieur* is based on evidentiary law, not constitutional due process.

69. LA. R.S. 15:445 (1950): "In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

LA. R.S. 15:446 (1950): "When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purposes of showing guilty knowledge and intent, but not to prove the offense charged."

tion.[70] Because the requisite knowledge and intent were apparent from the facts of the crime charged, the evidence was inadmissible in the state's case in chief for either of these purposes.[71] Further, the evidence was not admissible under any other exception to the exclusionary rule.[72] The only inference to be drawn from the evidence of the service station robbery was that defendant had a bad character; therefore, the use of this evidence constituted reversible error.[73]

In order to protect the defendant's constitutional rights which are endangered by the state's use of other crimes evidence,[74]

70. The court continued the recent definition of system. *See* text at note 59 *supra*. It noted that the crime charged was done in the evening by only one person, whereas the service station robbery occurred in the early morning and was done by two people. The testimony indicated that different weapons were used in each crime. This close inquiry into the facts is in direct contrast to the recent jurisprudence and marks a return to the earlier judicial approach.

71. If the defendant had raised either of these issues, the state possibly could have used such evidence on rebuttal. In Louisiana, the general denial of a charge does not place every element of the crime at issue, thus permitting the use of other crimes evidence. State v. Moore, 277 So.2d 141 (La. 1973); State v. Campbell, 263 La. 1058, 270 So.2d 506 (1972).

72. Thus, although the opinion is somewhat vague on this point, it does not necessarily limit the permissible uses of other crimes evidence to the statute's enumerated exceptions of knowledge, intent, and system. This is in accord with general authority. *See* MCCORMICK § 190, at 448. Louisiana courts have admitted such evidence for purposes other than those listed in the statute, *e.g.*, motive. State v. Dowdy, 217 La. 773, 47 So.2d 496 (1950); State v. Graffam, 202 La. 869, 13 So.2d 249 (1943); State v. Fontenot, 48 La. Ann. 305, 19 So. 111 (1896); State v. Anderson, 45 La. Ann. 651, 12 So. 737 (1893). Further, *State v. Rives*, 193 La. 186, 190 So. 374 (1939), held that R.S. 15:445, 446 retained the prior jurisprudence which included the use of other crimes evidence for purposes other than those expressed in the statutes. *State v. Moore*, 277 So.2d 141 (La. 1973), decided after *Prieur*, considered the admissibility of other crimes evidence for an extra-statutory exception, identity, thus resolving the ambiguity of the *Prieur* language.

73. Although the conviction was reversed, the court expressed its opinion of the admissibility of the second item of other crimes evidence, the prior robbery of a bus driver, in a possible future trial. Because that crime was committed by only one person at the same time of day as the crime charged, at the same street corner and also concerned a bus driver, the court concluded that this evidence might be admissible as system evidence. This careful factual analysis is further indication that *Prieur* adopts a more limited approach toward the use of such evidence than did the prior decision. *See* note 63 *supra*.

74. "The spirit of our constitutional provisions, we believe, requires the establishment of safeguards prerequisite to the admissibility of such evidence. Our Constitution specifically requires that the defendant be given notice of the offense for which he will stand trial so that he can know the nature and cause of the accusation in order to prepare his defense. Art. I, Sec. 10. It permits him full confrontation and cross-examination, which require prior knowledge of the offense and the circumstances so that he may adequately exercise these constitutional rights. Art. I, Sec. 9. It requires due process and trial for the offense before an impartial jury. Art. I, Secs. 2, 9." State v. Prieur, 277 So.2d 126, 130 (La. 1973).

the court established important procedural prerequisites to the use of such evidence in future cases. Based upon similar provisions adopted by the Minnesota courts,[75] these procedures afford defendant prior notice that other crimes evidence will be used against him, thus ensuring him a meaningful opportunity to prepare his defense and confront the witnesses against him.

> "When the State intends to offer evidence of other criminal offenses under the exceptions outlined in R.S. 15:445 and 446:
>
> (1) The State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are a part of the res gestae, or convictions used to impeach defendant's testimony.
>
> (2) In the written statement the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other acts or offenses.
>
> (3) Prerequisite to the admissibility of the evidence is a showing by the State that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered.
>
> (4) When the evidence is admitted before the jury, the court, if requested by defense counsel, shall charge the jury as to the limited purpose for which the evidence is received and is to be considered.
>
> (5) Moreover, the final charge to the jury shall contain a charge of the limited purpose for which the evidence was received, and the court shall at this time advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment or one responsive thereto."[76]

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75. State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

76. State v. Prieur, 277 So.2d 126, 130 (La. 1973). Although the procedural requirements do not apply to extraneous offenses forming part of the res gestae, the *admissibility* of such evidence is clearly an other crimes

Further, the court held that the evidence may not be admitted unless the state makes a preliminary showing, by *clear and convincing evidence*, that the defendant actually committed the other crime.[77]

State v. Prieur is of obvious importance. First, it expressly reinstates the traditional limited approach toward the admission of other crimes evidence. The accompanying emphasis on

evidence problem. Therefore, under *Prieur*, a res gestae other crime is inadmissible unless its probative worth justifies its prejudicial effect.

In defining res gestae, the purpose of the classification should be considered. The intent of the procedural safeguards—notice—indicates that for this purpose, a res gestae crime is not necessarily the same as a statement forming part of the res gestae for hearsay purposes. The opinion does not define the term, but it appears to contemplate another crime so closely associated with the crime charged that the defendant would expect its use at trial. Prosecutors would be well advised to comply with the procedural requirements until future decisions eliminate the vagueness of the term.

There is an important discovery value for the defendant in these procedures. First, the defendant must be given written notice of the extraneous crime which the state intends to use. Secondly, for the state to make a preliminary showing that the evidence is not repetitive, cumulative, or a mere subterfuge for depicting the defendant's bad character, it will be necessary for the trial judge to determine what *other* evidence the state has to prove the issue, thus giving defendant an indirect discovery method.

For the *impeachment* use of other crimes evidence see the companion article, 33 LA. L. REV. 630 (1973).

77. Before *Prieur*, neither the early courts nor the recent cases had expressed a standard of proof. However, the recent liberal use of defendant's other crimes had been accompanied by the use of highly tenuous evidence. *See, e.g., State v. Dotson*, 260 La. 471, 256 So.2d 594 (1971) where the evidence consisted of testimony that defendant was in a house "where others may have been using drugs." In *State v. Garrison*, 260 La. 141, 255 So.2d 719 (1971), the witness stated that even though defendant did no overt act, he *thought* defendant was going to rob him, *See also*, State v. Cupit, 189 La. 509, 179 So. 837 (1938) (hearsay opinion evidence). The adoption of the clear and convincing standard brings Louisiana into the majority of jurisdictions, *see* text at note 39 *supra*, and will protect defendant from unfounded accusations of criminal conduct.

After this article was prepared for publication, several significant decisions were rendered. The Prieur decision was followed in *State v. Moore*, No. 52,720 (Louisiana, May 7, 1973). In a charge of aggravated rape, the trial court had allowed the state to introduce evidence of a prior rape upon a different victim in order to show "intent, guilty knowledge, and mode of operation." In a 4-3 decision, the supreme court reversed. Justice Dixon emphasized that other crimes evidence problems should be solved by a double inquiry. "As for the prosecution of Napoleon Moore for the rape of September 18, the evidence of the rape of September 14 must meet two requirements to be admissible: (1) was it relevant to an issue of the case?, (2) if relevant, was it too prejudicial?" The issues of intent and guilty knowledge were found to be immaterial to the charge and thus the prior rape was inadmissible to prove either. Because these two acts had no factual peculiarities that would justify its use to prove identity or system, the conviction was reversed. Thus the prior act was held *irrelevant* to a material issue in the case, and no consideration of the second requirement, the prejudicial quality of the evidence, was necessary.

However, in *State v. Frezal*, No. 52,659 (Louisiana, May 7, 1973), the

relevancy appears to overrule many of the post-1950 decisions. For the first time in Louisiana, it has been expressly recognized that the trial court has the duty to exclude even relevant evidence if its probative value does not justify its prejudicial effect. Secondly, the supreme court recognizes the constitutional problems inherent in the use of other crimes evidence, and adopts comprehensive procedures to protect the defendant from unwarranted character attack.

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OTHER CRIMES EVIDENCE IN LOUISIANA—

II. TO ATTACK THE CREDIBILITY OF THE DEFENDANT ON CROSS-EXAMINATION

In Louisiana, when a defendant in a criminal trial chooses to testify in his own behalf, he may be cross-examined as any other witness.[1] The state may, by certain approved methods, then seek to persuade the jury to disregard his testimony by

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supreme court affirmed a murder conviction in which the state had been allowed to introduce evidence of a rape committed four years prior to the crime in question. In a 5-2 decision (two justices concurring), the majority affirmed the conviction because the defendant was charged with *felony-murder*; thus the prior rape was admissible to prove defendant's intent and system to commit the felony of rape, during which the death occurred. The two concurring opinions expressly adhered to *Prieur* and appeared to severely limit the majority's holding. The two dissenting justices stated that the evidence was cumulative, irrelevant, and highly prejudicial and thus should have been excluded under the holding of *Prieur*. The facts of the case and a fair reading of the concurring and dissenting opinions lead the writer to believe that the *Frezal* holding will be limited to its facts and that the dominant judicial attitude, and thus the viable authority in future cases, is expressed in *Prieur* and *Moore*. *See also*, State v. Jordan, 276 So.2d 277 (La. 1973).

1. LA. R.S. 15:462 (1950) provides: "When a person accused, or a husband or wife becomes a witness, such witness shall be subject to all the rules that apply to other witnesses, and may be cross-examined upon the whole case." *See* United States v. Bland, 432 F.2d 96 (5th Cir. 1970); State v. Cripps, 259 La. 403, 250 So.2d 382 (1971); State v. Guillory, 201 La. 52, 9 So.2d 450 (1942); State v. Dreher, 166 La. 924, 118 So. 85, *cert. denied*, 278 U.S. 641 (1928); State v. Toliver, 163 La. 1000, 113 So. 222 (1927); State v. Waldron, 128 La. 559, 54 So. 1009 (1911); State v. Guy, 106 La. 8, 30 So. 268 (1901); State v. Murphy, 45 La. Ann. 958, 13 So. 229 (1893). For a discussion of the general rule elsewhere, see 3A J. WIGMORE, EVIDENCE § 980 (Chadbourne rev. 1970) [hereinafter cited as WIGMORE]; and C. MCCORMICK, EVIDENCE § 132, at 278-79 (2d ed. 1972) [hereinafter cited as MCCORMICK]: "[W]hen an accused testifies he becomes liable to cross-examination under whatever rules would be applicable to any other witness, and by testifying he waives his privilege to that extent. Not only may he be questioned concerning all facts relevant to the matters he has testified to on direct examination but he is also subject to a searching cross-examination for impeachment purposes."