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WHEN IS EVIDENCE OF CRIMES, OTHER THAN THE ONE CHARGED, ADMISSIBLE?

It was recently held in *Melton v. State*, 140 S. W. (Tex.), 230, that in a trial for the theft of certain mules, evidence that the accused had previously stolen other mules in substantially the same manner was properly admitted. To understand the position taken by the court a brief statement of the facts is necessary. The accused represented to the prosecutor that he wanted some goods hauled. Prosecutor at the request of accused drove his own mules for that purpose, and was accompanied by accused. While on the way to the village the accused made an offer to buy the mules, but no sale was consummated. Upon arriving at the village, the prosecutor drove the mules into a yard, where he left them and accompanied the accused by train to a neighboring town where the accused pretended to be going on business. Falsely representing that he had private business to transact, the accused got away from the prosecutor and took the train back to the place where the mules had been left, took the mules out of the yard and sold them for five hundred dollars and departed from that communty for a time. On trial for stealing the mules, his defense was that he had purchased the mules from the prosecutor in good faith. In

admitting evidence of other thefts by the accused, the lower court said that as the other transactions were almost identical with the one of which the accused was being tried, and the defense being a purchase in good faith, evidence of other transactions was admissible, to show defendant's intent and system. The upper court sustained the holding, saying that in such cases evidence of former crimes is admissible on the grounds, (1) that it may be used to show the intent with which the accused acted toward the subject matter of the crime, and (2) to show a system of operation.

This Texas decision raises one of the most difficult questions in the law of evidence; whether evidence of crimes, similar in their method of perpetration, and near in point of time, yet unconnected with each other, although all traceable to the one fixed purpose, should ever be admissible.

The general rule as laid down in 1 *Bish. New Cr. Proc.* (4 ed., Sec. 1120) that the state cannot prove against the defendant any crime not alleged, either as a foundation for a separate punishment or as aiding the proofs that he is guilty of the one charged, even though he has put his character in issue. "This rule," said the Court in *People v. Mollineaux,* 168 N. Y., 264, "is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of *Magna Charta.* It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

However closely the courts have been inclined to follow the general rule, they have been forced to make a number of exceptions to it. These exceptions have their foundations in the fact that in many cases it would be practically impossible to secure a conviction if the general rule were rigidly adhered to. *State v. Spray,* 174 Mo., 569, 578. In *People v. Mollineaux, supra,* these exceptions are well classified and ably commented upon. In that opinion the Court said that proof of another crime is competent to prove the specific crime charged only when it tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing two or more crimes so

related to each other that the proof of one tends to establish the other, or (5) the identity of the person charged with the commission of the crime in question.

In *State v. Spray,* 174 Mo., 569, the court approved of the decision in *People v. Mollineaux,* and held that in larceny cases the facts constituting the offense are sufficient evidence of the intent and that evidence of similar crimes, committed under like circumstances, and about the same time, is not admissible. But in *Callards v. State,* 40 S. W. (Tex.), 974 (not reported in State reports), it was held, where accused was on trial on a charge of embezzlement by putting money received for sale of goods into his pocket and not ringing it up on the cash register, that evidence of former embezzlements in like manner were admissible to show the system pursued by the accused.

In *People v. Zucker,* 40 N. Y. Sup., 766, where defendant was on trial for arson consisting in burning a building in New York for the purpose of obtaining insurance money, the court admitted evidence of the burning of another building by the defendant in Newark a few days before and for the same purpose. The decisions were based on the ground that both acts were part of one common scheme, to obtain money fraudulently from insurance companies.

Probably the most extreme holding along this line is that of *Frazer v. State,* 135 Ind., 38. Defendant was on trial charged with the commission of a certain burglary. The court admitted evidence that other burglaries were committed in that community the same night, and that footprints found about one of the other houses entered corresponded with shoes worn by defendant. The court admitted this evidence on the ground that it showed a general system of operations.

There is another line of cases in which the general rule does not apply, and yet which do not come under the exceptions usually mentioned in the cases. These cases are referred to in *People v. Castro,* 133 Cal., 12, where the Court said, "The doctrine appears to be fairly well settled that in actions of adultery, seduction, etc., evidence of sexual intercourse between the parties, both before and after the particular crime charged, may be introduced in evidence as tending to sustain the main allegation." This view is

upheld by the following cases: *People v. Koller,* 142 Cal., 521; *State v. Witham,* 72 Me., 571; *State v. Williams,* 76 Me., 481; *Alsabrooks v. State,* 52 Ala., 25.

From an examination of the cases it would seem that the holding of the principal case is a logical, although extreme application of the principal that evidence of former crimes is admissible to show the intent with which the accused acted relative to the subject matter of the crime.