

1964

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Recommended Citation

Lester B. Orfield, *Relevancy in Federal Criminal Evidence*, 43 Neb. L. Rev. 485 (1964)

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RELEVANCY IN FEDERAL CRIMINAL EVIDENCE

by Lester B. Orfield*

It is an easy matter to state that evidence must be relevant. And it is easy to define relevancy in terms such as "prove or disprove," "probable inference," "logical as well as legal," and "pointing with compelling force." But the application of a test or test for relevant evidence is not a matter of definition and black letter law. When dealing with rules of evidence it is undeniable that "each case turns on its own facts."

This article is devoted to an analysis of relevant evidence in federal criminal cases. As the number of cited cases will indicate, this has been a Herculean task. Yet the result hoped for is more than a compilation; but if no more results than this, the practitioner will have at his disposal the facilities to provide the ultimate analysis.

I. IN GENERAL—THE TEST OF RELEVANCY

"The rule is universal in criminal trials that no evidence shall be introduced that 'does not directly tend to the proof or disproof of the matter in issue.'"¹ The Supreme Court has taken the position that evidence rules for criminal trials have the narrow effect of confining the trial contest to evidence which is "strictly relevant to the particular offense charged."² Relevancy is tested on the basis of "whether the conclusion sought to be established is a

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¹ *Bowman v. United States*, 267 Fed. 648, 650 (D.C. Cir. 1920). See also *Bird v. United States*, 180 U.S. 356, 360 (1901). See generally 1 WIGMORE, EVIDENCE §§ 2, 9-12, 25-36, 38-43, 52-81, 165a, 191-213 (3d ed. 1940); 2 WIGMORE, EVIDENCE §§ 301-04, 321, 445-60 (3d ed. 1940); 3 WIGMORE, EVIDENCE §§ 925, 998-99 (3d ed. 1940); 5 WIGMORE, EVIDENCE §§ 1608-21 (3d ed. 1940); 7 WIGMORE, EVIDENCE §§ 1980-86 (3d ed. 1940); MCCORMICK, EVIDENCE 314-83 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 183-214 (1961); 1 WHARTON, CRIMINAL EVIDENCE 281-567 (12th ed. 1955); 1 JONES, EVIDENCE 268-360 (5th ed. 1958); 1 UNDERHILL, CRIMINAL EVIDENCE §§ 6, 11, 15-19, 190-212, 265 (5th ed. 1956).

² *Williams v. New York*, 337 U.S. 241, 247 (1949).

probable inference from the offered fact.”³ In a case involving circumstantial evidence, Circuit Judge Hutcheson stated: “One of the prime rules in the trial of criminal cases is that circumstances, when relevant and cogent, may constitute evidence of guilt, but they must have a legal, as well as logical, relevancy, and they must have probative force, that is they must point with compelling force to the fact to be proven.”⁴ On the other hand, a leading writer would discard the term “legal relevancy” altogether in order to make for clearer thinking.”⁵ Examples of relevancy (or irrelevancy) abound. Where a letter is introduced for the sole purpose of comparison of handwriting, evidence as to the causes for writing the letter is irrelevant.⁶ It is error to allow the prosecution to question defendant’s counsel and a government witness regarding the signing of a statement in the counsel’s office after the defendant’s arrest, where the defendant was not present at the signing.⁷ In the first place the defendant took no part in the transaction, and second, the inference might arise that defendant’s counsel had endeavored to tamper with the prosecution’s witness. In the prosecution of a physician for illegal sale of drugs, the testimony of a narcotics agent that the defendant’s office was a mecca for badly emaciated, nervous and fidgety patients was held to be irrelevant and prejudicial.⁸ In a prosecution for violation of a cabaret tax statute, the court properly excluded the defendant’s evidence as to examination by the government of the defendant’s income tax liability, as this was a collateral matter having no relevancy.⁹

³ *Guthrie v. United States*, 207 F.2d 19, 24 (D.C. Cir. 1953). See McCORMICK, EVIDENCE 317-19 (1954).

On the meaning of relevancy see generally 1 WIGMORE, EVIDENCE §§ 2, 9-12, 25-36, 38-43 (3d ed. 1940); McCORMICK, EVIDENCE 314-21 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 183-96 (1961); 1 WHARTON, CRIMINAL EVIDENCE 281-312 (12th ed. 1955); 1 UNDERHILL, CRIMINAL EVIDENCE §§ 6, 11, 15-19, 265 (5th ed. 1956); 1 JONES, EVIDENCE 268-82 (5th ed. 1958); James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941); THAYER, A PRELIMINARY TREATISE OF EVIDENCE 263-76, 515-18 (1898); Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1 (1956); 6 KAN. L. REV. 39 (1957); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952); Ladd, *Determination of Relevancy*, 31 TUL. L. REV. 81 (1956).

⁴ *Kassin v. United States*, 87 F.2d 183, 184 (5th Cir. 1937).

⁵ McCORMICK, EVIDENCE § 152, at 320-21 (1954). See Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

⁶ *Fasulo v. United States*, 7 F.2d 961 (9th Cir. 1925).

⁷ *Irving v. United States*, 53 F.2d 55, 57-58 (9th Cir. 1931).

⁸ *Nigro v. United States*, 117 F.2d 624, 631-32 (8th Cir. 1941).

⁹ *United States v. Franklin*, 170 F. Supp. 503, 506 (N.D. Ohio 1959).

In a prosecution for mailing obscene matter, the trial judge may properly exclude books and magazines regularly sold in commerce containing nudes because the evidence has no potential probative weight on the issues under trial.¹⁰

In the early case of *United States v. Dowden*, it was held that the defendant has the right to introduce evidence indicating the spirit and temper with which the prosecution has been conducted.¹¹ For example, he may show that the government has tampered with witnesses who testified against the defendant at the preliminary examination. *United States v. Lennon* held that on the record presented, an attempt to insinuate politics into a prosecution of a Congressman's secretary for income tax evasion, was not reversible error.¹²

In a prosecution for possession of an unregistered distillery and fermenting mash, testimony that, when apprehended, defendant was carrying 1,242 dollars in cash and a check for 245 dollars had probative value in corroborating the defendant's role in the illegal enterprise, and it could be admitted to corroborate a confession.¹³

INTENT

For purposes of showing intent the government was allowed to introduce statements of prostitutes showing the defendant's intimate familiarity with prostitution in a prosecution for violation of the Mann Act.¹⁴ Where evidence of Communist Party activities is relevant, it is admissible even though it tends to provoke present-day juries towards prejudice.¹⁵ In a prosecution for income tax evasion, evidence of the defendant's transactions with others was held admissible. The court stated: "We believe these offers of evidence were relevant to the defendant's contentions that his omission of sales receipts was not wilful."¹⁶

REMOTENESS

Remoteness is largely a matter of discretion of the trial judge. The judge may exclude evidence of facts which, though relevant

¹⁰ *Womack v. United States*, 294 F.2d 204, 206 (D.C. Cir. 1961).

¹¹ 25 Fed. Cas. 905, 906 (No. 14990a) (Crim. Ct. D.C. 1843).

¹² 246 F.2d 24, 28 (2d Cir. 1957), cert. denied, 355 U.S. 836 (1957).

¹³ *Hagan v. United States*, 245 F.2d 556, 558 (5th Cir. 1957). The court cited *McCormick*, Evidence §§ 151-52 (1954).

¹⁴ *Holder v. United States*, 271 F.2d 214, 217 (8th Cir. 1959).

¹⁵ *Travis v. United States*, 269 F.2d 928, 939 (10th Cir. 1959).

¹⁶ *Watkins v. United States*, 287 F.2d 932, 934 (1st Cir. 1961). The court cited 1 WIGMORE, EVIDENCE §§ 34-36 (3d ed. 1940).

to the issue, appear to him to be too remote to be material under all the circumstances of the case.¹⁷ Remoteness may be a bar to evidence of other offenses in case of a declaration against interest.¹⁸ With respect to evidence of other offenses to show intent or motive the trial court has much discretion as to remoteness in time.¹⁹ In trial of a defendant for conspiracy to oppose the draft law by force, admission of a highly seditious and disloyal speech by a third person not shown to be connected with the defendant is reversible error.²⁰ In cases where there are witnesses to the happening of an event and the sole question is whether or not the event happened, it is not proper to permit the introduction of other remote matters to prove intent where intent is not involved.²¹

Where an indictment in setting forth a scheme to defraud by the use of the mails charged that stock of a corporation sold pursuant to the scheme was of little or no value, and also charged a conspiracy from June 27, 1921 to October 12, 1922, the testimony of a trustee in bankruptcy, who took over the assets in October, 1922, as to what the assets then were, was not too remote, as it was during the continuance of the conspiracy.²²

The probative remoteness of testimony is never alone an absolute reason for its exclusion.²³ The objection should be accompanied by some other objection such as the confusion it may cause or the emotions it may arouse to disturb impartial decision. Nevertheless, "the trial judge possesses wide latitude in the determination of the relevancy or materiality of evidence and his ruling cannot be reversed in the absence of an abuse of discretion."²⁴ "[R]ulings will be sustained, if the testimony, which is admitted tends even remotely to establish the ultimate fact."²⁵

¹⁷ *Johnson v. United States*, 170 Fed. 581, 582 (1st Cir. 1909) (evidence admitted).

¹⁸ *United States v. Mulholland*, 50 Fed. 413, 415 (D. Ky. 1892). *But see United States v. Bucur*, 194 F.2d 297, 304 (7th Cir. 1952).

¹⁹ *Kettenbach v. United States*, 202 Fed. 377, 383-84 (9th Cir. 1913), *cert. denied*, 229 U.S. 613 (1913).

²⁰ *Enfield v. United States*, 261 Fed. 141, 143 (8th Cir. 1919).

²¹ *Holzmacher v. United States*, 266 Fed. 979 (7th Cir. 1920).

²² *Tank v. United States*, 8 F.2d 697, 699 (7th Cir. 1925).

²³ *United States v. Werner*, 160 F.2d 438, 443 (2d Cir. 1947); *United States v. Thompson*, 117 F. Supp. 685, 690 (S.D. N.Y. 1953).

²⁴ *Wilson v. United States*, 250 F.2d 312, 325 (9th Cir. 1957).

²⁵ *Louie v. United States*, 218 Fed. 36, 41 (9th Cir. 1914).

HARMLESS ERROR

Admission of irrelevant evidence not objected to may constitute harmless error. In a prosecution for conspiracy to blow up a railroad track, and for actually blowing up track, testimony of a witness that one of the alleged accomplices gave the witness dynamite more than a week *after* the offense was irrelevant, but since not seasonably objected to it was harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure.²⁶

Judge Learned Hand has concluded that "when evidence has any substantial logical bearing on the issue, it is best to admit it, unless it interjects other and disturbing issues into the trial."²⁷ In holding that there was no reversible error in permitting a government witness to give, on cross-examination, testimony as to the defendant's arrest "for policy" some fifteen years earlier, it was stated by Judge Charles E. Clark:²⁸

It is now common place that the rules of evidence have tended ever more freely in the direction of admission of all relevant testimony in the light of modern experience that the truth is more often found by full revelation than by concealment. Hence we have a modern principle, stated in the Model Code of Evidence, and now embodied in the Uniform Rules of Evidence, Rule 7: '*General Abolition of . . . Exclusionary Rules.*' Except as otherwise provided in these Rules . . . (f) all relevant evidence is admissible. And we have often admonished our trial judges to err, if at all, on the side of the admission, rather than the exclusion, of evidence. A trial judge must rule on admissibility quickly and almost by instinct; his instinct ought to be to bring out the truth, rather than to permit a party to cover up a part of his case.

However, evidence not relevant to the defendant's defense offered at the trial does not become relevant when the defendant on appeal raises a defense which he failed to raise at the trial.²⁹

When an item of evidence is offered and judged in isolation, of course it cannot be expected to furnish conclusive proof of the ultimate fact to be inferred.³⁰ In a prosecution for possession of unstamped distilled spirits, the court, in passing on the relevancy

²⁶ *Horton v. United States*, 256 F.2d 138, 141 (6th Cir. 1958).

²⁷ *United States v. Grayson*, 166 F.2d 863, 870 (2d Cir. 1948). See also *United States v. Werner*, 160 F.2d 438, 443 (2d Cir. 1947); 1 WIGMORE, EVIDENCE § 10 (3d ed. 1940).

²⁸ *United States v. Apuzzo*, 245 F.2d 416, 420 (2d Cir. 1957). This case was followed in *United States v. Grunewald*, 164 F. Supp. 644, 646 (S.D. N.Y. 1958), citing *McCORMICK*, EVIDENCE at xi (1954).

²⁹ *Williamson v. United States*, 262 F.2d 476, 480 (9th Cir. 1959).

³⁰ *McCORMICK*, EVIDENCE § 152, at 317 (1954).

of evidence that the defendant had at an earlier time had such unstamped spirits in the same place, stated:³¹

Its relevancy did not, and indeed could not, demand that it be conclusive; most convictions result from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person. All that is necessary, and all that is possible, is that each bit may have enough rational connection with the issue to be considered a factor contributing to an answer.

The Supreme Court has stated that "an offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough."³²

The rules of evidence are framed on the bases of the practical necessities of legal controversy.³³ Justice Cardozo pointed out:³⁴

It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage the evidence goes out.

WEIGHT OF PROOF

Relevancy should be distinguished from weight of proof.³⁵ In *Morton v. United States*,³⁶ the court stated: "Appellant's objections to evidence concerning interest and bias of witnesses, blood tests, soil tests, whiskey bottles, photographs of the park table under which Mrs. Groome's body was found, and the newspaper containing a report of the crime which was found in appellant's room are applicable to the weight of the evidence in each case not to its admissibility."

³¹ *United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). The court cited 1 WIGMORE, EVIDENCE § 12 (3d ed. 1940). See also *Ketchum v. United States*, 259 F.2d 434, 436 (5th Cir. 1958), *cert. denied*, 359 U.S. 917 (1959); *Sorenson v. United States*, 168 Fed. 785, 799 (8th Cir. 1909); *Gormley v. United States*, 167 F.2d 454, 458 (4th Cir. 1948).

³² *Candless v. United States*, 298 U.S. 342, 346 (1936). See 1 WIGMORE, EVIDENCE § 14 (3d ed. 1940).

³³ 1 WIGMORE, EVIDENCE § 27 (3d ed. 1940).

³⁴ *Shepard v. United States*, 290 U.S. 96, 104 (1933).

³⁵ 1 WIGMORE, EVIDENCE § 29 (3d ed. 1940).

³⁶ 147 F.2d 28, 31 (D.C. Cir. 1945), *cert. denied*, 324 U.S. 875 (1945). The U.S. 875 (1945). The Court cited 1 WIGMORE, EVIDENCE §§ 12, 28 (3d ed. 1940). See *Columbian Ins. Co. v. Lawrence*, 2 Pet. (27 U.S. 25, 44 (1829).

³⁷ *Silverfarb v. United States*, 151 F.2d 11, 12 (D.C. Cir. 1945).

Judge Edgerton, in a concurring opinion,³⁷ quoted Wigmore's conclusion that the "evidentiary fact offered does not need to have strong, full, superlative probative value, *does not need to involve demonstration* or to produce persuasion by its sole and intrinsic force, but merely to be *worth consideration by the jury*."³⁸ In a prosecution for removing and concealing nontax paid distilled spirits, evidence of a conversation three or four months prior to the offenses charged wherein the defendant stated that he was again in the business of selling liquor was properly admitted as an admission against interest over an objection based on remoteness, since mere remoteness in the absence of extrinsic facts, such as a chance to repent, affects only the weight and not the admissibility of evidence.³⁹

Even though evidence is relevant it may be excluded because of reasons of practical policy, such as introduction of collateral matters, complicating the issues, prolonging the trial and confusing the jury.⁴⁰

*United States v. Townsend*⁴¹ quoted the view of Professor McCormick: "But relevance is not always enough. There remains the question, is its value worth what it costs This balancing of intangibles . . . probative values against probable dangers—is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized."

³⁸ 1 WIGMORE, EVIDENCE § 29, at 411 (3d ed. 1940).

³⁹ *Wolstein v. United States*, 80 F.2d 779, 780 (8th Cir. 1935).

⁴⁰ *Frank v. United States*, 262 F.2d 695 (D.C. Cir. 1958); *United States v. Krulwich*, 145 F.2d 76, 80 (2d Cir. 1944), citing 1 WIGMORE, EVIDENCE §§ 39(2), 42 (3d ed. 1940); *United States v. Spaeth*, 152 F. Supp. 216, 221 (N.D. Ohio 1957), citing 1 WIGMORE, EVIDENCE § 29a (3d ed. 1940). court cited MCCORMICK, EVIDENCE § 152, at 319-20 (1954). See also *United States v. Kahaner*, 203 F. Supp. 78, 83 (S.D. N.Y. 1962), citing MCCORMICK, EVIDENCE 319 (1954); 6 WIGMORE, EVIDENCE § 1864, at 491 (3d ed. 1940); UNIFORM RULES OF EVIDENCE 45; MODEL CODE OF EVIDENCE, rule 303 (1942).

⁴¹ *United States v. Townsend*, 151 F. Supp. 378, 381 n.5 (D.D.C. 1957). The court cited MCCORMICK, EVIDENCE 319 (1954); 6 WIGMORE, EVIDENCE § 1864 at 491; UNIFORM RULES OF EVIDENCE 45; MODEL CODE OF EVIDENCE, rule 303 (1942).

II. CIRCUMSTANTIAL EVIDENCE

"Presumptive evidence is said to be indirect or circumstantial evidence."⁴² The gist of circumstantial evidence is that:⁴³

[C]ertain facts may be inferred or presumed from proof of other facts. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company was arrested near the spot with a bloody dagger in his possession, it would raise, in the absence of explanatory evidence, a presumption of fact that he killed him. So, if it was shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong, according to the circumstances, that those marks had been made by the feet of the accused person.

The Ninth Circuit has stated: "Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance or set of circumstances is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact without the necessity for such inference."⁴⁴

But in *Rodella v. United States*,⁴⁵ the court pointed out: "Any attempted differentiation between direct and circumstantial evidence at times becomes indistinct and in law, unimportant." In practice questions of relevancy arise only as to circumstantial evidence.⁴⁶

⁴² *Ezzard v. United States*, 7 F.2d 808, 810 (8th Cir. 1925). See 1 WIGMORE, EVIDENCE § 25 (3d ed. 1940). On circumstantial evidence see 1 WIGMORE, EVIDENCE §§ 25-26, 38-43 (3d ed. 1940); McCORMICK, EVIDENCE 316-17, 324, 334, 401-06, 568, 650-52 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 192-99 (1962); 1 WHARTON, CRIMINAL EVIDENCE 293-94 (12th ed. 1955); 1 UNDERHILL, CRIMINAL EVIDENCE 16-29 (5th ed. 1956).

⁴³ *Dunlop v. United States*, 165 U.S. 486, 502-03 (1897). See also *Rumely v. United States*, 293 Fed. 532, 551 (2d Cir. 1923), *cert. denied*, 263 U.S. 713 (1923). Possession of stolen goods is circumstantial evidence as to theft and burglary. *Considine v. United States*, 112 Fed. 342, 348 (6th Cir. 1901), *cert. denied*, 184 U.S. 699 (1902). Compare *Sorenson v. United States*, 168 Fed. 785, 793 (8th Cir. 1909).

⁴⁴ *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950). See also *United States v. Greene*, 146 Fed. 803, 824 (S.D. Ga. 1906); McCORMICK, EVIDENCE 316 (1954).

⁴⁵ *Rodella v. United States*, 286 F.2d 306, 312 (9th Cir. 1960). The court cited 1 WIGMORE, EVIDENCE § 26 (3d ed. 1940).

⁴⁶ McCORMICK, EVIDENCE § 152, at 316 (1954).

Judge Learned Hand, in holding that a charge on relevant circumstantial evidence was not necessary, stated:⁴⁷

Some courts have held otherwise. . . . The requirement seems to us a refinement which only seems to confuse laymen into supposing that they should use circumstantial evidence otherwise than testimonial. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these, as do inferences from events. A jury tests a witness' credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it.

Many federal courts have followed a rule giving the defendant a great measure of protection. Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt, it is the duty of the trial judge to grant a judgment of acquittal. This rule, sometimes called the "reasonable hypothesis rule,"⁴⁸ has been applied in all the Circuits,⁴⁹ but the Second, Fourth, Ninth and the District of Columbia.⁵⁰ Wigmore has criticized the rule.⁵¹

⁴⁷ *United States v. Becker*, 62 F.2d 1007, 1010 (2d Cir. 1933). The case was followed in *United States v. Valenti*, 134 F.2d 362, 364 (2d Cir. 1943), *cert. denied*, 320 U.S. 809 (1943).

⁴⁸ Note, 55 COLUM. L. REV. 549 (1955); Note, 38 GEO. L. J. 285 (1950).

⁴⁹ (In order by Circuits) *Yoffe v. United States*, 153 F.2d 570, (1st Cir. 1946); *United States v. Dolasco*, 184 F.2d 746 (3d Cir. 1950); *United States v. Laffman*, 152 F.2d 393 (3d Cir. 1945); *United States v. Ginn*, 124 F. Supp. 658 (E.D. Pa. 1954); *United States v. Gasomiser Corp.*, 7 F.R.D. 712 (D. Del. 1947); *Vick v. United States*, 216 F.2d 228 (5th Cir. 1954); *Bryan v. United States*, 175 F.2d 223 (5th Cir. 1949); *Davies v. United States*, 177 F.2d 255 (6th Cir. 1949); *United States v. Fenwick*, 177 F.2d 488 (7th Cir. 1949); *cf. United States v. Yeoman-Henderson Inc.*, 193 F.2d 867 (7th Cir. 1952); *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949); *Morgan v. United States*, 159 F.2d 85 (10th Cir. 1947); *Parnell v. United States*, 64 F.2d 324 (10th Cir. 1933); *cf. Warner v. United States*, 60 F.2d 700 (10th Cir. 1932); *but see Corbin v. United States*, 253 F.2d 646, 649 n.8 (10th Cir. 1958).

⁵⁰ (In order by Circuits) *United States v. Ploof*, 311 F.2d 544 (2d Cir. 1963); *United States v. Spagnuolo*, 168 F.2d 768 (2d Cir. 1948); *United States v. Lawrenson*, 298 F.2d 880 (4th Cir. 1962); *White v. United States*, 279 F.2d 740 (4th Cir. 1960); *Milanovich v. United States*, 275 F.2d 716 (4th Cir. 1960); *Moore v. United States*, 271 F.2d 564 (4th Cir. 1959); *Foster v. United States*, 160 F.2d 576 (4th Cir. 1947); *Bisno v. United States*, 299 F.2d 711 (9th Cir. 1961); *Elwert v. United States*, 231 F.2d 928 (9th Cir. 1956); *Remmer v. United States*, 205 F.2d 277 (9th Cir. 1953); *McCoy v. United States*, 169 F.2d 776 (9th Cir. 1948); *Curley v. United States*, 160 F.2d 229 (D.C. Cir. 1947) (reviews the holdings of the other circuits).

In many American courts a special charge was required in circumstantial evidence cases. The charge was often in the language of "where the evidence is circumstantial it must be such as to exclude any reasonable hypothesis other than that of guilt." But in 1954 the Supreme Court stated that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect" because "circumstantial evidence in this respect is intrinsically no different from testimonial evidence."⁵² This was followed in a Delaware case⁵³ and the Third, Fifth, Sixth and Tenth Circuits.⁵⁴

Circumstantial evidence may be sufficient to convict. But, "whenever a circumstance relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible."⁵⁵ A trial judge may properly refuse to instruct that the jury should acquit if the facts and circumstances were as consistent with innocence as with guilt where the evidence is direct and positive.⁵⁶ Where the defendant wishes an instruction on circumstantial evidence, he should request it; if he does not, there is no reversible error.⁵⁷ In one case, the court of appeals reversed a conviction because "it would be equally consistent with the evidence" to infer

⁵¹ WIGMORE, EVIDENCE § 26 (3d ed. 1940).

⁵² *Holland v. United States*, 348 U.S. 121, 139 (1954) citing 1 WIGMORE, EVIDENCE §§ 25-26 (3d ed. 1940). This view is approved in 55 COLUM. L. REV. 549, 588 (1950) and 38 GEO. L. J. 285 (1950).

⁵³ *United States v. Glazer*, 129 F. Supp. 285, 288-89 (D. Del. 1955).

⁵⁴ (In order by Circuits) *United States v. Olivo*, 278 F.2d 415 (3d Cir. 1960); *United States v. Giuliano*, 263 F.2d 582 (3d Cir. 1959); *United States v. J. & R. Transport Co.*, 176 F. Supp. 871 (E.D. Pa. 1959); *Pias-sick v. United States*, 253 F.2d 658 (5th Cir. 1958); but see *Strauss v. United States*, 311 F.2d 926 (5th Cir. 1963) and *Clark v. United States*, 293 F.2d 445 (5th Cir. 1961); *United States v. Young*, 291 F.2d 389 (6th Cir. 1961); *Corbin v. United States*, 253 F.2d 646 (10th Cir. 1958).

⁵⁵ *Turinetti v. United States*, 2 F.2d 15, 17 (8th Cir. 1924). See also *Calvaresi v. United States*, 216 F.2d 891, 905 (10th Cir. 1954).

⁵⁶ *Portman v. United States*, 34 F.2d 406, 408 (8th Cir. 1929); *Blanton v. United States*, 213 Fed. 320, 326 (8th Cir. 1914).

⁵⁷ *Herman v. United States*, 48 F.2d 479, 480 (5th Cir. 1931); *Stassi v. United States*, 50 F.2d 526, 527-31 (8th Cir. 1931); *Bloch v. United States*, 261 Fed. 321, 325 (5th Cir. 1919); *McCoy v. United States*, 169 F.2d 776, 785-86 (9th Cir. 1948), *cert. denied*, 335 U.S. 898 (1948).

innocence.⁵⁸ The case did not discuss whether a reasonable jury could find the defendant guilty.⁵⁹ It would seem that the court of appeals weighed the evidence for itself.

Circuit Justice Clifford has pointed out that "whenever the necessity arises for a resort to such evidence, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other."⁶⁰ The Supreme Court has taken this position in a murder prosecution.⁶¹

In 1893, the United States Supreme Court stated in a civil case:⁶²

As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth . . . The modern tendency, both of legislation, and of the decisions of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.

This language has been quoted in subsequent criminal cases.⁶³ Often in certain types of cases, fraud for example, the offense can be established by circumstantial evidence only.

Similarly the evidence used in proof of a conspiracy will gen-

⁵⁸ *United States v. Tatcher*, 131 F.2d 1002 (3d Cir. 1942), *reversing* 43 F. Supp. 659 (E.D. Pa. 1942).

⁵⁹ MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 346 (4th ed. 1957).

⁶⁰ *United States v. Hartwell*, 26 Fed. Cas. 196, 203 (No. 15318) (C.C.D. Mass. 1869). Compare *Sorenson v. United States*, 168 Fed. 785, 799 (8th Cir. 1909).

⁶¹ *Moore v. United States*, 150 U.S. 57, 60 (1893).

⁶² *Holmes v. Goldsmith*, 147 U.S. 150, 164 (1893).

⁶³ *Williamson v. United States*, 207 U.S. 425, 451 (1908); *Smith v. United States*, 267 Fed. 665, 668-69 (8th Cir. 1920); *Silverfarb v. United States*, 40 A.2d 82, 84 (Munic. Ct. App. D.C. 1944), *aff'd*, 151 F.2d 11 (D.C. Cir. 1945).

erally be, from the very nature of the case, circumstantial.⁶⁴ "Conspiracy does indeed widen the scope of relevant evidence through the operation of the principle of agency or representation by which all are made responsible for the acts of each of the partners in crime. This, however, is not a breakdown, it is merely an application of the rules of evidence."⁶⁵

In a prosecution for conspiracy to commit a liquor offense, the admission of evidence that a certain person had died from drinking wood alcohol was held reversible error, because of a failure to connect the defendant therewith.⁶⁶ Likewise, evidence that certain defendants were present from time to time in a garage in which it was claimed that the liquor was manufactured was held insufficient to warrant conviction. Evidence which showed, at most, that the defendant associated with one who was convicted of the crime, and that he had knowledge that a crime was to be committed, or had been committed is insufficient.⁶⁷ In a prosecution for conspiracy to violate the liquor laws, admission of evidence as to a proposed raid by prohibition agents, introduced to show a motive for the raid other than that testified by the defendant, was held reversible error in the absence of evidence connecting it with the defendant or his brother.⁶⁸

Wigmore has suggested: "[T]he Court will often, where the facts would be highly improper if irrelevant, require the other facts, instead of being postponed, to be first offered so as to ensure the presence of the proper foundation and leave nothing to the sanguine expectations of counsel. This, however, is rather a question of the order of presenting evidence."⁶⁹ This position was quoted favorably in *D'Aquino v. United States*.⁷⁰

There have been federal cases suggesting that an inference on an inference will not be permitted, that is to say, that a fact desired

⁶⁴ *Smith v. United States*, 267 Fed. 665, 668-69 (8th Cir. 1920), *cert. denied*, 256 U.S. 691 (1921); *Marrash v. United States*, 168 Fed. 225, 229 (2d Cir. 1909); *United States v. Hutchins*, 26 Fed. Cas. 442, 444 (No. 15430) (C.C.S.D. Ohio 1876); *United States v. Cole*, 25 Fed. Cas. 493, 522 (No. 14832) (C.C.D. Ohio 1853).

⁶⁵ *Kassin v. United States*, 87 F.2d 183, 184 (5th Cir. 1937).

⁶⁶ *Brauer v. United States*, 299 Fed. 10, 13-14 (3d Cir. 1924).

⁶⁷ *O'Brien v. United States*, 299 Fed. 568, 571 (8th Cir. 1924).

⁶⁸ *Nations v. United States*, 52 F.2d 97, 100-05 (8th Cir. 1931).

⁶⁹ 1 WIGMORE, EVIDENCE § 40, at 433 (3d ed. 1940).

⁷⁰ *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 364 n.16 (9th Cir. 1951).

to be used circumstantially must itself be established by testimonial evidence.⁷¹ But in 1955, the Ninth Circuit stated that the old rule "that an inference predicated upon an inference is inadmissible has been repudiated."⁷²

Circumstantial evidence has been admitted to establish the offenses of counterfeiting,⁷³ piracy,⁷⁴ stealing a letter from the mails,⁷⁵ murder on the high seas,⁷⁶ perjury,⁷⁷ loaning public money,⁷⁸ conspiracy,⁷⁹ mailing letters concerning lotteries,⁸⁰ distilling,⁸¹ murder in Indian Territory,⁸² breaking into a post office,⁸³ murder in a territory,⁸⁴ concealing property while bankrupt,⁸⁵ receiving stolen goods,⁸⁶ and using the mails to defraud.⁸⁷ The government

⁷¹ *Brady v. United States*, 24 F.2d 399, 403-04 (8th Cir. 1928). See criticism in 7 WIGMORE, EVIDENCE § 2131, at 572-73 n.5 (3d ed. 1940). See also *Nations v. United States*, 52 F.2d 97, 105-06 (8th Cir. 1931).

⁷² *Toliver v. United States*, 224 F.2d 742, 745 (9th Cir. 1955). The court cited 1 WIGMORE, EVIDENCE § 41 (3d ed. 1940). See Jennings, *Probative Value of an Inference Drawn Upon Another Inference, With Special Considerations of Ohio Decisions*, 22 U. CINC. L. REV. 39 (1953).

⁷³ *United States v. Roudenbush*, 27 Fed. Cas. 902, 903 (No. 16198) (C.C.E.D. Pa. 1832); *United States v. Moses*, 27 Fed. Cas. 5 (No. 15825) (C.C.E.D. Pa. 1827).

⁷⁴ *United States v. Gibert*, 25 Fed. Cas. 1287, 1291 (No. 15204) (C.C.D. Mass. 1834).

⁷⁵ *United States v. Martin*, 26 Fed. Cas. 1183, 1184 (No. 15731) (C.C.D. Ind. 1840).

⁷⁶ *United States v. Douglass*, 25 Fed. Cas. 896, 897 (No. 14988) (C.C.D.C. 1813).

⁷⁷ *United States v. Gardiner*, 25 Fed. Cas. 1245, 1247 (No. 15186a) (C.C.D.C. 1853).

⁷⁸ *United States v. Hartwell*, 26 Fed. Cas. 196, 203 (No. 15318) (C.C.D. Mass. 1869).

⁷⁹ *United States v. Hutchines*, 26 Fed. Cas. 442, 444 (No. 15430) (C.C.S.D. Ohio 1876); *United States v. Babcock*, 24 Fed. Cas. 913, 926 (No. 14487) (C.C.E.D. Mo. 1876).

⁸⁰ *United States v. Noelke*, 1 Fed. 426, 436-39 (C.C.S.D. N.Y. 1880).

⁸¹ *United States v. Ridgeway*, 31 Fed. 144, 145-46 (C.C.S.D. Ga. 1887).

⁸² *Moore v. United States*, 150 U.S. 57, 60 (1893).

⁸³ *Considine v. United States*, 112 Fed. 342, 348-50 (6th Cir. 1901), *cert. denied*, 184 U.S. 699 (1902).

⁸⁴ *Perovich v. United States*, 205 U.S. 86, 89 (1907).

⁸⁵ *United States v. Greenbaum*, 252 Fed. 259, 266-67 (E.D. Mich. 1918).

⁸⁶ *Chass v. United States*, 258 Fed. 911 (3d Cir. 1919), *cert. denied*, 250 U.S. 665 (1919).

⁸⁷ *Clark v. United States*, 293 Fed. 301, 305 (5th Cir. 1923).

has questioned a prospective juror on voir dire to ascertain if his views on circumstantial evidence were such as to preclude him from finding a verdict of guilty where the penalty prescribed by law is death.⁸⁸ However, in a case coming up from the Canal Zone the court of appeals reduced the sentence from death to life imprisonment where the evidence was wholly circumstantial.⁸⁹ In *Dimmick v. United States*⁹⁰ the court stated: "The general rule is now well settled that in all criminal cases the corpus delicti may be established by circumstantial evidence."⁹¹ Circumstantial evidence may also be used to establish the identity of the defendant.⁹² Where the evidence is purely circumstantial, the government may show that another person who was in the vicinity at the time of the offense could not have committed the offense.⁹³ While in direct evidence cases motive need not be shown, in cases of circumstantial evidence it may be important as showing whether the offense was committed by the defendant or by some other person.⁹⁴ In addition, circumstantial evidence may be used to prove venue.⁹⁵

The Court of Appeals for the Fourth Circuit has held that circumstantial evidence is not alone enough to prove perjury.⁹⁶ But in 1959, the Second Circuit doubted the rule that the evidence must be direct.⁹⁷ There had been previous decisions criticizing the

⁸⁸ *Hardy v. United States*, 186 U.S. 224, 227 (1902).

⁸⁹ *Kemp v. Government of Canal Zone*, 167 F.2d 938, 942 (5th Cir. 1948).

⁹⁰ *Dimmick v. United States*, 135 Fed. 257 (9th Cir. 1905).

⁹¹ *Id.* at 263. See also *Wagner v. United States*, 8 F.2d 581, 586 (8th Cir. 1925); *Perovich v. United States*, 205 U.S. 86, 90-91 (1907).

⁹² *McInerney v. United States*, 143 Fed. 729, 739 (1st Cir. 1906). The court cited 4 WIGMORE, EVIDENCE § 2529 (1st ed. 1905). This is the earliest citation to WIGMORE by a federal court that I have found.

⁹³ *Bram v. United States*, 168 U.S. 532, 568 (1897).

⁹⁴ *Schmidt v. United States*, 133 Fed. 257, 263 (9th Cir. 1904).

⁹⁵ *Dean v. United States*, 246 F.2d 335, 337 (8th Cir. 1957); *United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949); *Vernon v. United States*, 146 Fed. 121, 126 (8th Cir. 1906); See Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U. KAN. CITY L. REV. 30, 38 (1963).

⁹⁶ *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950). See Annot., 88 A.L.R.2d 852, 859 (1963); *Clayton v. United States*, 284 Fed. 537, 539 (4th Cir. 1922); *Allen v. United States*, 194 Fed. 664, 668 (4th Cir. 1912).

⁹⁷ *United States v. Collins*, 272 F.2d 650, 652 (2d Cir. 1959), *cert. denied*, 362 U.S. 911 (1960). See also *Jacobs v. United States*, 31 F.2d 568 (6th Cir. 1929), *cert. denied*, 279 U.S. 869 (1929).

rule against circumstantial evidence.⁹⁸ One court has held that circumstantial evidence is admissible only where the nature of the testimony is such that no direct testimony of its falsity could be obtained, such as testimony as to the witness' knowledge or belief.⁹⁹

Opinion evidence given by experts, for example a handwriting analysis, is not circumstantial evidence, and does not call for an instruction that it is.¹⁰⁰

III. CHARACTER AND HABIT

A. CHARACTER IN GENERAL

Professor McCormick has noted: "A conspicuous instance in which rules of admissibility have been molded by the effort to balance probative values against countervailing dangers of prejudice, distraction, etc., is the area of rules about the admissibility of evidence of character."¹⁰¹

There are different types of proof which may be offered as evidence of character.¹⁰² There is testimony as to the defendant's conduct as reflecting on his character;¹⁰³ testimony of a witness as to his opinion of the person's character based on observation;¹⁰⁴

⁹⁸ *Goins v. United States*, 99 F.2d 147, 149 (4th Cir. 1938); *Cohen v. United States*, 27 F.2d 713, 714 (2d Cir. 1928).

⁹⁹ *Behrle v. United States*, 100 F.2d 714, 715 (D.C. Cir. 1938). See 51 COLUM. L. REV. 1056, 1057 (1951); 70 HARV. L. REV. 383, 384 (1956); Annot., 88 A.L.R.2d 852 (1963). See Orfield, *Proof of Perjury and the "Two Witnesses" Requirement in Federal Criminal Cases*, 17 SW. L.J. 227, 233-34 (1963).

¹⁰⁰ *Spaeth v. United States*, 281 F.2d 361, 365 (6th Cir. 1955).

¹⁰¹ MCCORMICK, EVIDENCE 322 (1954). On character and habit, see 1 WIGMORE, EVIDENCE §§ 52-81, 92-97, 191-200, 202-05, 215-18 (3d ed. 1940), 2 WIGMORE, EVIDENCE §§ 300-71 (3d ed. 1940), 5 WIGMORE, EVIDENCE §§ 1608-10 (3d ed. 1940), 7 WIGMORE, EVIDENCE §§ 1980-86 (3d ed. 1940); MCCORMICK, EVIDENCE § 153, at 322-43 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 200-01, 213-14 (1962); 1 WHARTON, CRIMINAL EVIDENCE §§ 216-48 (12th ed. 1955); 1 UNDERHILL, CRIMINAL EVIDENCE §§ 109-212 (5th ed. 1956); 1 JONES, EVIDENCE §§ 165-79 (5th ed. 1958); Hale, *Character Evidence*, 22 So. CAL. L. REV. 341 (1949); Ladd, *Techniques of Character Testimony*, 24 IOWA L. REV. 498 (1939); Udall, *Character Proof in the Law of Evidence*, 18 U. CINC. L. REV. 283 (1949).

¹⁰² MCCORMICK, EVIDENCE 322-23 (1954); 1 WIGMORE, EVIDENCE §§ 52, 53, 193 (3d ed. 1940).

¹⁰³ 1 WIGMORE, EVIDENCE §§ 191-213 (3d ed. 1940).

¹⁰⁴ 7 WIGMORE, EVIDENCE §§ 1980-86 (3d ed. 1940).

and, testimony as to defendant's reputation.¹⁰⁵ The third type is the preferred type; the other two, when received at all, are received only in limited situations.

The Model Code of Evidence of the American Law Institute does not deal with the question. Its comment to Rule 304 is: "No rules are laid down as to proof of reputation when reputation is a fact to be proved. When reputation is a material matter, it is provable in the same manner as is any other disputed fact."¹⁰⁶

B. EVIDENCE TO PROVE CHARACTER

Generally, particular good acts of the defendant may not be shown. Judge Charles E. Clark has stated: "Defendants offer to prove that on occasions other than those charged he sold lettuce without tie-in with other vegetables was properly rejected as the evidence was irrelevant."¹⁰⁷

In a prosecution for bank robbery and for attempt to break into a post office, the court stated: "As to other crimes committed by appellant they were properly considered by the trial judge in fixing sentence, as they had direct bearing upon the character of appellant and the sort of sentence which ought to be imposed for the crime of which he had been convicted."¹⁰⁸ In sentencing, the trial judge may consider out-of-court information.¹⁰⁹

Some statutes have been construed as allowing the fact of prior conviction to be considered by the jury before verdict.¹¹⁰ Wigmore calls this method "decidedly an inferior one."¹¹¹ In a prosecution for rape evidence of the complainant's prior unchaste conduct was held admissible.¹¹² Wigmore states: "The better view

¹⁰⁵ 5 WIGMORE, EVIDENCE §§ 1608-21 (3d ed. 1940).

¹⁰⁶ MODEL CODE OF EVIDENCE rule 304 (1942).

¹⁰⁷ *United States v. Shapiro*, 159 F.2d 890, 891 (2d Cir. 1947), citing 1 WIGMORE, EVIDENCE § 195, at 665-66 (3d ed. 1940). Wigmore suggests that on principle such evidence might well come in.

¹⁰⁸ *Parker v. United States*, 248 F.2d 803, 804 (4th Cir. 1957).

¹⁰⁹ *Williams v. New York*, 337 U.S. 241, 244 (1949).

¹¹⁰ *Hefferman v. United States*, 50 F.2d 554, 556 (3d Cir. 1931); *Smith v. United States*, 41 F.2d 215 (9th Cir. 1930); *Massey v. United States*, 281 Fed. 293, 297 (8th Cir. 1922).

¹¹¹ 1 WIGMORE, EVIDENCE § 196, at 670 (3d ed. 1940).

¹¹² *Packineau v. United States*, 202 F.2d 681, 686 (8th Cir. 1953).

is that which admits the evidence."¹¹³ In a prosecution of a common offender, evidence of particular acts is admissible.¹¹⁴

Circuit Justice McLean in 1840, stated: "The witness cannot advert to particular facts as to his personal knowledge of the individual impeached, but to his general reputation for truth."¹¹⁵ In 1859, the Supreme Court via Mr. Justice Clifford stated that an "impeaching witness is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness has been derived, nor indeed is he allowed to do so."¹¹⁶ In 1952, a court clearly held that a character witness may not offer his personal opinion of the truth, honesty, and integrity of the defendant.¹¹⁷ He may testify only as to his reputation in the community.

In several early cases lower federal courts held that it was not error to ask an impeaching witness, after testifying that the general reputation of an opposing witness was bad, whether, from his knowledge of that general reputation he would believe the witness on oath.¹¹⁸ Mr. Justice Wayne, dissenting in a Supreme Court civil case stated: "The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbors—what that reputation is, and whether from such knowledge he would believe him upon oath."¹¹⁹ In a subsequent civil case, the Supreme Court referred to the conflict in the authorities and to Greenleaf's view that the

¹¹³ 1 WIGMORE, EVIDENCE § 200, at 683 (3d ed. 1940).

¹¹⁴ McNutt v. United States, 267 Fed. 670, 674 (8th Cir. 1920); United States v. Bonham, 31 Fed. 808 (D.S.C. 1887); United States v. Jackson, 26 Fed. Cas. 556 (No. 15455) (C.C.E.D. Va. 1875). See 1 WIGMORE, EVIDENCE § 203 (3d ed. 1940).

¹¹⁵ United States v. Vansickle, 28 Fed. Cas. 361, 362 (No. 16609) (C.C.D. Mich. 1840).

¹¹⁶ Teese v. Huntington, 23 How. (64 U.S.) 2, 13 (1859).

¹¹⁷ Bridges v. United States, 199 F.2d 811, 830 (9th Cir. 1952), *rev'd on other grounds*, 346 U.S. 209 (1953). The court cited 7 WIGMORE, EVIDENCE § 1980 (3d ed. 1940). See generally 7 WIGMORE, EVIDENCE §§ 1980-86 (3d ed. 1940); McCORMICK, EVIDENCE 94-95, 323 (1954).

¹¹⁸ United States v. Vansickle, 28 Fed. Cas. 361, 362 (No. 16609) (C.C.D. Mich. 1840); United States v. White, 28 Fed. Cas. 550, 552 (No. 16675) (C.C.D.C. 1836); United States v. Masters, 26 Fed. Cas. 1197 (No. 15739) (C.C.D.C. 1834).

¹¹⁹ Gaines v. Relf, 12 How. (53 U.S.) 472, 554 (1851).

weight of authority was against such a question and to Taylor's view to the contrary.¹²⁰ In 1919, the Fifth Circuit upheld the question.¹²¹

In 1925, the Seventh Circuit rejected the question. It expressed the opinion that the weight of authority was against such question and referred to Greenleaf's similar view.¹²² The court did not cite the cases as to weight of authority. The next year the Eighth Circuit referred favorably to Greenleaf's view, but based its ruling on the ground that the first question dealt with the reputation for honesty and veracity of the witness being impeached and was too broad a basis on which to rest the second question as to whether the witness would testify falsely.¹²³ But two years later the same court seemed to hold that the trial judge had discretion to allow such a question, but that on the particular facts it was not reversible error not to allow the question.¹²⁴ In 1963, after a careful review of the cases and authorities, the Sixth Circuit upheld the question.¹²⁵ It was pointed out that most state courts now allow the question and that Wigmore favored it.

C. CHARACTER AS EVIDENTIARY OF AN ACT

At one time there was a presumption of the good character of the defendant; and, on the defendant's request the jury was to be so instructed.¹²⁶ But subsequent decisions rejected this view.¹²⁷ In 1918, the Supreme Court squarely held that there was no presumption of good character and doubted that this was the rule in 1789.¹²⁸

Evidence of the general reputation of a defendant charged

¹²⁰ *Teese v. Huntington*, 23 How. (64 U.S.) 2, 11-13 (1859).

¹²¹ *Held v. United States*, 260 Fed. 932, 933 (5th Cir. 1919). The court cited WIGMORE, EVIDENCE § 1985 (1st ed. 1904).

¹²² *Colbeck v. United States*, 10 F.2d 401, 403 (7th Cir. 1925).

¹²³ *Colbeck v. United States*, 14 F.2d 801, 803 (8th Cir. 1926).

¹²⁴ *Swafford v. United States*, 25 F.2d 581, 584 (8th Cir. 1928).

¹²⁵ *United States v. Walker*, 313 F.2d 236, 239 (6th Cir. 1963).

¹²⁶ *Garst v. United States*, 180 Fed. 339, 343 (4th Cir. 1910); *Lowdon v. United States*, 149 Fed. 673, 677 (5th Cir. 1906); *Mullen v. United States*, 106 Fed. 892, 894 (6th Cir. 1901); *United States v. Guthrie*, 171 Fed. 528, 532 (S.D. Ohio 1909).

¹²⁷ *Price v. United States*, 218 Fed. 149, 150 (8th Cir. 1914); *United States v. Smith*, 217 Fed. 839 (E.D. Pa. 1914).

¹²⁸ *Greer v. United States*, 245 U.S. 559, 561 (1918). One judge dissented. The lower court also held against the presumption. 240 Fed. 320, 324 (8th Cir. 1917). See also *Michelson v. United States*, 335 U.S. 469, 475 (1948); 2 WIGMORE, EVIDENCE § 290, at 176-77 (3d ed. 1940).

with making a false deposition is competent, and it is error to exclude such testimony upon the theory that it should be offered only after the defendant himself has testified.¹²⁹ He may introduce testimony as to his general reputation as a law-abiding citizen whether he testifies or not.¹³⁰ Evidence as to good character should not be excluded merely because the questions are not put in proper form.¹³¹

While in general the government may not attack the defendant's reputation before the defendant has put it in issue,¹³² where the trial court is passing on probable cause for a search and seizure of a truck, there may be inquiry as to the defendant's reputation as this bears on probable cause.¹³³ This may be done in the presence of the jury if the defendant fails to object. If evidence offered by the government is otherwise competent, relevant and material it is not objectionable on the ground that it may tend incidentally to put the defendant's character in issue.¹³⁴

Evidence of good character is admissible to show want of intent.¹³⁵ Wigmore points out that "a defendant may offer his good character to evidence the improbability of his doing the act charged."¹³⁶ This language was accepted in *Petersen v. United States*.¹³⁷ The Supreme Court stated that "character is relevant

¹²⁹ *Edgington v. United States*, 164 U.S. 361, 363 (1896). This case is mentioned as the leading case on good character in criminal cases in *Sunderland v. United States*, 19 F.2d 202, 214 (8th Cir. 1927). On permitting the defendant to produce evidence of his good character see *McCORMICK, EVIDENCE* 333-38 (1954); 1 *WIGMORE, EVIDENCE* §§ 55-60, 197 (3d ed. 1940), 3 *WIGMORE, EVIDENCE* §§ 925, 988 (3d ed. 1940), 7 *WIGMORE, EVIDENCE* §§ 1980-86 (3d ed. 1940); Annot., 71 A.L.R. 1504 (1931); Annot., 68 A.L.R. 1068 (1930); Annot., 67 A.L.R. 1210 (1930); Annot., 80 A.L.R. 227 (1932); 1 *UNDERHILL, CRIMINAL EVIDENCE* §§ 190-202 (5th ed. 1956); 1 *WHARTON, CRIMINAL EVIDENCE* §§ 221-27 (12th ed. 1955); *MORGAN, BASIC PROBLEMS OF EVIDENCE* 200-05 (1962).

¹³⁰ *Sutherland v. United States*, 92 F.2d 305, 308 (4th Cir. 1937).

¹³¹ *Cohen v. United States*, 291 Fed. 368, 370 (7th Cir. 1923).

¹³² *United States v. Walker*, 313 F.2d 236, 238 (6th Cir. 1963). *United States v. Rinaldi*, 301 F.2d 576, 578 (2d Cir. 1962).

¹³³ *Crosby v. United States*, 231 F.2d 679, 681 (5th Cir. 1956), *cert. denied*, 352 U.S. 831 (1956).

¹³⁴ *Cochran v. United States*, 310 F.2d 585, 589 (8th Cir. 1962).

¹³⁵ *Masters v. United States*, 42 App. D.C. 350, 357 (1914).

¹³⁶ 1 *WIGMORE, EVIDENCE* § 56, at 450 (3d ed. 1940).

¹³⁷ *Petersen v. United States*, 268 F.2d 87, 88 (10th Cir. 1959).

in resolving probabilities of guilt."¹³⁸ The rule applies to all offenses including misdemeanors.¹³⁹

But as early as 1827, Circuit Justice Story instructed the jury that:¹⁴⁰

[T]he general good character of the defendant may be properly brought into the cause, and ought to have weight with the jury in all cases, where the facts are doubtful, or admit of different interpretations. But where the evidence is positive, and satisfactory to the jury, such good character certainly cannot overcome the just presumption of guilt arising therefrom.

A district judge, in 1876, concluded that evidence of good character was competent in all cases, not simply doubtful ones¹⁴¹ and this view was taken by the Supreme Court in 1896 when it stated that "good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt."¹⁴²

Judge Learned Hand stated that "evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken."¹⁴³

The Court of Appeals for the Eighth Circuit has held that it is the duty of the trial judge, even in the absence of a request, to instruct on the subject of character evidence.¹⁴⁴ But it is question-

¹³⁸ *Michelson v. United States*, 335 U.S. 469, 476 (1948).

¹³⁹ *Egan v. United States*, 287 Fed. 958, 969 (D.C. Cir. 1923).

¹⁴⁰ *United States v. Freeman*, 25 Fed. Cas. 1208, 1210 (No. 15162) (C.C.D. Mass. 1827). See also *United States v. Allen*, 24 Fed. Cas. 772, 775 (No. 14432) (C.C.E.D.N.Y. 1868); *United States v. Knowles*, 26 Fed. Cas. 800, 802 (No. 15540) (N.D. Cal. 1864); *United States v. Emerson*, 25 Fed. Cas. 1013 (No. 15051) (C.C.D. Ind. 1855); *United States v. Roudenbush*, 27 Fed. Cas. 902, 930 (No. 16198) (C.C.E.D. Pa. 1832).

¹⁴¹ *United States v. Hutchins*, 26 Fed. Cas. 442, 445 (No. 15430) (C.C.S.D. Ohio 1876).

¹⁴² *Edgington v. United States*, 164 U.S. 361, 366 (1896). One justice merely concurred in the judgment, and one dissented. See also *Rosen v. United States*, 271 Fed. 651, 657 (2d Cir. 1920); *Rowe v. United States*, 97 Fed. 779, 781 (8th Cir. 1899).

¹⁴³ *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). This case was quoted favorably in *Michelson v. United States*, 335 U.S. 469, 474 n.5 (1948). On instructions to the jury as to the force of character evidence, see Annot., 68 A.L.R. 1068 (1930).

¹⁴⁴ *Hermansky v. United States*, 7 F.2d 458, 460 (8th Cir. 1925). *But compare United States v. Quick*, 128 F.2d 832, 835 (3d Cir. 1942); *Stassi v. United States*, 50 F.2d 526, 529 (8th Cir. 1931).

able that this is the weight of authority.¹⁴⁵ A general instruction is sufficient where the defendant does not ask for a detailed instruction.¹⁴⁶ In 1942, the Third Circuit held, in reversing the trial court, that the defendant on request is entitled to an instruction as to character evidence which sets forth: the purpose of character evidence, i.e., to generate a reasonable doubt; the probative status of such evidence, i.e., that it be considered by the jury whether or not the other evidence is clear or doubtful; and the possible effect of character evidence, i.e., when considered along with other evidence in the case if a reasonable doubt exists as to defendant's guilt he is entitled to acquittal.¹⁴⁷

In 1944, the Court of Appeals for the Fourth Circuit upheld a trial court in its refusal to instruct that the circumstances may be such that an established reputation for good character would alone create a reasonable doubt.¹⁴⁸ The court concluded that there were decisions from the Sixth, Seventh and District of Columbia Circuits upholding such a requested instruction. But the Second, Third, Fifth, Eighth and Ninth Circuits were contrary; and were accepted as correct for the Fourth Circuit. In 1950, the District of Columbia adhered to its view.¹⁴⁹ In 1959, the Tenth Circuit stated that "this court has held without deviation that when evidence of good character is submitted, the jury should be instructed that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing of guilt."¹⁵⁰ In the Seventh Circuit, an instruction that the mere fact that the defendant may have a good reputation prior to the time of the alleged crime could not be used by the jury

¹⁴⁵ *Kreiner v. United States*, 11 F.2d 722, 731 (2d Cir. 1926), *cert. denied*, 271 U.S. 688 (1926). This case was followed in *Kinard v. United States*, 96 F.2d 522, 524 (D.C. Cir. 1938). See also *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 639 (2d Cir. 1946), *cert. denied*, 329 U.S. 742 (1946); *Springer v. United States*, 148 F.2d 411, 415 (9th Cir. 1945).

¹⁴⁶ *Foshay v. United States*, 68 F.2d 205, 217 (8th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934).

¹⁴⁷ *United States v. Quick*, 128 F.2d 832, 835 (3rd Cir. 1942). Compare *United States v. Dewrinsky*, 41 F. Supp. 149, 152 (D. N.J. 1941). See also *Hawley v. United States*, 133 F.2d 966, 972 (10th Cir. 1943).

¹⁴⁸ *Mannix v. United States*, 140 F.2d 250, 253 (4th Cir. 1944).

¹⁴⁹ *Villaroman v. United States*, 184 F.2d 261, 263 (D. C. Cir. 1950).

¹⁵⁰ *Johnson v. United States*, 269 F.2d 72, 74 (10th Cir. 1959). See also *Hayes v. United States*, 227 F.2d 540, 544 (10th Cir. 1955), *cert. denied*, 353 U.S. 983 (1957); *Miller v. United States*, 120 F.2d 968, 971 (10th Cir. 1941).

as an excuse for acquittal, was held reversible error.¹⁵¹ By 1959, the rule that character evidence alone may create a reasonable doubt was rejected in all the circuits but the Seventh and Tenth.¹⁵²

In 1948, the Supreme Court pointed out that it had previously held that character testimony "alone, in some circumstances may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed."¹⁵³ But this decision was held to be narrow in scope because of the use of the word "proper."¹⁵⁴

Suppose that the doing of the act charged is not in dispute. The Court of Appeals of the Ninth Circuit has stated: "No reason is suggested and we see none for concluding that evidence of good character for truth, honesty and integrity would tend to support a claim of innocence when the defendant admits a deliberate refusal to obey an order of the induction board, basing his refusal on conscientious grounds."¹⁵⁵ Yet it should be admissible when the criminal intent remains in issue.¹⁵⁶ Only rarely is intent not in issue.

It is grounds for a new trial if the government, in its argument to the jury, points out that the defendant failed to offer evidence of good reputation.¹⁵⁷ If the government withdraws the argument, possibly the error is cured.¹⁵⁸ The court may cure the error by instructing the jury to disregard the argument.¹⁵⁹

As early as 1802 it was held that the government cannot give evidence of the general bad character of the defendant unless the

¹⁵¹ *United States v. Semeniuk*, 193 F.2d 508 (7th Cir. 1952).

¹⁵² *Petersen v. United States*, 268 F.2d 87, 89 n.3 (10th Cir. 1959) (citing cases). But Judge Murrah criticized the minority view. See also *Smith v. United States*, 305 F.2d 197, 205 (9th Cir. 1962).

¹⁵³ *Michelson v. United States*, 335 U.S. 469, 476 (1948). The court cited *Edgington v. United States*, 164 U.S. 361 (1896).

¹⁵⁴ *Black v. United States*, 309 F.2d 331, 343 (8th Cir. 1962); *Smith v. United States*, 305 F.2d 197, 206 (9th Cir. 1962).

¹⁵⁵ *Springer v. United States*, 148 F.2d 411, 415 (9th Cir. 1945).

¹⁵⁶ 1 WIGMORE, EVIDENCE § 56, at 453-54 (3d ed. 1940).

¹⁵⁷ *Greer v. United States*, 245 U.S. 559, 560 (1918); *Middleton v. United States*, 49 F.2d 538, 540 (8th Cir. 1931); *Lowdon v. United States*, 149 Fed. 673, 675 (5th Cir. 1906); *McKnight v. United States*, 97 Fed. 208, 209 (6th Cir. 1899).

¹⁵⁸ *Lowdon v. United States*, 149 Fed. 673, 677 (5th Cir. 1906).

¹⁵⁹ *Dale v. United States*, 66 F.2d 666, 668 (7th Cir. 1933); *United States v. Bonner*, 21 F. Supp. 82 (M.D. Pa. 1937).

defendant first gives evidence to support his character.¹⁶⁰ The character of a defendant is put in issue only when he calls witnesses to attest to his reputation.¹⁶¹ The defendant does not put his character in issue when he testifies to service in the armed forces and honorable discharge, as this is merely introduction.

Evidence of bad character "is never admitted until the accused has first put his character in issue, or, in other words, has laid the foundation for its introduction by offering to show that he is of good character; and then the counter-proof is properly admitted as rebutting testimony."¹⁶² Where the defendant pleads entrapment the government may cross-examine the defendant not only as to other felonies, but also as to misdemeanors, in order to show his predisposition.¹⁶³

A character witness for the defendant may be asked whether or not he had heard disparaging rumors about the defendant.¹⁶⁴ A witness for a defendant charged with stealing a letter from the mail may be asked whether the defendant had not been charged with passing counterfeit money.¹⁶⁵ A witness who testified to the good reputation of the defendant may be properly cross-examined as to whether he had ever heard of the defendant being accused of acts inconsistent with the character attributed to him.¹⁶⁶

A character witness for the defendant in a liquor prosecution

¹⁶⁰ *United States v. Carrigo*, 25 Fed. Cas. 310 (No. 14735) (C.C.D.C. 1802). See also *Michelson v. United States*, 335 U.S. 469, 475 (1948); *Greer v. United States*, 245 U.S. 559, 560 (1918); *Lott v. United States*, 218 F.2d 675, 678 (5th Cir. 1955); *United States v. Jones*, 208 F.2d 124 (2d Cir. 1953); *United States v. Modern Reed & Rattan Co.*, 159 F.2d 656, 658 (2d Cir. 1947); *Mackreth v. United States*, 103 F.2d 495, 496 (5th Cir. 1939); *Mullen v. United States*, 106 Fed. 892, 894 (6th Cir. 1901); *United States v. Holmes*, 26 Fed. Cas. 349, 354 (No. 15382) (C.C.D. Me. 1858). See 1 WIGMORE, EVIDENCE § 57 (3d ed. 1940).

¹⁶¹ *United States v. Masino*, 275 F.2d 129, 133 (2d Cir. 1960); *United States v. Tomaiolo*, 249 F.2d 683, 689 (2d Cir. 1957).

¹⁶² *United States v. Holmes*, 26 Fed. Cas. 349, 354 (No. 15382) (C.C.D. Me. 1858). See also *Michelson v. United States*, 335 U.S. 469, 479, n.15 (1948), citing 1 WIGMORE, EVIDENCE § 58 (3d ed. 1940); *Josey v. United States*, 135 F.2d 809, 811 (D.C. Cir. 1943).

¹⁶³ *Whiting v. United States*, 296 F.2d 512, 516 (1st Cir. 1961); *Carlton v. United States*, 198 F.2d 795, 797 (9th Cir. 1952).

¹⁶⁴ 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

¹⁶⁵ *United States v. Whitaker*, 28 Fed. Cas. 538, 539 (No. 16672) (C.C.D. Ohio 1855).

¹⁶⁶ *Jung Quoy v. United States*, 222 Fed. 766, 771 (9th Cir. 1915). See 1 WIGMORE, EVIDENCE § 197 (3d ed. 1940).

may be asked whether he had heard of defendant's being arrested for violation of the liquor law;¹⁶⁷ or that the defendant had been convicted of a crime.¹⁶⁸ The answer goes directly to the weight and credibility of the testimony of the character witness. In one case a record of conviction was admitted in rebuttal where the witness had denied hearing of it.¹⁶⁹ Questions may be non-prejudicial in view of the answers given and instructions to the jury.¹⁷⁰

Cross-examination of the defendant's character witness as to whether rumors of the defendant's commission of another crime, if heard by the witness, would alter his testimony, if promptly objected to, is improper.¹⁷¹ The question was based on the assumption that the rumors were facts. Cross-examining the defendant's character witness, who had testified as to the defendant's reputation prior to the date of the alleged conspiracy as to whether they had read in the newspapers about discovery of whiskey and fake whiskey labels in the defendant's room shortly after the alleged conspiracy was erroneous.¹⁷² The inquiry is to be limited to what people thought about the defendant's character and not what the witness thought. The matter in issue was the general reputation of the party. Cross-examination is not limited to inquiry as to reputation at the time and prior to the time of the alleged offense. Character witnesses for the defendant may be asked whether they had heard that the defendant had been arrested two years before on a charge of operating a still and saloon.¹⁷³

A witness who has testified to the good reputation of the defendant for the particular trait may be asked specifically as to

¹⁶⁷ *Filippelli v. United States*, 6 F.2d 121, 125 (9th Cir. 1925). But the witness may not be asked whether he had heard that the defendant had been arrested frequently for violation of the liquor law.

¹⁶⁸ *Mitrovich v. United States*, 15 F.2d 163 (9th Cir. 1926).

¹⁶⁹ *Chiccarello v. United States*, 68 F.2d 315 (3d Cir. 1933). This appears unsound. See 3 WIGMORE, EVIDENCE § 988, at 619 n.1 (3d ed. 1940).

¹⁷⁰ *Reuben v. United States*, 86 F.2d 464, 467 (7th Cir. 1936), *cert. denied*, 300 U.S. 671 (1937).

¹⁷¹ *Little v. United States*, 93 F.2d 401, 408 (8th Cir. 1937). See also *Pittman v. United States*, 42 F.2d 793, 795 (8th Cir. 1930).

¹⁷² *Sloan v. United States*, 31 F.2d 902, 905 (8th Cir. 1929).

¹⁷³ *Spalitto v. United States*, 39 F.2d 782, 785 (8th Cir. 1930). The court cited 2 WIGMORE, EVIDENCE § 988 (2d ed. 1923). See also *Clark v. United States*, 23 F.2d 756 (D.C. Cir. 1927); *Mitrovich v. United States*, 15 F.2d 163, 164 (9th Cir. 1926); *Jung Quey v. United States*, 222 Fed. 766, 771 (9th Cir. 1915). Compare *Sacks v. United States*, 41 App. D.C. 34, 36 (1913).

whether he has heard that the defendant has committed particular criminal acts inconsistent with the reputation vouched for on direct examination.¹⁷⁴ But the witness may not be asked whether he knows that the defendant has committed other crimes.¹⁷⁵ On principle as to indictments or informations, convictions, or repeated arrests, or imprisonment, it should be possible to ask the witness if he knows of these. But the federal courts have merely held that there is not reversible error if the answer is in the negative, or if the record does not show any answer,¹⁷⁶ or if no objection was made at the trial.¹⁷⁷

In a prosecution for assault with a dangerous weapon, questions to character witnesses as to whether "they had heard that the defendant had been arrested in 1940 for disorderly conduct" were allowed.¹⁷⁸

In one case a defendant was tried in 1947 for bribery of a revenue agent. On direct examination the defendant acknowledged a conviction for a trade mark violation in 1927. He produced witnesses for his honesty and veracity, some of whom had known him for thirty years. On cross-examination they were asked: "Did you ever hear that on October 11, 1920, the defendant . . . was arrested for receiving stolen goods." They answered in the negative. The government assured the trial judge in private of the truth of the fact of such arrest, which was not questioned. The judge explained to the jury the limited purpose of the question. The Supreme Court affirmed the conviction.¹⁷⁹ This was in accord with the weight

¹⁷⁴ *Stewart v. United States*, 104 F.2d 234, 235 (D.C. Cir. 1939); *Clark v. United States*, 23 F.2d 756 (D.C. Cir. 1927), citing 2 WIGMORE, EVIDENCE § 988 (2d ed. 1923). See McCORMICK, EVIDENCE 335 (1954).

¹⁷⁵ *Michelson v. United States*, 335 U.S. 469, 482 (1948); *Kasper v. United States*, 225 F.2d 275, 279 (9th Cir. 1955); *Stewart v. United States*, 104 F.2d 234, 235 (D.C. Cir. 1939).

¹⁷⁶ *Lucas v. United States*, 104 F.2d 225 (D.C. Cir. 1939).

¹⁷⁷ *Saunders v. United States*, 192 F.2d 409 (D.C. Cir. 1951).

¹⁷⁸ *Josey v. United States*, 135 F.2d 809, 811 (D.C. Cir. 1943), citing 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

¹⁷⁹ *Michelson v. United States*, 335 U.S. 469 (1948), noted in 15 BROOKLYN L. REV. 299 (1949); 34 CORNELL L. Q. 642 (1949); 53 DICK. L. REV. 339 (1949); 41 IOWA L. REV. 325, 347-48 (1956); 34 IOWA L. REV. 700 (1949); 40 J. CRIM. L., C. & P.S. 58 (1949); 47 MICH. L. REV. 843 (1949); 22 SO. CAL. L. REV. 489 (1949); 22 TEMP. L. Q. 347 (1949); 17 U. CHI. L. REV. 525, 532 (1950); 12 U. DET. L.J. 174 (1949); 2 VAND. L. REV. 479 (1949). The Court of Appeals had also affirmed. *United States v. Michelson*, 165 F.2d 732, 734 (2d Cir. 1948), noted in 22 TEMP. L. Q. 347 (1949). The Supreme Court did not accept a rule suggested by the Court of Appeals,

of authority,¹⁸⁰ but the holding is questionable. The mere asking by the government, no matter what the answer, may suggest to the jury that the imputation is true. The dissent in the case would have limited the cross-examination to a very general one on opportunities for knowledge of reputation excluding completely inquiries about other crimes or rumors thereof.¹⁸¹ But this might unduly encourage the use of false or biased character-witnesses.¹⁸² One protection would be to require the government to give its professional statement to the judge, in the absence of the jury, that it believes and has reasonable ground to believe that the crimes or misconduct were actually committed by the defendant.¹⁸³ The government's assurance should be based on the statements of witnesses, believed to be credible, who purport to have first-hand knowledge. The trial judge can stop the government when it asks questions in bad faith.¹⁸⁴ Judge Jerome Frank thought that on the merits questions are improper unless they relate to offenses similar to those for which the defendant is on trial.¹⁸⁵

In an income tax prosecution, it was held that the trial court properly cut short, after objection, a question of the government to a defense witness whether he had heard that the defendant was convicted for violation of labor laws.¹⁸⁶ The court at once told the jury to disregard it. No reversible error was found. The government could properly ask if the witness had heard that the defendant had been in court on a conspiracy to steal charge and was freed after making restitution, when the defendant did not try to prove the falsity of the intimation and did not ask for an instruction as to the limited purpose for which the question was asked.¹⁸⁷

In a prosecution for possession of counterfeit notes, the defendant's character witness stated on direct examination that the

namely, that the cross examination be limited to questions which relate to offenses similar to those for which the defendant is on trial.

¹⁸⁰ 40 J. CRIM. L., C. & P.S. 58, 59 (1949); 22 TEMP. L. Q. 347 (1949); 2 VAND. L. REV. 479 (1949); Annot., 71 A.L.R. 1504 (1931).

¹⁸¹ *Michelson v. United States*, 335 U.S. 469, 496 (1947). The court cited 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

¹⁸² 1 WIGMORE, EVIDENCE § 58 (3d ed. 1940).

¹⁸³ *United States v. Giddins*, 273 F.2d 843, 845 (2d Cir. 1960); *McCORMICK*, EVIDENCE § 158, at 337 (1954).

¹⁸⁴ *Sloan v. United States*, 31 F.2d 902, 906 (8th Cir. 1929).

¹⁸⁵ *United States v. Michelson*, 165 F.2d 732, 735 n.8 (2d Cir. 1948).

¹⁸⁶ *Gaunt v. United States*, 184 F.2d 284, 292 (1st Cir. 1950).

¹⁸⁷ *Malatkofski v. United States*, 179 F.2d 905, 913 (1st Cir. 1950).

defendant's reputation was good. It was held proper upon cross-examination to question these witnesses concerning previous arrests of the defendant.¹⁸⁸ It was not necessary first to ascertain whether in fact there had been such arrests or that they had been for crimes involving moral turpitude. Questioning as to infractions similar in nature to those for which the defendant was on trial was proper.¹⁸⁹ In an income tax prosecution, cross-examination of the witnesses as to whether he had heard of the defendant being arrested on a certain date for issuing fraudulent checks was held prejudicial where there was no showing that the defendant had been arrested and no instruction limiting the use of the evidence was given.¹⁹⁰

Following *Michelson v. United States*,¹⁹¹ it is reversible error where the cross-examination of the defendant's character witness occurred in the presence of the jury, where cross-examination was to what the witnesses knew, not what they had heard, and where the trial court permitted the government to assure the jury of record evidence of the actuality of each arrest and conviction inquired about.¹⁹² The Court of Appeals reversed although only a general objection was made in the trial court. Correct instructions to the jury did not cure the error.

It has been stated broadly that a witness "may properly be cross-examined as to whether or not he ever heard of some incident that might have a bearing on his good reputation."¹⁹³ Testimony that witnesses, by reputation, knew of the defendant as an "underworld" man and a "strong-arm" man was admissible to prove the charge that conspiracy to commit extortion contemplated the use of persons known to the victim to have underworld reputations and to possess the necessary power to execute the conspirators' demand by force and violence and that one of the defendants was enlisted for that purpose.¹⁹⁴ This was a case of multiple admissibility and the trial judge had instructed accordingly.

¹⁸⁸ *United States v. Conforti*, 200 F.2d 365, 369 (7th Cir. 1952).

¹⁸⁹ *United States v. H. Wood & Sons*, 215 F.2d 95, 99 (2d Cir. 1954).

¹⁹⁰ *United States v. Phillips*, 217 F.2d 435, 443 (7th Cir. 1954).

¹⁹¹ *Michelson v. United States*, 335 U.S. 469 (1948).

¹⁹² *Roberson v. United States*, 237 F.2d 536, 541 (5th Cir. 1956).

¹⁹³ *Segal v. United States*, 246 F.2d 814, 820 (8th Cir. 1957).

¹⁹⁴ *Carbo v. United States*, 314 F.2d 718, 740 (9th Cir. 1963). The court cited UNIFORM RULE OF EVIDENCE rule 47; MODEL CODE OF EVIDENCE rule 306(1) (1942); 1 WIGMORE, EVIDENCE §§ 55, 57 (3d ed. 1940).

A question directed to a character witness for the defendant during cross-examination as to whether he had heard of the defendant's claim of a constitutional privilege before a congressional investigating committee had no probative value; or, if it had probative value, such value was outweighed by the possible impact on the jury of equating such plea of privilege with guilt; and was prejudicial error.¹⁹⁵ A concurring judge thought it also improper to ask whether the witness had heard that the defendant had been convicted of criminal contempt of court because this would not bear on the defendant's veracity.¹⁹⁶

The question may not be hypothetical nor assume unproven facts.¹⁹⁷ The following question is thus improper: "If you had heard that, would it modify your judgment some as to his law abiding citizenship."¹⁹⁸

The reputation subject to proof is that respecting the trait of character involved in the offense charged.¹⁹⁹ Where prosecution was founded on the initial larceny of an automobile, it was competent to prove his general reputation for honesty and integrity, and reversible error occurs if it is excluded.²⁰⁰ It is not enough to simply allow evidence as to reputation for being an upright, law-abiding citizen. Gambling and liquor dealing would not necessarily prove want of honesty and integrity. In a prosecution for false entry in a bank report, testimony as to the defendant's character for "morality and sobriety" was held properly excluded.²⁰¹ It was sufficient to allow testimony as to reputation for truthfulness, veracity, and honesty.

Inquiry is limited to the trait or traits involved in the crime on

¹⁹⁵ *Travis v. United States*, 247 F.2d 130, 133 (10th Cir. 1957).

¹⁹⁶ *Id.* at 136.

¹⁹⁷ *Michelson v. United States*, 335 U.S. 469, 480 n.17 (1948); *United States v. Alker*, 260 F.2d 135, 150 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959); *Little v. United States*, 93 F.2d 401, 408 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1937).

¹⁹⁸ *United States v. Alker*, 260 F.2d 135, 150 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959).

¹⁹⁹ *Hawley v. United States*, 133 F.2d 966, 972 (10th Cir. 1943). See *McCORMICK, EVIDENCE* § 158, at 334 (1954). But in *United States v. Latin*, 139 F.2d 569, 570 (2d Cir. 1943), in a prosecution for setting up an unregistered still, the defendant was held entitled to prove good reputation as to "moral character."

²⁰⁰ *Keady v. United States*, 62 F.2d 689 (10th Cir. 1933). The court cited 1 *WIGMORE, EVIDENCE* § 59 (2d ed. 1923).

²⁰¹ *Harper v. United States*, 170 Fed. 385, 390 (8th Cir. 1909).

trial such as honesty in theft cases.²⁰² In a prosecution for rape, the witness should not be asked whether he had heard that the defendant was convicted of furnishing liquor to a minor.²⁰³ In a prosecution for income tax evasion, the court may refuse evidence of the defendant that he was charitable.²⁰⁴ In a prosecution for treason, the inquiry should not be as to "truth, honesty, and integrity," but rather as to "truth and veracity" as at common law.²⁰⁵

In a prosecution for negligent homicide, the defendant may not have admitted in evidence a certificate of honorable discharge from the Army to show character.²⁰⁶ It is objectionable as hearsay. Where the court, although it instructed that the defendant had been honorably discharged from the United States Army eight years earlier, refused to admit the defendant's service record as evidence of good character, no reversible error occurred.²⁰⁷ Proof of good character may be limited to character at the date of the commission of the offense.²⁰⁸

If the defendant has introduced evidence of good reputation, the government is not allowed to prove in rebuttal of good reputation, judgments of convictions for crimes involving the same trait in or near the community in which the defendant lived, and within a reasonable time before the commission of the offense on trial. In a prosecution for tax and liquor violations, it was held error to allow the government to prove previous convictions for similar offenses and specific acts after the offense on trial on the issue of reputation. The court stated: "There was no proof that the prior convictions and the subsequent unlawful acts of the appellant were known to the community, or that they in any wise impaired the reputation of the appellant as a man of honesty and integrity."²⁰⁹

²⁰² *Springer v. United States*, 148 F.2d 411, 415 n.1 (9th Cir. 1945); *Clark v. United States*, 23 F.2d 756 (D.C. Cir. 1927); *Smith v. United States*, 161 U.S. 85, 88 (1896).

²⁰³ *Sacks v. United States*, 41 App. D.C. 34 (1913).

²⁰⁴ *Steinberg v. United States*, 162 F.2d 120, 124 (5th Cir. 1947).

²⁰⁵ *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 372 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952).

²⁰⁶ *Ridgell v. United States*, 54 A.2d 679, 684 (D.C. Munic. Ct. App. 1947), noted in 3 *RUTGERS L. REV.* 137 (1949). Urging admission, see 5 *WIGMORE, EVIDENCE* § 1675(a) (3d ed. 1940); 1 *WIGMORE, EVIDENCE* § 59, at 462-63 (3d ed. 1940).

²⁰⁷ *French v. United States*, 232 F.2d 736, 740 (5th Cir. 1956).

²⁰⁸ *Bryant v. United States*, 257 Fed. 378, 387 (5th Cir. 1919). See *McCORMICK, EVIDENCE* § 158, at 335 (1954).

²⁰⁹ *Eley v. United States*, 117 F.2d 526, 529 (6th Cir. 1941).

In criticism, it has been pointed out that such convictions bear strongly on reputation, are easily provable, and, while there is danger of prejudice, the defendant may avoid it by not injecting the issue of reputation.²¹⁰ If the defendant takes the stand other convictions may be shown. If he does not, the jury may in fact assume his guilt, but it will make no such assumption when he merely fails to open the door of reputation.

It was held prejudicial error in a court-martial for rape not to allow the accused to introduce evidence of the reputation of the complaining witness for chastity in her community.²¹¹ This approach is supported by writers on evidence.²¹²

In a plea of self-defense evidence of the deceased's character and belligerency, though unknown to the defendant, is admissible in corroboration of the defendant's testimony that the deceased was the aggressor. The defendant was entitled to show that the deceased was aggressive when drunk. The court quoted the views of Wigmore:²¹³

When the issue of self-defense is made in a trial for homicide, and thus a controversy arises *whether the deceased was the aggressor*, one's persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased's action The additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief.

Another theory of admissibility is to show the state of mind of the defendant. The Supreme Court has stated that "any evidence which, according to the common experience of mankind, tended to show that the defendant had reasonable cause to apprehend great bodily harm from the conduct of the deceased towards him just before the killing was admissible" including "evidence that the

²¹⁰ McCORMICK, EVIDENCE § 158, at 337 (1954).

²¹¹ Hicks v. Hiatt, 64 F. Supp. 238, 249 (M.D. Pa. 1946).

²¹² See 1 WIGMORE, EVIDENCE § 62 (3d ed. 1940); MORGAN, BASIC PROBLEMS OF EVIDENCE 201-02 (1962).

²¹³ Evans v. United States, 277 F.2d 354, 356 (D.C. Cir. 1960). See 1 WIGMORE, EVIDENCE § 63, at 467, 470-71 (3d ed. 1940); McCORMICK, EVIDENCE § 160 (1954). See Notes, 3 ARK. L. REV. 464 (1949); 25 CALIF. L. REV. 459 (1937); 6 WASH. & LEE L. REV. 224 (1949); Annot., 64 A.L.R. 1029 (1929); Annot., 34 A.L.R. 2d 451 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 200-01 (1962); McCORMICK, EVIDENCE § 160 (1954); 1 WHARTON, CRIMINAL EVIDENCE § 217 (12th ed. 1955); 3 UNDERHILL, CRIMINAL EVIDENCE § 647 (5th ed. 1956).

deceased had the general reputation of being a quarrelsome and dangerous person," especially "if his character was known to the defendant."²¹⁴

D. CHARACTER AS AN ISSUE IN THE CASE

In a prosecution for keeping a house of ill-fame, the reputation of the visitors of the house was admitted.²¹⁵ In a similar prosecution, the reputations of some inmates of three or four years prior were admitted as showing the defendant's knowledge.²¹⁶ In a prosecution for assisting patronage of a house of ill-fame, the reputation of the defendant's house-detective as a panderer was admitted.²¹⁷

E. CHARACTER USED TO IMPEACH

A court has stated: "Having testified in his own behalf, there was no error in permitting impeaching evidence of his general bad character, and his bad character for truth and veracity."²¹⁸

Where a defendant has put her reputation as a witness in issue, the government may inquire whether she had been convicted in absentia for operating a bawdy house and had forfeited bond.²¹⁹ When the defendant becomes a witness, impeaching evidence is admissible to prove that his general reputation for truth and veracity is bad, although evidence is not admissible to show that his general character is bad.²²⁰

It is familiar practice to allow proof of the bad character of a witness for veracity by evidence of conviction of crime and by the testimony of reputation witnesses. This would seem to constitute another exception to the policy against using evidence of character to show conduct, namely here to show that the witness may have testified to an untruth.²²¹ The author has dealt with this subject elsewhere.²²²

²¹⁴ *Smith v. United States*, 161 U.S. 85, 88 (1896). See 2 WIGMORE, EVIDENCE § 246 (3d ed. 1940).

²¹⁵ *United States v. Stevens*, 27 Fed. Cas. 1312 (No. 16391) (C.C.D.C. 1833).

²¹⁶ *Graul v. United States*, 47 App. D.C. 543, 548 (1918).

²¹⁷ *Thaler v. United States*, 261 Fed. 746, 750 (6th Cir. 1919).

²¹⁸ *Hyche v. United States*, 135 F.2d 44 (5th Cir. 1943). See 3 WIGMORE, EVIDENCE § 925 (3d ed. 1940).

²¹⁹ *United States v. Boyette*, 299 F.2d 92, 96 (4th Cir. 1962).

²²⁰ *United States v. Walker*, 313 F.2d 236, 239 (6th Cir. 1963), citing 3 WIGMORE, EVIDENCE §§ 890, 925 (3d ed. 1940).

²²¹ MCCORMICK, EVIDENCE § 161 (1954).

²²² Orfield, *Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 KAN. L. REV. 447, 460-73 (1963).

F. HABIT AND CUSTOM

Evidence of habit or custom is often admitted as evidence of conduct on a particular occasion.²²³ In a prosecution for stealing the contents of mail, the defendant contended that the letter was open when it arrived. It was held reversible error to exclude evidence of the habitual arrival of torn mail packages during the two prior months.²²⁴

When a letter has been written and signed in the course of business and placed in the regular place of mailing, evidence of the custom of the business organization as to the mailing of such letters is receivable as evidence that it was duly mailed.²²⁵ The deposit of a letter in the post office, postage prepaid, directed to a person at his usual place of residence is evidence tending to show that it reached its destination.²²⁶ The customs of the post office may be shown.²²⁷ Telegrams delivered to a door-keeper accustomed to distribute dispatches to the defendant's office may be admitted.²²⁸ The mode of sending notice to registrants for the draft may be shown.²²⁹ The testimony of a bank cashier as to the custom of mailing letters was admitted.²³⁰ The custom of affixing air mail stamps in the regular course of business to letters received by air mail may be shown.²³¹

The modern cases appear to hold that upon proper evidence of the habit of an individual commercial house as to addressing and mailing, the mere execution of a letter in the usual course of business may constitute evidence of its later receipt by the person to

²²³ 1 WIGMORE, EVIDENCE §§ 92, 93 (3d ed. 1940); McCORMICK, EVIDENCE § 162 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 205-07 (1962).

²²⁴ *Chitwood v. United States*, 153 Fed. 551 (8th Cir. 1907).

²²⁵ 1 WIGMORE, EVIDENCE § 95 (3d ed. 1940); McCORMICK, EVIDENCE § 162, at 343 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 206 (1962).

²²⁶ *King v. United States*, 25 F.2d 242, 244 (6th Cir. 1928); *Brady v. United States*, 24 F.2d 399, 403 (8th Cir. 1928); *United States v. Babcock*, 24 Fed. Cas. 909, 910 (No. 14485) (C.C.E.D. Mo. 1876); *United States v. Weinberger*, 4 F. Supp. 892, 902 (D.N.J. 1933).

²²⁷ *Dunlop v. United States*, 165 U.S. 486, 494 (1897).

²²⁸ *United States v. Babcock*, 24 Fed. Cas. 909, 911 (No. 14485) (C.C.E.D. Mo. 1876).

²²⁹ *United States ex rel. Helmecke v. Rice*, 281 Fed. 326, 333 (S.D. Tex. 1922).

²³⁰ *United States v. Decker*, 51 F. Supp. 15, 18 (D. Md. 1943), citing 1 WIGMORE, EVIDENCE § 95 (2d ed. 1923, Supp. 1934).

²³¹ *United States v. Leathers*, 135 F.2d 507, 510 (2d Cir. 1943).

whom it is addressed. In a prosecution for using the mails to defraud, a stenographer's testimony as to the habit of mailing was held sufficient.²³² A court has stated that a "signature of an employee plus the company's letterhead, together with proof that the letter was mailed by someone, is sufficient" to show mailing.²³³

IV. FACT OF OTHER OFFENSES

A. GENERALLY

This discussion would not be complete if it were not pointed out that evidence of other offenses sometimes comes in at times other than the presentation of evidence.²³⁴ In one case the opening statement of the government mentioned eighty-three other offenses, with the aid of a blackboard chart.²³⁵ The conviction was reversed. In the prosecution of Congressman Adam Clayton Powell for tax evasion, the government stated in its opening statement that it would prove tax frauds "of far greater magnitude" than those alleged in the indictment.²³⁶ Implied reference to other offenses may be made in the government's summation. In a prosecution for using the mails to defraud there was a reversal where the government called the defendant a "skunk," "weak-faced weasel," and "a cheap, scaly, slimy, crook."²³⁷ In a prosecution for peddling dope, an accusation of narcotics addiction was held not reversible error because of a curative instruction.²³⁸ News of other offenses may also reach the jurors through newspapers, magazines, radio, and television.²³⁹

As early as 1807, Chief Justice Marshall stated: "It is, I believe, a general rule in criminal prosecutions that a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged

²³² *Alford v. United States*, 41 F.2d 157, 160 (9th Cir. 1930). See also *United States v. Vandersee*, 279 F.2d 176, 180 (3d Cir. 1960); *Cochran v. United States*, 41 F.2d 193, 205 (8th Cir. 1930).

²³³ *Greenbaum v. United States*, 80 F.2d 113, 125 (9th Cir. 1935).

²³⁴ See Note, 70 *YALE L. J.* 763, 782-88 (1961).

²³⁵ *Leonard v. United States*, 277 F.2d 834 (9th Cir. 1960).

²³⁶ *New York Times*, March 10, 1960, p. 1, col. 7.

²³⁷ *Volkmer v. United States*, 13 F.2d 594, 595 (6th Cir. 1926).

²³⁸ *Az Din v. United States*, 232 F.2d 283, 285 (9th Cir. 1956).

²³⁹ Note, 70 *YALE L. J.* 763, 785-88 (1961). See *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962), noted 12 *AM. U.L. REV.* 90, 17 *U. MIAMI L. REV.* 51; *Marshall v. United States*, 360 U.S. 310 (1959).

in the indictment was committed.”²⁴⁰ Early American cases relied on English law.²⁴¹

In general, there may not be proof of other offenses to show that the defendant has a general criminal disposition or character or even a character likely to make him commit the crime for which he is on trial.²⁴² In a case decided in 1795, in a prosecution for treason by participation in an insurrection, evidence that the defendant had participated in a robbery of the public mail and that some of the stolen letters had been read at a meeting of the insurrectionists was held inadmissible.²⁴³

In one case the trial judge instructed that evidence of similar offenses “has been permitted to be offered to show, if it does, or tend to show if it does, and to render it more probable, if in your findings you believe that it does, that they did appropriate the fire clay.” The Court of Appeals in reversing stated: “The italicized

²⁴⁰ United States v. Burr, 25 Fed. Cas. 187, 196 (No. 14694) (C.C.D. Va. 1807). Compare United States v. Tardy, 28 Fed. Cas. 15 (No. 16432) (C.C.D. Pa. 1817). On proof of other offenses, see 1 WIGMORE, EVIDENCE §§ 192-94 (3d ed. 1940), 2 WIGMORE, EVIDENCE §§ 300-70 (3d ed. 1940); 1 JONES, EVIDENCE 290-94 (5th ed. 1958); MCCORMICK, EVIDENCE 326-33, 345-46 (1st ed. 1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 213-14 (1962); 1 WHARTON, CRIMINAL EVIDENCE 492-567 (12th ed. 1955); 1 UNDERHILL, CRIMINAL EVIDENCE 447-507 (5th ed. 1956); Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956); Lacy, *Admissibility of Evidence of Crimes Not Charged in Indictment*, 31 ORE. L. REV. 267 (1952); Trautman, § 5 VAND. L. REV. 385, 403-10 (1952); Note, 29 MICH. L. REV. 473 (1931); Note, 37 MINN. L. REV. 608 (1953); Note, 70 YALE L.J. 763 (1961); Note, 7 U.C.L.A. L. REV. 463 (1960).

²⁴¹ Stone, *The Rule and Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 991-93 (1938). See United States v. Doebler, 25 Fed. Cas. 883, 886 (No. 14977) (C.C.E.D. Pa. 1832).

²⁴² Massei v. United States, 241 F.2d 895, 902 (1st Cir. 1957); Swann v. United States, 195 F.2d 689, 690 (4th Cir. 1952); Hargett v. United States, 183 F.2d 859, 862 (5th Cir. 1950); Lovely v. United States, 169 F.2d 386, 388 (4th Cir. 1948); United States v. Modern Reed & Rattan Co., 159 F.2d 656, 658 (2d Cir. 1947); United States v. Richmond, 57 F. Supp. 903, 906 (S.D. W. Va. 1944); Coulston v. United States, 51 F.2d 178, 180 (10th Cir. 1931); Jianole v. United States, 299 Fed. 496, 499 (8th Cir. 1924); Thompson v. United States, 283 Fed. 895, 896 (3d Cir. 1922); Shea v. United States, 236 Fed. 97, 104 (6th Cir. 1916); Fish v. United States, 215 Fed. 544, 551 (1st Cir. 1914); Dyar v. United States, 186 Fed. 614, 620 (5th Cir. 1911), citing 1 WIGMORE, EVIDENCE § 192 (see 3d ed. 1940).

²⁴³ United States v. Mitchell, 26 Fed. Cas. 1282 (No. 15789) (C.C.D. Pa. 1795). See Annot., 125 A.L.R. 1036, 1040 (1940).

words are erroneous. It is logical to conclude . . . that because a man was dishonest he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these premises. It cannot be shown that the accused has committed similar crimes to show that it is probable he committed the one charged."²⁴⁴

Mr. Justice Jackson, speaking for the Supreme Court stated: "Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."²⁴⁵ This was not the earlier common law rule, nor is it now the rule in some civil law countries.

A Court of Appeals reversed because of introduction of evidence of prior conviction of a similar offense.²⁴⁶ The error was not rendered harmless by the defendant's subsequent introduction of character evidence. It is possible that the defendant would not have introduced the latter evidence but for the introduction of the evidence of the conviction for the prior offense.

In general, the criminality of the conduct of which evidence is sought to be introduced is immaterial if it is otherwise relevant.²⁴⁷ The character rule is merely an exception. This exception is that conduct tending and offered to show bad moral character as evidence is inadmissible.²⁴⁸ Furthermore, admissibility for one purpose is not affected by inadmissibility for another.²⁴⁹ Justice Story, in speaking about the rule allowing evidence of other wrongs to show intent, stated:²⁵⁰

They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily

²⁴⁴ *Railton v. United States*, 127 F.2d 691, 692-93 (5th Cir. 1942). See 1 WIGMORE, EVIDENCE § 192 (3d ed. 1940); Notes and Comments, 70 YALE L.J. 763, 764 (1961).

²⁴⁵ *Michelson v. United States*, 335 U.S. 469, 475 (1948). The court cited 1 WIGMORE, EVIDENCE § 193 (3d ed. 1940).

²⁴⁶ *United States v. Modern Reed & Rattan Co.*, 159 F.2d 656, 658 (2d Cir. 1947).

²⁴⁷ 1 WIGMORE, EVIDENCE § 216 (3d ed. 1940); 2 WIGMORE, EVIDENCE § 305 (3d ed. 1940).

²⁴⁸ 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940).

²⁴⁹ 1 WIGMORE, EVIDENCE § 13 (3d ed. 1940). See Orfield, *Admission and Exclusion of Evidence in Federal Criminal Cases* 41 TEXAS L. REV. 617, 638-40 (1963).

²⁵⁰ *Wood v. United States*, 16 Pet. (41 U.S.) 342, 360 (1842).

embodied in the very substance of the rule; for whatever does legally conduce to establish the point in issue is necessarily embraced in it, and therefore, a proper subject of proof, whether it be direct or only presumptive.

Rule 311 of the Model Code of Evidence provides:²⁵¹

Subject to Rule 306, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

Rule 55 of the Uniform Rules of Evidence provides:²⁵²

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

Judge Bazelon has stated that "the rule is that evidence of other offenses is admissible when substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it, but otherwise inadmissible."²⁵³

Judge Goodrich has stated a rule favorable to evidence of other offenses in very broad terms: "Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."²⁵⁴

B. EXCEPTIONS

At an earlier time there had been a tendency to hold evidence of other offenses not admissible unless it came within a list of ex-

²⁵¹ MODEL CODE OF EVIDENCE rule 311 (1942).

²⁵² UNIFORM RULE OF EVIDENCE 55.

²⁵³ *Harper v. United States*, 239 F.2d 945, 946 (D.C. Cir. 1956). The court cited *Stone, The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938); *Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267 (1952).

²⁵⁴ *United States v. Stirone*, 262 F.2d 571, 576 (3d Cir. 1958). See also *United States v. Prince*, 264 F.2d 850, 853 (3d Cir. 1959); *Swann v. United States*, 195 F.2d 689, 690 (4th Cir. 1952); *Notes and Comments*, 70 YALE L.J. 763, 767 (1961).

ceptions.²⁵⁵ In 1868, Justice Field had stated: "The case of fraud . . . is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."²⁵⁶ Under the old approach of exceptions, evidence relative to some accepted purposes might be admitted without regard to its prejudicial content.²⁵⁷

The fact that the testimony offered as to a murder tended also to show another murder is not sufficient to exclude it, if it was otherwise competent.²⁵⁸ Where the indictment itself charges two murders committed at the same date and place, both may be shown.²⁵⁹ In a prosecution for unlawful abstraction of money from a bank, relevant evidence is admissible even though it shows other offenses of the same kind barred by the statute of limitations.²⁶⁰

A fact supplying a motive for the crime charged may be shown, though it may tend to show the defendant guilty of another offense. Thus it may be shown that one charged with counterfeiting had a motive to counterfeit as he was an abortionist who needed money in case of arrest.²⁶¹ It may be said that there are two classes of cases as to motive: (1) proof as to different criminal acts which are explainable as results of the same motive; and, (2) proofs of other and independent criminal acts which in and of themselves form the motive for committing the crime now under prosecution.²⁶²

In an income tax evasion case, the government may show the actual income of the defendant by the amount of his expenditures, including the payment of state fines.²⁶³ This does not violate the rule against evidence of other offenses. In a prosecution for abortion prior acts of abortion were admitted. Judge Holtzoff

²⁵⁵ See Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938).

²⁵⁶ *Lincoln v. Claflin*, 7 Wall. (74 U.S.) 132, 138-39 (1868). See also *Shea v. United States*, 236 Fed. 97, 102 (6th Cir. 1916); *Dyar v. United States*, 186 Fed. 614, 622 (5th Cir. 1911).

²⁵⁷ *Baker v. United States*, 227 F.2d 376, 377 (5th Cir. 1955).

²⁵⁸ *Moore v. United States*, 150 U.S. 57, 61 (1893).

²⁵⁹ *Pointer v. United States*, 151 U.S. 396, 400 (1894).

²⁶⁰ *Wolfson v. United States*, 101 Fed. 430, 433 (5th Cir. 1900).

²⁶¹ *Thompson v. United States*, 144 Fed. 14, 16 (1st Cir. 1906). See also *United States v. Johnson*, 254 F.2d 175, 176 (2d Cir. 1958).

²⁶² *Thompson v. United States*, 144 Fed. 14, 18 (1st Cir. 1906). The court cited 1 WIGMORE, EVIDENCE § 210 (1st ed. 1905) [§ 216 (3d ed. 1940)].

²⁶³ *United States v. Caserta*, 199 F.2d 905, 909 (3d Cir. 1952). The court cited 1 WIGMORE, EVIDENCE, §§ 215, 216 (3d ed. 1940).

stated: "While the bare fact that a defendant has committed other crimes is not in and of itself admissible against him, the fact that evidence otherwise competent and relevant would also show that the defendant committed other crimes, is no reason for its exclusion."²⁶⁴ The jury should be cautioned to consider the evidence only for the competent purpose.²⁶⁵

These other evidential acts need not be proved beyond a reasonable doubt.²⁶⁶ Judge Charles E. Clark has stated: "The requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; it operates on the whole case, and not on separate bits of evidence each of which need not be so proven; and it cannot be accorded a quantitative value other than as a general cautionary admonition."²⁶⁷ But another offense only vaguely evidenced may not be shown.²⁶⁸

Other offenses may be shown where they are a part of the *res gestae*.²⁶⁹ It has been stated broadly that where two distinct offenses are so inseparably connected that the proof of one necessarily involves proof of the other, on prosecution for one offense evidence proving it should not be excluded because it also proves the other.²⁷⁰ Attempts to obstruct the administration of justice were involved. Evidence is admissible "when it corroborates or supple-

²⁶⁴ *United States v. Harper*, 137 F. Supp. 4, 5 (D.D.C. 1956). See also *United States v. Montalvo*, 271 F.2d 922, 927 (2d Cir. 1959), citing 1 WIGMORE, EVIDENCE, §§ 215-16 (3d ed. 1940) and McCORMICK, EVIDENCE §157 at 332 (1954); *O'Dell v. United States*, 251 F.2d 704, 707 (10th Cir. 1958).

²⁶⁵ *Montgomery v. United States*, 203 F.2d 887, 891 (5th Cir. 1953).

²⁶⁶ McCORMICK, EVIDENCE 331 (1954).

²⁶⁷ *United States v. Valenti*, 134 F.2d 362, 364 (2d Cir. 1943), *cert. denied*, 319 U.S. 761 (1943).

²⁶⁸ *Fabacher v. United States*, 20 F.2d 736, 738 (5th Cir. 1927). See Annot., 3 A.L.R. 779, 784 (1919); Note, 3 VAND. L. REV. 779, 788 (1950).

²⁶⁹ *United States v. Alker*, 260 F.2d 135, 156-57 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959), citing 1 WIGMORE, EVIDENCE § 218 at 719 (3d ed. 1940); *Barnes v. United States*, 8 F.2d 832, 833 (8th Cir. 1925); *West v. United States*, 258 Fed. 413, 419 (6th Cir. 1919). See also *Lypp v. United States*, 159 F.2d 353, 355 (6th Cir. 1947); *United States v. Rubenstein*, 151 F.2d 915, 918 (2d Cir. 1945), *cert. denied*, 326 U.S. 766 (1945); *Carney v. United States*, 79 F.2d 821, 822 (6th Cir. 1935); 2 WIGMORE, EVIDENCE § 306 (3d ed. 1940).

²⁷⁰ *McCormick v. United States*, 9 F.2d 237, 239 (8th Cir. 1925); *Astwood v. United States*, 1 F.2d 639, 642 (8th Cir. 1924). See also *United States v. Bucciferro*, 274 F.2d 540, 542 (7th Cir. 1960); *United States v. Crowe*, 188 F.2d 209, 212 (7th Cir. 1951); *Schwartz v. United States*, 160 F.2d 718, 721 (9th Cir. 1947).

ments the offense charged."²⁷¹ Here the assault was the result of the substantive offense and threw light on the conspiracy charged against the defendant.

Judge Parker stated: "To bring evidence of other offenses within this rule, the test is not whether they have certain elements in common with the crime charged, but whether they tend to establish a preconceived plan which resulted in the commission of that crime."²⁷²

A leading opinion by Judge Learned Hand allows an exception to show by similar acts or incidents that the act on trial was not without guilty knowledge. In a prosecution for knowingly transporting a stolen car in interstate commerce, evidence of a previous sale of a stolen car is admissible.²⁷³ Likewise other offenses may be shown to prove that the act on trial was not unintentional. The trial judge has a wide range of discretion in deciding whether the probative value justifies admission. In one case, the Court of Appeals declined to reverse although it thought that evidence of offenses committed six years before might better have been excluded.²⁷⁴ It has been held that subsequent as well as prior acts are admissible for this purpose.²⁷⁵

²⁷¹ *Rodriguez v. United States*, 284 F.2d 863, 867 (5th Cir. 1960), *cert. denied*, 368 U.S. 1001 (1962).

²⁷² *Lovely v. United States*, 169 F.2d 386, 391 (4th Cir. 1948). The court cited 2 WIGMORE, EVIDENCE § 300 (2d ed. 1923).

²⁷³ *United States v. Brand*, 79 F.2d 605, 606 (2d Cir. 1935), *cert. denied*, 296 U.S. 654 (1936).

Judge Hand stated that "the argument [for exclusion] is based on the doctrine . . . that evidence of the receipt of other stolen goods is not admissible unless the prosecution proves that the accused knew them to have been stolen. At least in this circuit there is no such doctrine. . . . [T]he competence of such evidence does not depend upon conformity with any fixed conditions, such as upon direct proof of scienter, or the identity of the thief in the earlier instance, or of the victim, or the number of instances in which the accused received stolen goods, or the similarity of the goods stolen. These are all relevant circumstances but not necessary constituents. Nor can we see any basis for distinguishing between knowledge and intent in such cases. The judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge of the accused in the transaction under inquiry; that is all that can be said about the matter."

²⁷⁴ *United States v. Feldman*, 136 F.2d 394, 399 (2d Cir. 1943). (Clark, J., dissenting).

²⁷⁵ *Schmeller v. United States*, 143 F.2d 544, 551 (6th Cir. 1944).

In 1842, Mr. Justice Story stated for the Supreme Court that "where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."²⁷⁶ The rule had been early applied in cases of uttering bad money and spurious notes, conspiracy and perjury.

In one case the court, in reversing a conviction, said:²⁷⁷

We think, however, that such similar acts can be proved only when they were done sufficiently near, in point of time, to the act charged as fairly to throw some light upon the question of intent; when the similar act is so related in kind to the one charged as to illustrate the question of intent; when the similar acts are in fact acts of the same general nature related to the transactions out of which the alleged criminal acts arose; and, when, in fact, the similar acts are acts of the persons against whom that particular proof is directed.

The issue of nearness in time is largely in the discretion of the trial court,²⁷⁸ but the evidence of the other offense must be plain, clear and conclusive.²⁷⁹ Thus evidence of arrest for a similar offense in another district, where there was no indictment, is admissible. When showing intent the other offenses may be prior in time or subsequent.²⁸⁰ But as to knowledge, the other acts must

²⁷⁶ *Wood v. United States*, 41 U.S. (16 Pet.) 342, 360 (1842). See also Mr. Justice Story's decision in *Bottomley v. United States*, 3 Fed. Cas. 968, 971 (No. 1688) (C.C.D. Mass. 1840), cited favorably in *New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 599 (1886).

²⁷⁷ *Prettyman v. United States*, 180 Fed. 30, 36 (6th Cir. 1910). The court cited 1 WIGMORE, EVIDENCE § 302 (1st. ed. 1904). See also *Sutherland v. United States*, 92 F. 2d 305, 308 (4th Cir. 1937).

²⁷⁸ *Orloff v. United States*, 153 F.2d 292, 294 (6th Cir. 1946) (15 years not too long); *Kettenbach v. United States*, 202 Fed. 377, 383 (9th Cir. 1913), *cert. denied*, 229 U. S. 613 (1913); *Schultz v. United States*, 200 Fed. 234, 237 (8th Cir. 1912); *Walsh v. United States*, 174 Fed. 615 (7th Cir. 1909) (12 years not too long).

²⁷⁹ *Kraft v. United States*, 238 F.2d 794, 802 (8th Cir. 1956); *Gart v. United States*, 294 Fed. 66, 67 (8th Cir. 1923); *Paris v. United States*, 260 Fed. 529, 531 (8th Cir. 1919); *United States v. Cohen*, 73 F. Supp. 96, 100 (W.D. Pa. 1947).

²⁸⁰ *Waller v. United States*, 177 F.2d 171, 176 (9th Cir. 1949); *Shreve v. United States*, 103 F.2d 796 (9th Cir. 1939).

be prior in time.²⁸¹ According to one case,²⁸² remoteness concerns the weight of the evidence and not its admissibility. Prior acts, not offenses when committed, are not admissible to prove intent.²⁸³

The rule as to intent should not be extended.²⁸⁴ While evidence of other offenses is allowed to meet the presumption of accident or mistake in connection with intent it should not be allowed for other purposes. Evidence of other offenses is not needed in the case of a scheme to defraud. Where evidence of other offenses is admitted to show intent, the jury should be instructed as to the probative extent of the evidence so admitted.²⁸⁵ However, there is authority that in the absence of request no instruction need be given.²⁸⁶

Dean Wigmore has stated:²⁸⁷

It is not here necessary to look for a general scheme or to discover a united system in all the acts; the attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of the scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.

This language was quoted favorably in *United States v. Shiller*.²⁸⁸

In 1949, the Supreme Court held on a prosecution for filing false invoices with an agency of the United States, evidence of the presentation of false invoices other than those charged, in the indictment is admissible on the issue of intent.²⁸⁹

In 1958, the Third Circuit held: "The law is well settled that prior and subsequent acts whether they portray criminality or not

²⁸¹ *Waller v. United States*, 177 F.2d 171, 176 (9th Cir. 1949); *Witters v. United States*, 106 F.2d 837 (D.C. Cir. 1939); see *Slough & Knightly, Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 329 (1956); Notes, 37 MINN. L. REV. 608, 610 (1953); 25 VA. L. REV. 234 (1938).

²⁸² *Holt v. United States*, 42 F.2d 103, 106 (6th Cir. 1930). See Note, 29 MICH. L. REV. 473, 481 (1931).

²⁸³ *Haywood v. United States*, 268 Fed. 795, 806-07 (7th Cir. 1920).

²⁸⁴ *Marshall v. United States*, 197 Fed. 511, 515 (2d Cir. 1912); see *Grantello v. United States*, 3 F.2d 117, 119 (8th Cir. 1924); *Erber v. United States*, 234 Fed. 221, 227-28 (2d Cir. 1916).

²⁸⁵ *Orloff v. United States*, 153 F.2d 292, 295 (6th Cir. 1946); *Tedesco v. United States*, 118 F.2d 737, 740 (9th Cir. 1941).

²⁸⁶ *Smith v. United States*, 173 F.2d 181, 185 (9th Cir. 1949).

²⁸⁷ 2 WIGMORE, EVIDENCE § 302, at 200 (3d ed. 1940).

²⁸⁸ 187 F.2d 572, 574-75 (2d Cir. 1951).

²⁸⁹ *Nye & Nissen v. United States*, 336 U.S. 613 (1949). The court cited 2 WIGMORE, EVIDENCE §§ 302-04 (3d ed. 1940).

when substantially similar to the subject matter forming the basis of the indictment are probative to negate the inference that the crucial conduct was unintentional, innocent, inadvertent or the product of mistake."²⁹⁰ It must be shown that the prior acts are sufficiently similar to allow for some probative value.²⁹¹ Much is left to the discretion of the trial judge,²⁹² and Wigmore observes that: "It is hopeless to attempt to reconcile the precedents under the various heads; for too much depends on the tendency of the Court in dealing with a flexible principle."²⁹³

In a prosecution for conspiracy to violate the narcotics act, a prior conviction could be shown. The court stated that "it would seem that evidence of the prior conviction had a distinct probative value in that it tended to negative innocence of motive or intent."²⁹⁴ Thus anonymous intent may be shown by proof of other offenses.

Evidence of other offenses to show intent "is to be distinguished from evidence introduced to establish design or system which is usually involved when the very doing of the fact charged is still to be proved."²⁹⁵ There is "a sharp distinction between the requirements for showing intent and those for showing scheme or plan."²⁹⁶ The trial judge should pass on the offer of evidence beforehand to see whether it satisfies the proper test.

Wigmore states as to the theory of evidencing design or system:²⁹⁷

The clue to the difference is best gained by remembering that in the one class of cases the act charged is assumed to be done, and

²⁹⁰ *United States v. Alker*, 260 F.2d 135, 157 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959). The court cited *McCORMICK*, EVIDENCE 328-31, 345 (1954); 2 WIGMORE, EVIDENCE §§ 302, 305, 316, 321 (3d ed. 1940); 51 HARV. L. REV. 988 (1938).

²⁹¹ *Slough & Knightly, Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 328 (1956).

²⁹² *Schmeller v. United States*, 143 F.2d 544, 551 (6th Cir. 1944); *United States v. Feldman*, 136 F.2d 394, 399 (2d Cir. 1943), *aff'd*, 322 U.S. 487 (1944).

²⁹³ 2 WIGMORE, EVIDENCE § 302, at 201 (3d ed. 1940). See *United States v. Stirone*, 262 F.2d 571, 576 n.6 (3d Cir. 1958).

²⁹⁴ *Enriquez v. United States*, 188 F.2d 313, 316 (9th Cir. 1951). The court cited 2 WIGMORE, EVIDENCE §§ 302, 303 (3d ed. 1940).

²⁹⁵ *United States v. Bridell*, 180 F. Supp. 268, 273 (N.D. Ill. 1960). The court cited 2 WIGMORE, EVIDENCE § 302, at 196-205 (3d ed. 1940).

²⁹⁶ *United States v. Klass*, 166 F.2d 373, 378 (3d Cir. 1948). The court quoted 2 WIGMORE, EVIDENCE § 304, at 302 (3d ed. 1940).

²⁹⁷ 2 WIGMORE, EVIDENCE § 304, at 204 (3d ed. 1940). See *Harper v. United States*, 239 F.2d 945, 946-47 (D.C. Cir. 1956).

the mind asks only for something that will negative innocent intent; and the mere prior occurrence of an act similar in its gross features, i.e., the same doer and the same sort of act, but not necessarily the same mode of acting nor the same sufferer—may suffice for that purpose. But where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test.

Where a defendant was indicted for murder, and it appeared in evidence that the killing followed an attempt to rob, the lower court admitted over objection evidence tending to show that the defendant had committed other robberies in that neighborhood on different days, shortly before the killing took place.²⁹⁸ The Supreme Court held that the evidence was inadmissible for any purpose.²⁹⁹ Other cases have admitted evidence of other offenses to show identity.³⁰⁰ Of course, if identity is in fact not in issue, the evidence should not come in.³⁰¹ Where there is doubt that proof of the other offense will show identity, such proof should be excluded.³⁰² And when admitted proof of the other offenses should be clear and definite.

Only in exceptional cases may proof of other offenses be admitted. Such proof³⁰³

[i]s competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

²⁹⁸ *United States v. Boyd*, 45 Fed. 851, 869 (W.D. Ark. 1890); see McCORMICK, EVIDENCE 330-31 (1954); Note, 29 MICH. L. REV. 473, 477 (1931); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 330 (1956).

²⁹⁹ *Boyd v. United States*, 142 U.S. 450, 454 (1890); accord, *United States v. Magee*, 261 F.2d 609, 612 (7th Cir. 1958); *Sorenson v. United States*, 168 Fed. 785, 794 (8th Cir. 1909).

³⁰⁰ *Dean v. United States*, 246 Fed. 568, 574 (5th Cir. 1917) (but the defendant did not object properly). See also *Smith v. United States*, 173 F.2d 181, 185 (9th Cir. 1949).

³⁰¹ *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948).

³⁰² *Labiosa v. Government of Canal Zone*, 198 F.2d 282, 284 (5th Cir. 1952).

³⁰³ *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 294, (1901). This case was quoted favorably in *Burge v. United States*, 26 App. D.C. 524, 536 (D.C. Cir. 1906); *United States v. Harper*, 137 F. Supp. 4, 6 (D.D.C. 1956). See McCORMICK, EVIDENCE § 157, at 327 n.2 (1954); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1023-30 (1938).

In another case the court listed the following exceptions: (1) to prove intent; (2) to explain, illustrate, or characterize the act charged when such act is capable of more than one construction; (3) to rebut a claim of mistake or inadvertence; (4) where the crime is one of a series of swindles, or where the crime charged is part of a plan or system of criminal action.³⁰⁴

One exception allowing proof of other offenses is proving other like crimes by the defendant so nearly identical in method as to earmark them as the handiwork of the defendant.³⁰⁵ Another exception is admissions by conduct intended to obstruct justice.³⁰⁶ For example, it may be shown that the defendant before trial assaulted a witness who stated his intention to tell the truth.³⁰⁷ Also, evidence of other offenses may come in when the defendant takes the stand as a witness, by proof of his convictions of crime or by eliciting on cross-examination of the defendant his admissions as to other crimes or misconduct reflecting on his credibility.³⁰⁸

C. JUDICIAL DISCRETION & HARMLESS ERROR

Some decisions call for a balancing of considerations and stress the element of discretion.³⁰⁹ In one case, the Court of Appeals referred to discretion as a reason for affirming the trial judge's admitting evidence of other offenses.³¹⁰ But there is grave danger

³⁰⁴ *Weiss v. United States*, 122 F.2d 675, 682-88 (5th Cir. 1941), *cert. denied*, 314 U.S. 687 (1941). The discussion is only full. See also *Smith v. United States*, 173 F.2d 181, 185 (9th Cir. 1949).

³⁰⁵ *Coulston v. United States*, 51 F.2d 178, 180 n.1 (10th Cir. 1931). See *McCORMICK, EVIDENCE* § 157, at 328 (1954); *Annot.*, 22 A.L.R. 1006; *Note*, 70 *YALE L.J.* 763, 764 (1961); *Note*, 35 *CALIF. L. REV.* 131, 136 (1947).

³⁰⁶ *McCORMICK, EVIDENCE* § 157, at 330 (1954).

³⁰⁷ *Hass v. United States*, 31 F.2d 13, 14 (9th Cir. 1929).

³⁰⁸ See *Orfield, Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 *KAN. L. REV.* 447, 460-70 (1963); *McCORMICK, EVIDENCE* § 157, at 331 (1954); *Note*, 37 *MINN. L. REV.* 608, 616-17 (1953); *Note*, 70 *YALE L.J.* 763, 774-78 (1961).

³⁰⁹ *Boyer v. United States*, 132 F.2d 12, 13 (D.C. Cir. 1942), quoting 29 *MICH. L. REV.* 473, 480 (1931). See *United States v. Montalvo*, 271 F.2d 922, 927 (2d Cir. 1959), citing *McCORMICK, EVIDENCE* 332 (1954).

³¹⁰ *Neff v. United States*, 105 F.2d 688, 692 (8th Cir. 1939) (prosecution was for violation of the Mann Act). In *King v. United States*, 144 F.2d 729, 732 (8th Cir. 1944), *cert. denied*, 325 U.S. 854 (1944), remoteness in time was said to be in the trial judge's discretion, but similarity of the other offense would be determined on appeal from the record.

of unfairness where the discretion is exercised against the defendant so as to admit the evidence.³¹¹

If the incidental risk of prejudice in the minds of the jury is very great, and if the situation indicates hope by the government that its ulterior possibilities will seize the front of the stage, the evidence should be excluded. Thus, the government failed to justify the use of evidence that the defendant had been imprisoned by arguing that this tended to establish his personal ignorance of certain material events.³¹² It made no difference that the defendant later went on the stand and testified to the fact; as he might not have taken the stand but for this evidence. In a prosecution for robbery committed in a house of prostitution, it was error to allow testimony that the defendant had been engaged in keeping a house of prostitution; nor was the error cured by an instruction that such testimony was to be considered only as explaining the presence of the witness in the defendant's house at the time involved.³¹³ Such an explanation was neither necessary nor relevant, and the fact of the presence of the witness was not denied.

In an income tax prosecution, evidence of violation of OPA regulations is inadmissible where such proof would tend to create hostility and confusion of issues which far outweigh its value in proving the offense charged.³¹⁴

The government is not precluded from showing another offense by the fact that the defendant has been indicted for it, if such other offense could otherwise be shown.³¹⁵ Asking a co-defendant whether he had committed other offenses is not reversible error where defendant's objection was sustained and the jury was warned to imply nothing from the question.³¹⁶

In a prosecution for income tax evasion, admitting evidence of the defendant's conviction for possession of opium based on a

³¹¹ McCORMICK, EVIDENCE § 157, at 332 (1954). See Note, 70 YALE L.J. 763, 769 (1961).

³¹² McLendon v. United States, 13 F.2d 777, 778 (6th Cir. 1926).

³¹³ Robinson v. United States, 18 F.2d 185 (D.C. Cir. 1927).

³¹⁴ United States v. Klein, 131 F. Supp. 807, 809, 810 (S.D.N.Y. 1955). The court cited 1 WIGMORE, EVIDENCE § 616 (2d ed. 1923); WIGMORE, CODE OF EVIDENCE, RULE 11, and reviewed many federal cases. See Note, 70 YALE L.J. 763 n.2 (1961); 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940).

³¹⁵ Witters v. United States, 106 F.2d 837, 838, (D.C. Cir. 1939). See cases cited at 125 A.L.R. 1037 (1940).

³¹⁶ Whitaker v. United States, 5 F.2d 546 (1st Cir. 1925), *cert. denied*, 269 U.S. 569 (1925).

statement made to a federal agent was prejudicial error, although the defendant made no objection at the time but later moved to strike. The motion was overruled, and no cautionary instruction was given.³¹⁷ Admission cannot be justified on the basis that the statement covered both the offense charged and other offenses and that the two could not be segregated.

The rule against admission of other offenses applies whether the evidence is elicited from a government witness or from the defendant himself.³¹⁸ If the defendant takes the stand, he may be questioned as to other offenses to affect credibility, but not to prove the offense charged. In addition, defendant cannot complain of redirect examination affecting other offenses where he himself first brought out the matter on cross-examination.³¹⁹

Error in permitting proof of other offenses may sometimes be cured by instruction by the trial judge to disregard such evidence.³²⁰ But some defense attorneys prefer to have no instruction on such evidence, fearful that a judicial reminder will arouse the memory of the jurors, and give the evidence still more weight.³²¹ In some cases when it is apparent that the error is not curable, the appellate court will reverse despite the instructions.³²² The error may be so serious that neither striking out the evidence nor instructing the jury to disregard will cure the error.³²³

It has been held that evidence of other offenses is not reversible error when the evidence of the guilt of the defendant is strong,³²⁴ or if the jury could not have reached any other verdict. Thus, a court of appeals was unwilling to reverse although evidence of similar unconnected schemes to defraud by use of the mails was introduced.³²⁵

³¹⁷ *Sang Soon Sur v. United States*, 167 F.2d 431, 433 (9th Cir. 1948).

³¹⁸ *Weiner v. United States*, 20 F.2d 522 (3d Cir. 1927).

³¹⁹ *Casmano v. United States*, 13 F.2d 451 (6th Cir. 1926). See *O'Neal v. United States*, 240 F.2d 700, 702 (10th Cir. 1957).

³²⁰ *Heglin v. United States*, 27 F.2d 310, 313 (8th Cir. 1928); *Barnes v. United States*, 8 F.2d 832, 833 (8th Cir. 1925). Compare Note, 70 *YALE L.J.* 763, 765 (1961).

³²¹ *United States v. Tramaglino*, 197 F.2d 928, 932 n.2 (2d Cir. 1952).

³²² *Boyd v. United States*, 142 U.S. 450 (1892).

³²³ *Helton v. United States*, 221 F.2d 338, 340 (5th Cir. 1955).

³²⁴ *Whitaker v. United States*, 5 F.2d 546, 548 (9th Cir. 1925, *cert. denied*, 269 U.S. 569 (1925)); see *Heglin v. United States*, 27 F.2d 310, 313 (8th Cir. 1928); *Ryan v. United States*, 26 App. D.C. 74, 84 (D.C. Cir. 1905).

³²⁵ *United States v. Shurtleff*, 43 F.2d 944, 948 (2d Cir. 1930). See Note, 29 *MICH. L. REV.* 473, 481 (1931).

Where the fact of arrest of the defendant for another offense was inadvertently brought out, incidental to an attempt by the witness to fix the date of a certain event, there is no prejudicial error.³²⁶ Where a government witness on cross-examination by the defendant reveals the commission of an offense fifteen years previously there is no reversible error.³²⁷

In some cases, proof of other offenses may be harmless error where trial is by the court without a jury, but not if before a jury.³²⁸

The statute of limitations does not apply to evidence produced in support of an indictment. "Evidence of a prior offense, though barred by the statute of limitations, may be used to prove intent, motive, state of mind, etc., of the crime charged."³²⁹

V. THE PARTICULAR CRIME

That the test of relevancy is not standard in its application should by now be apparent to the reader. While the general approach remains the same, it now becomes necessary to examine in more detail the issue of relevancy in the context of specific criminal conduct.

A. COUNTERFEITING

1. *Theft Crimes*

In a prosecution for passing counterfeit notes, evidence may be given of the defendant's passing similar counterfeit notes in order to prove his knowledge that the note in question was a counterfeit.³³⁰ But if the indictment is for passing a counterfeit note of the Bank of the United States, evidence of passing a counterfeit note of another bank, at another time, is not admissible; and, if

³²⁶ *Berra v. United States*, 221 F.2d 590, 595 (8th Cir. 1955).

³²⁷ *United States v. Apuzzo*, 245 F.2d 416 (2d Cir. 1957).

³²⁸ *Smith v. United States*, 224 F.2d 58, 61 (5th Cir. 1955), *cert. denied*, 350 U.S. 885 (1955).

³²⁹ *United States v. Anzalone*, 100 F.Supp. 987, 989-90 n.6 (W.D. Pa. 1951) citing many cases), *rev'd on other grounds*, 197 F.2d 714 (3d Cir. 1952). See also *United States v. Hougendobler*, 218 Fed. 187 (E.D. Pa. 1914); *Wolfson v. United States*, 101 Fed. 430, 433 (5th Cir. 1900); *Dow v. United States*, 82 Fed. 904, 909 (8th Cir. 1897).

³³⁰ *York v. United States*, 241 Fed. 656, 659 (9th Cir. 1916); *Schultz v. United States*, 200 Fed. 234, 237 (8th Cir. 1912); *United States v. Roudenbush*, 27 Fed. Cas. 902, 903 (No. 16198) (C.C.E.D. Pa. 1832); *United States v. Doeblor*, 25 Fed. Cas. 883, 887 (No. 14977) (C.C.E.D. Pa. 1932).

received without objection by the defendant the jury will be instructed not to consider it.³³¹

The former article must have some similarity to the one in question.³³² The passing of the other article may have occurred before or after the one in question.³³³ In an indictment for uttering counterfeit coins, possession of other coins is admissible.³³⁴ In an indictment for uttering counterfeit five cent pieces, possession of a mold for counterfeit twenty-five cent pieces was admitted to show intent.³³⁵ In a prosecution for passing counterfeit bills, evidence showing the presence of the defendant at other places where identical bills were passed was held admissible to show intent.³³⁶ "It is well settled that, in a counterfeiting case, evidence of passing or attempting to pass similar counterfeit notes on other occasions is admissible on the question of defendant's intent which is indispensable to proof of the offense."³³⁷ A court has stated that "the fact that intent is in issue is not enough to let in evidence of similar acts unless they are 'so connected with the offense charged in part of time and circumstances as to throw light upon the intent:'"³³⁸ No fixed rule determines the length of time.³³⁹ Evidence tending to prove that the defendant became interested in counterfeiting some three years before the present charge is admissible "within the discretion of the trial judge."³⁴⁰

³³¹ *United States v. Roudenbush*, 27 Fed. Cas. 902, 903 (No. 16198) (C.C.E.D. Pa. 1832).

³³² *United States v. Roudenbush*, 27 Fed. Cas. 902, 903 (No. 16198) (C.C.E.D. Pa. 1832); *United States v. Doeblor*, 25 Fed. Cas. 883, 886 (No. 14977) (C.C.E.D. Pa. 1832).

³³³ *United States v. Doeblor*, 25 Fed. Cas. 883, 887 (No. 14977) (C.C.E.D. Pa. 1832).

³³⁴ *United States v. Burns*, 24 Fed. Cas. 1313, 1314 (No. 14691) (C.C.D. Ohio 1849). See 2 WIGMORE, EVIDENCE §§ 311-13 (3d ed. 1940).

³³⁵ *Bryan v. United States*, 133 Fed. 495, 500 (5th Cir. 1904).

³³⁶ *Carrull v. United States*, 184 F.2d 743 (8th Cir. 1950).

³³⁷ *United States v. Leitner*, 202 F. Supp. 688, 691 (S.D.N.Y. 1962); Note, 70 YALE L.J. 763, 767 (1961). The court cited 2 WIGMORE, EVIDENCE §§ 309, 312 (3d ed. 1940).

³³⁸ *Boyer v. United States*, 132 F.2d 12, 13 (D.C. Cir. 1942); *accord*, *Wolcher v. United States*, 200 F.2d 493, 497 (9th Cir. 1952), *cert. denied*, 350 U.S. 822 (1955).

³³⁹ *Mitchell v. United States*, 213 F.2d 951, 958 (9th Cir. 1954), *cert. denied*, 340 U.S. 912. The court cited 2 WIGMORE, EVIDENCE § 316(2) (3d ed. 1940).

³⁴⁰ *United States v. Corry*, 183 F.2d 155, 157 (2d Cir. 1950). The court cited 2 WIGMORE, EVIDENCE § 316(2) (3d ed. 1940).

2. Forgery

In an indictment for forgery, scienter may be proved by the fact of similar forged orders found in the possession of the defendant.³⁴¹ Obtaining money by a deed of trust on property gotten shortly before by a forged deed is admissible to show the intent in a prosecution for forging the deed.³⁴² In a prosecution for forgery of Chinese immigrant duplicate certificates, other forged duplicate certificates were admitted to show intent.³⁴³ In a prosecution for forgery of a pension check indorsement, forged vouchers were admitted as showing a "single scheme to defraud." They were admissible "to prove the guilty intent and knowledge with which the principal acts charged were done."³⁴⁴

3. Embezzlement

Evidence of other false dealings with the same bank was held admissible to show intent in a prosecution for making false entries in the books of a national bank.³⁴⁵ In a prosecution for misapplication of bank funds, instances of similar misapplication for three years previous was held admissible to show intent.³⁴⁶ It made no difference that the statute of limitations had run as to the earlier offense. In a prosecution for embezzlement and false entries, certain other false statements were held admissible on intent.³⁴⁷ The court stated in a prosecution for embezzlement of rationing coupons that "evidence of other offenses was admissible to show a fraudulent plan, scheme or design beginning with the giving away of a few coupons, going forward to the suggestion of pay, and moving logically to the acts in proof here as an integral part of it."³⁴⁸

³⁴¹ *United States v. Hinman*, 26 Fed. Cas. 324, 325 (No. 15370) (C.C.D.N.J. 1831).

³⁴² *United States v. Brooks*, 10 D.C. (3 MacArth.) 315, 317 (1879).

³⁴³ *Dillard v. United States*, 141 Fed. 303, 308 (9th Cir. 1905); see also *Ex parte Schorer*, 197 Fed. 67, 77 (E.D. Wis. 1912), citing 2 WIGMORE, EVIDENCE § 312 (1st ed. 1904). *Contra*, *Laughlin v. United States*, 92 F.2d 506, 508 (D.C. Cir. 1937).

³⁴⁴ *Withaup v. United States*, 127 Fed. 530, 532 (8th Cir. 1903). *But see* *Laughlin v. United States*, 92 F.2d 506, 509 (D.C. Cir. 1937) (dissent cited 1 WIGMORE, EVIDENCE § 315, at 509 (2d ed. 1923); *MacDonald v. United States*, 264 Fed. 733, 740 (1st Cir. 1920) (dissent at 751-52 cited 1 WIGMORE, EVIDENCE §§ 300, 304, 315 (1st ed. 1904)).

³⁴⁵ *Dorsey v. United States*, 101 Fed. 746, 756 (8th Cir. 1900). Judge Sanborn dissented.

³⁴⁶ *Wolfson v. United States*, 101 Fed. 430, 433 (5th Cir. 1900).

³⁴⁷ *Cravens v. United States*, 62 F.2d 261, 284 (8th Cir. 1932).

³⁴⁸ *Henderson v. United States*, 143 F.2d 681, 683 (9th Cir. 1944).

Where a plan has been shown of diverting bank funds by a certain method, a varying act, such as diversion in another manner, is not admissible.³⁴⁹

4. *Larceny*

Possession of a forged letter was held inadmissible as evidence in a prosecution for larceny of a trunk.³⁵⁰ In a prosecution for secreting and stealing mail contents, the defendant's destruction of mail shortly before by burning was held admissible to show intent.³⁵¹ Former possession of another car only vaguely evidenced was not admissible in a prosecution for theft of a motor vehicle.³⁵² But in a prosecution for theft of a motor vehicle, evidence of other offenses, such as stealing harnesses, is not reversible error where some of such evidence was not objected to and some was brought out on direct examination of the defendant and cross-examination of a witness. The offenses were interwoven, numerous cautions as to the evidence were given, and the evidence of guilt was overwhelming.³⁵³ Evidence of stealing other horses is admissible where defendant is being prosecuted for stealing horses.³⁵⁴ Where the defendant was charged with theft because he became a party to the theft by acting as a lookout, and the defendant denied that he knew what the other parties were doing, evidence of other like activities of the defendant was admissible to show the defendant's knowledge and intent.³⁵⁵ A subsequent transaction has been admitted to show intent.³⁵⁶

5. *Robbery*

Other similar prior assaults were admitted to show intent in a prosecution for assault with intent to rob.³⁵⁷ In a prosecution for robbery, a prior solicitation for help to rob the same man was ad-

³⁴⁹ *Flood v. United States*, 36 F.2d 444, 446 (9th Cir. 1929). See 29 MICH. L. REV. 473, 479 (1931).

³⁵⁰ *Ryan v. United States*, 26 App. D.C. 74, 83 (1905).

³⁵¹ *Chitwood v. United States*, 153 Fed. 551, 553 (8th Cir. 1907). Judge Sanborn, concurring in the result, thought it was error to receive in evidence testimony relative to burning of mail.

³⁵² *Fabacher v. United States*, 20 F.2d 736, 738 (5th Cir. 1927).

³⁵³ *Heglin v. United States*, 27 F.2d 310, 313 (8th Cir. 1928).

³⁵⁴ *Tinsley v. United States*, 43 F.2d 890, 893 (8th Cir. 1930).

³⁵⁵ *United States v. Platt*, 156 F.2d 326, 327 (7th Cir. 1946). The court cited 2 WIGMORE, EVIDENCE § 346 (3d ed. 1940).

³⁵⁶ *Waller v. United States*, 177 F.2d 171, 175 (9th Cir. 1949).

³⁵⁷ *Weathers v. United States*, 269 Fed. 254, 256 (9th Cir. 1921).

missible.³⁵⁸ The evidence tended to prove the defendant's "plan, purpose, and intent." In a prosecution for robbery at a house of prostitution, testimony that for half a year women had lured other men to the defendant's house of prostitution for robbery in collusion with the defendant was held inadmissible.³⁵⁹ In a prosecution for armed bank robbery occurring in South Bend, Indiana, it was reversible error to admit evidence that on two prior occasions the defendant had robbed a bank in Cicero, Illinois.³⁶⁰

6. *Burglary*

Evidence of a prior bank robbery may be admitted where the crime charged is burglary of a post office.³⁶¹ Defendant's counsel had brought out the fact on cross-examination. Cautioning the jury would avoid any prejudice.

7. *Extortion*

In a prosecution for receiving money under threat of informing, similar offenses were not admitted as intent was not in issue.³⁶² A subsequent attempt two years later to blackmail the victim was held admissible in an attempted extortion prosecution.³⁶³ Testimony as to a similar act subsequently committed is admissible to show "intent, plan or scheme."³⁶⁴

8. *Knowing Possession or Receipt of Stolen Goods*

To prove knowledge that the goods in question were stolen, it may be shown that at other times the defendant received stolen goods from the same person.³⁶⁵

Intent and knowing receipt of shoes stolen from a railway car can be proven by showing possession of other shoes stolen from cars at the same station.³⁶⁶ The essence of the offense is guilty knowledge. Such knowledge may be shown by competent, though

³⁵⁸ *Tomlinson v. United States*, 93 F.2d 652, 654 (D.C. Cir. 1937).

³⁵⁹ *Robinson v. United States*, 18 F.2d 185 (D.C. Cir. 1927).

³⁶⁰ *United States v. Magee*, 261 F.2d 609, 611 (7th Cir. 1958).

³⁶¹ *Kanner v. United States*, 34 F.2d 863, 866 (7th Cir. 1929).

³⁶² *Farkas v. United States*, 2 F.2d 644, 647 (6th Cir. 1924).

³⁶³ *United States v. Blount*, 229 F.2d 669, 671 (2d Cir. 1956). The court cited 2 WIGMORE, EVIDENCE § 352 (3d ed. 1940).

³⁶⁴ *United States v. Stirone*, 262 F.2d 571, 577 (3d Cir. 1958).

³⁶⁵ *Sapir v. United States*, 174 Fed. 219, 221 (2d Cir. 1909); *New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 599 (1886); *Bottomley v. United States*, 3 Fed. Cas. 968, 971 (No. 1688) (C.C.D. Mass. 1840).

³⁶⁶ *Degnan v. United States*, 271 Fed. 291, 293 (2d Cir. 1921).

circumstantial, evidence.³⁶⁷ In a prosecution for knowing possession of stolen cloth, evidence of possession of stolen bonds was excluded on the facts.³⁶⁸ The receipt of the bonds occurred almost two years after the offense charged. However, evidence of different stolen goods has been admitted.³⁶⁹ In a prosecution for receiving property stolen from the mails, admission of evidence of thefts from the mint and from a bank was not error, where it was inseparably interwoven with the offense charged and tended to prove intent, knowledge, and existence of a conspiracy.³⁷⁰ *Casmano v. United States*,³⁷¹ wrongly held that evidence of receipt of other goods stolen from the same place was not admissible. In a prosecution for receiving 2,000 dollars in currency, receipt of another stolen 400 dollars from the same parties was held admissible to show knowledge and intent.³⁷²

In these cases there should be no hard and fast requirement that it be proved that the defendant knew that the other property was stolen,³⁷³ although it has been held otherwise.³⁷⁴ Likewise, receiving similar stolen goods after the offense for which he is being tried will not be admitted to show knowledge earlier.³⁷⁵ Evidence tending to show that the defendant had committed the state crime of buying stolen property was admitted to show intent and knowledge under the National Stolen Property Act.³⁷⁶ In a prosecution for knowingly transporting stolen motor vehicles in commerce, evidence of a prior trip was admitted.³⁷⁷

³⁶⁷ *Kasle v. United States*, 233 Fed. 878, 888-90 (6th Cir. 1916).

³⁶⁸ *Wolf v. United States*, 290 Fed. 738, 745 (2d Cir. 1923).

³⁶⁹ *Nakutin v. United States*, 8 F.2d 491 (7th Cir. 1925).

³⁷⁰ *McCormick v. United States*, 9 F.2d 237, 238 (8th Cir. 1925).

³⁷¹ 13 F.2d 451 (6th Cir. 1926). But there was no reversal because the defendant failed to except and because the defendant himself first raised the issue on cross-examination.

³⁷² *Johnston v. United States*, 22 F.2d 1, 5 (9th Cir. 1927).

³⁷³ *United States v. Antrobus*, 191 F.2d 969, 971 (3d Cir. 1951). See *United States v. Brand*, 79 F.2d 605, 606 (2d Cir. 1935); *McCORMICK, EVIDENCE* § 157, at 329 n.13 (1954).

³⁷⁴ *Edwards v. United States*, 18 F.2d 402, 404 (8th Cir. 1927). See *McKusick, Techniques in Proof of Other Crimes to Show Guilty Knowledge and Intent*, 24 IOWA L. REV. 471, 475 (1939). See also *Niederluecke v. United States*, 21 F.2d 511 (8th Cir. 1927).

³⁷⁵ *Witters v. United States*, 106 F.2d 837, 840 (D.C. Cir. 1939). One judge would admit the evidence. He cited 1 WIGMORE, *EVIDENCE* § 325 (3d ed. 1940). See 25 VA. L. REV. 234 (1938).

³⁷⁶ *Kowalchuk v. United States*, 176 F.2d 873, 878 (6th Cir. 1949).

³⁷⁷ *United States v. Antrobus*, 191 F.2d 969, 971 (3d Cir. 1951).

B. FRAUD CRIMES

1. *False Representations*

It is not competent, in a prosecution for obtaining money under false pretenses, to admit evidence that the defendant had previously obtained money by means of other false representations.³⁷⁸ But it is competent to show that he had made previous false representations to others for the purpose of obtaining money from them.

Evidence of similar transactions at a previous time is relevant in a prosecution for using the mails to defraud. But this evidence is relevant only in so far as it goes to prove the intent.³⁷⁹ In a prosecution for false certification of checks by a bank president knowing the account to be deficient, prior approval of illegal stock speculations of the cashier by the defendant was admitted to show intent.³⁸⁰ In a prosecution for a false report to the comptroller by the president of a national bank, previous false reports were admitted to show intent.³⁸¹ Similar false representations to another person were admitted in a prosecution for false pretenses as to a stock guaranty.³⁸² In a prosecution for false pretenses based on forged deeds caused to be recorded, similar false records in another county were admitted to show intent and a general scheme to defraud.³⁸³ Where the defendant was charged with conspiracy and using the mails to defraud, a fraud similar to that charged, committed by the defendant and a third conspirator, was admitted against the defendant "to prove his fraudulent purpose toward the victim."³⁸⁴ But in a prosecution for false pretenses, testimony as to similar representations made two years before was excluded.³⁸⁵ Such representations did not show knowledge or intent. Evidence that the defendant on another occasion agreed to sell a similarly fraudulent export declaration was admitted to show "design and intent" in a prosecution for false and fraudulent statements in ship-

³⁷⁸ *Waight v. United States*, 28 Fed. Cas. 1337 (No. 17042) (C.C.D.C. 1844).

³⁷⁹ *United States v. Flemming*, 18 Fed. 907, 911 (N.D. Ill. 1883).

³⁸⁰ *Spurr v. United States*, 87 Fed. 701, 710 (6th Cir. 1898).

³⁸¹ *Bacon v. United States*, 97 Fed. 35, 41 (8th Cir. 1899).

³⁸² *Partridge v. United States*, 39 App. D.C. 571, 575 (D.C. Cir. 1913).

³⁸³ *MacKnight v. United States*, 263 Fed. 832, 838 (1st Cir. 1920).

³⁸⁴ *United States v. Reiburn*, 127 F.2d 525, 526 (2d Cir. 1942); see also *Allen v. United States*, 289 F.2d 235 (5th Cir. 1961).

³⁸⁵ *Boyer v. United States*, 132 F.2d 12, 13 (D.C. Cir. 1942).

pers' export declaration.³⁸⁶ In a prosecution for income tax evasion "evidence of collateral, similar or connected conduct with reference to his income tax is admissible to show his intention."³⁸⁷

The government was not permitted to show, in a prosecution for using the mails to defraud by false representations as to medical skill and eminence, that the defendant had been convicted three times of various offenses in the United States and other times in England.³⁸⁸ But, on principle, the government should have been permitted to prove the falsity of the representations by showing that the life of the defendant had been otherwise.³⁸⁹

Wigmore has noted:³⁹⁰

Knowledge of the falsity of the other representatives need not be shown It is the mere recurrence of similar incorrect (not necessarily false) representations which leads to the belief that they could not have been made innocently; we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

In a prosecution for use of the mails to defraud by bogus setting on a pretended turf exchange, it was held that other similar fraud by the defendants at another fake turf exchange was admissible to show knowledge and intent. But not an unrelated fraud by the defendants involving stock transactions was inadmissible.³⁹¹ Defendant, in a trial for conspiracy to defraud the United States by the use of counterfeits of the stamping devices used by the government inspectors, denied all knowledge that the counterfeit stamps had been procured or used. Evidence that he placed a government inspector at the factory under a previous contract on the factory payroll under an assumed name was not admissible. The evidence did not tend to show his knowledge that the counterfeit stamps were procured and used, and the question was not whether

³⁸⁶ *United States v. Leviton*, 193 F.2d 848, 852 (2d Cir. 1951), citing 2 WIGMORE, EVIDENCE §§ 301, 304 (3d ed. 1940); 3 VAND L. REV. 779 (1950).

³⁸⁷ *United States v. Bridell*, 180 F. Supp. 268, 273 (N.D. Ill. 1960).

³⁸⁸ *Dyar v. United States*, 186 Fed. 614, 620 (5th Cir. 1911).

³⁸⁹ 2 WIGMORE, EVIDENCE § 321, at 220 n.1 (3d ed. 1940).

³⁹⁰ 2 WIGMORE, EVIDENCE § 321, at 227 (3d ed. 1940). See *Green v. United States*, 188 F.2d 48 (D.C. Cir. 1951).

³⁹¹ *Shea v. United States*, 236 F.2d 97, 102 (6th Cir. 1916). See *McCORMICK*, EVIDENCE § 164, at 345 (1954). The other representations must be shown to be false. *Boyer v. United States*, 132 F.2d 12, 13 (D.C. Cir. 1942).

he had guilty knowledge, but whether he had any knowledge at all.³⁹²

2. *Fraudulent Transfers*

In a prosecution of a bankrupt for falsely scheduling and concealing assets, evidence of sham conveyances by the bankrupt and his wife to third parties was admissible to show a fraudulent purpose to defeat creditors.³⁹³ But in this case the evidence was withdrawn. Similarly, concealment of other property was admitted in a prosecution for concealment of a bankrupt's estate.³⁹⁴

3. *Sundry Frauds*

In an information for forfeiture for fraudulent undervaluation of imported goods, the defendant had entered twenty-nine importations of which the four charged were a part, during the years 1839 to 1840. Fifteen were before and ten after the four charged. All these invoices were overvalued and all asserted an exporter's discount which was not given. The Supreme Court, in an opinion by Mr. Justice Story, admitted "other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act."³⁹⁵ The Court stated that the principle applied in criminal cases as well as civil.

In a prosecution for making a false income tax return, evidence of failure to file a tax return for the preceding year is admissible to prove intent to defraud the government.³⁹⁶ False reports to the United States Comptroller seven years previously were admitted in a prosecution for false entry by a bank officer.³⁹⁷ Again the period of time of the earlier offenses is largely discretionary with the trial judge. In a prosecution for failing to furnish the Collector

³⁹² *MacDonald v. United States*, 264 Fed. 733, 738 (1st Cir. 1930). One judge dissented, asserting that the evidence was admissible as part of one general plan and in order to show design. *MacDonald v. United States*, *supra* at 740, 751, citing 3 WIGMORE, EVIDENCE §§ 300, 304, 315 (3d ed. 1940).

³⁹³ *Blodgett v. United States*, 161 F.2d 47, 51 (8th Cir. 1947). See 2 WIGMORE, EVIDENCE §§ 333-38 (3d ed. 1940).

³⁹⁴ *Lueders v. United States*, 210 Fed. 419, 423 (9th Cir. 1914).

³⁹⁵ *Wood v. United States*, 41 U.S. (16 Pet.) 342, 360 (1842).

³⁹⁶ *United States v. Sullivan*, 98 F.2d 79, 80 (2d Cir. 1938); *Emmich v. United States*, 298 Fed. 5, 9 (6th Cir. 1924), *cert. denied*, 266 U.S. 608 (1924). See also *Mitchell v. United States*, 208 F.2d 854, 857 (8th Cir. 1954); *Leeby v. United States*, 192 F.2d 331, 334 (8th Cir. 1951).

³⁹⁷ *Kettenbach v. United States*, 202 Fed. 377, 383 (9th Cir. 1913).

of Internal Revenue information as to a partnership, evidence of the defendant's refusal to furnish prior returns was admitted.³⁹⁸ But, in 1962, a court held that admission of the defendant's income tax returns for prior years, showing substantial income from gambling, for the asserted purpose of showing motive, intent, or wilful misconduct, was prejudicial error in a prosecution for false statements in later returns which showed income from a different source.³⁹⁹ The case had been tried by a jury. If tried by a judge the result might be different.⁴⁰⁰

In a prosecution for fraud and bribery of inspectors in performing a government contract for army shoes, the indictment charged conspiracy to buy and use outer and inner soles inferior to the contract requirements. Evidence of using inferior middle soles was admitted to show intent.⁴⁰¹

Charged with using the mails to defraud by investment circulars, defendant's solicitations of a similar sort a year previously, were admitted.⁴⁰² In a similar prosecution, various reports of the defendant were admitted.⁴⁰³ In one case similar circulars sent prior to the offense charged were admitted, but those sent afterwards were excluded.⁴⁰⁴ The same result was reached with regard to the sale of burial lots through mailed representations to other purchasers.⁴⁰⁵ It may be shown that the "same scheme and artifice"

³⁹⁸ *Pappas v. United States*, 216 F.2d 515, 518 (10th Cir. 1954).

³⁹⁹ *United States v. Accardo*, 298 F.2d 133, 136 (7th Cir. 1962).

⁴⁰⁰ *United States v. Iacullo*, 226 F.2d 788, 793 (7th Cir. 1955), *cert. denied*, 350 U.S. 966 (1955).

⁴⁰¹ *Sears v. United States*, 264 Fed. 257, 262 (1st Cir. 1920). *But cf. MacDonald v. United States*, 264 Fed. 733, 738 (1st Cir. 1920).

⁴⁰² *Packer v. United States*, 106 Fed. 906, 909 (2d Cir. 1901). See also *Goodman v. United States*, 273 F.2d 853, 857 (8th Cir. 1960), *But see Harper v. United States*, 143 F.2d 795, 803 (8th Cir. 1944); *Johnson v. United States*, 82 F.2d 500, 505 (6th Cir. 1936); *United States v. Sprinkle*, 57 F.2d 968, 969 (2d Cir. 1932); *United States v. Shurtleff*, 43 F.2d 944, 947 (2d Cir. 1930); *Kercheval v. United States*, 12 F.2d 904, 906 (8th Cir. 1926); *Hallowell v. United States*, 253 Fed. 865, 867 (9th Cir. 1918); *Farmer v. United States*, 223 Fed. 903, 911 (2d Cir. 1915); *Marshall v. United States*, 197 Fed. 511, 513 (2d Cir. 1912), which was not followed in later cases and overruled in *United States v. Walker*, 176 F.2d 564, 566 (2d Cir. 1949).

⁴⁰³ *Balliet v. United States*, 129 Fed. 689, 693 (8th Cir. 1904).

⁴⁰⁴ *McLendon v. United States*, 13 F.2d 777, 778 (6th Cir. 1926). Wigmore would admit the latter as well as the former. 2 WIGMORE, EVIDENCE § 341 (3d ed. 1940).

⁴⁰⁵ *Osborne v. United States*, 17 F.2d 246, 249 (9th Cir. 1927).

was afterwards used in another town in the same state.⁴⁰⁶ In one case "similar transactions not too remote in time" were admitted.⁴⁰⁷ In a prosecution for using the mails to defraud by sending a pretended remedy for a disease, "evidence of other and similar ventures" by the defendant admitted to show intent.⁴⁰⁸

In a prosecution for mail fraud in soliciting of funds for an orphanage, evidence of the defendant's alleged violation of federal income tax laws and threats of harm to a receiver appointed by a state court to take charge of the defendant's institution was inadmissible for any purpose, including a showing of intent to defraud.⁴⁰⁹

Charged with conspiracy to obtain land grants by fraudulent homestead claims, other instances of similar fraudulent claims made by the defendant in connivance with other persons were admitted.⁴¹⁰ Similarly, transactions in another part of the state and by a different method were admitted.⁴¹¹ In an action for fraudulent entry of homestead land on old soldiers' rights, similar arrangements with soldiers' widows were held properly admitted to show knowledge and intent.⁴¹² In a prosecution for misbranding medicine, circulars containing the same statements on the label were admitted.⁴¹³ Other prior acts of dishonesty were admitted in a prosecution for false claims against the government.⁴¹⁴ Prior similar offenses were admitted in a prosecution under the Securities Act of 1933,⁴¹⁵ and in a prosecution for conspiracy to defraud the United States.⁴¹⁶ Evidence of similar frauds perpetrated by inducing marriages on false representations to obtain money from victims, was admitted to show intent in a prosecution for transporting money in interstate

⁴⁰⁶ *Hatem v. United States*, 42 F.2d 40, 41 (4th Cir. 1930). See 29 MICH. L. REV. 473, 474 (1931).

⁴⁰⁷ *Butler v. United States*, 53 F.2d 800, 805 (10th Cir. 1931). See also *King v. United States*, 144 F.2d 729, 732 (8th Cir. 1944).

⁴⁰⁸ *Samuels v. United States*, 232 Fed. 536, 542 (8th Cir. 1916).

⁴⁰⁹ *Coleman v. United States*, 167 F.2d 837, 839 (5th Cir. 1948).

⁴¹⁰ *Jones v. United States*, 162 Fed. 417, 427 (9th Cir. 1908).

⁴¹¹ *Jones v. United States*, 179 Fed. 584, 610 (9th Cir. 1910).

⁴¹² *Jones v. United States*, 258 U.S. 40, 48 (1922).

⁴¹³ *Alberty v. United States*, 91 F.2d 461, 463 (9th Cir. 1937).

⁴¹⁴ *Roberts v. United States*, 137 F.2d 412, 415 (4th Cir. 1943), *cert. denied*, 320 U.S. 768 (1943).

⁴¹⁵ *Harper v. United States*, 143 F.2d 795, 803 (8th Cir. 1944).

⁴¹⁶ *Nye & Nissen Corp. v. United States*, 336 U.S. 613, 618 (1949). The Court cited 2 WIGMORE, EVIDENCE §§ 302-04 (3d ed. 1940).

commerce which had been gotten feloniously by fraud.⁴¹⁷ In a prosecution for transportation of a check with intent to defraud, evidence of other fraudulent conduct was admitted.⁴¹⁸

C. CRIMES AGAINST THE PERSON

1. *Homicide*

The government in a murder prosecution may prove an assault or a contemplated assault on a police officer for the purpose of escaping.⁴¹⁹ In a murder case where there was only one witness, evidence that the defendant threatened the life of such witness and made assaults on her some months after the killing was admissible.⁴²⁰ In a prosecution for murder of a police officer, claimed to have been committed in an effort to escape arrest for two other murders committed a few hours before, evidence as to the earlier homicide is admissible.⁴²¹ Evidence of a former robbery was admitted to show motive in a prosecution for murder of a police officer.⁴²²

Where a homicide was committed in the presence of three witnesses, it was held reversible error to permit one of those witnesses to testify that six months later the defendant was very disagreeable and tried to start a fight with another member of the party.⁴²³ The evidence tended to prove that the defendant was a dangerous man. In a prosecution for the murder of his wife, the government could not show that half an hour later he shot his mother-in-law because the record failed to show "such threats and declarations as might have made the latter crime reflect light upon the intent of the appellant in committing the earlier crime."⁴²⁴ The government could show that the defendant after shooting the

⁴¹⁷ *United States v. Walker*, 176 F.2d 564, 566 (2d Cir. 1949).

⁴¹⁸ *Miller v. United States*, 278 F.2d 691, 693 (9th Cir. 1960).

⁴¹⁹ *Bowman v. United States*, 267 Fed. 648, 651 (D.C. Cir. 1920); *Funk v. United States*, 16 App. D.C. 478, 494 (1900). See also *McHenry v. United States*, 276 Fed. 761 (D.C. Cir. 1921). See 25 IND. L. J. 64 (1949).

⁴²⁰ *Bowman v. United States*, 267 Fed. 648, 651 (D.C. Cir. 1920).

⁴²¹ *Copeland v. United States*, 2 F.2d 637, 639 (D.C. Cir. 1924).

⁴²² *Suhay v. United States*, 95 F.2d 890, 894 (10th Cir. 1938). The defendant was sentenced to death.

⁴²³ *Bird v. United States*, 180 U.S. 356, 360 (1901).

⁴²⁴ *Burge v. United States*, 26 App. D.C. 524, 537 (1906).

deceased pursued and shot the sister of the deceased in order to prove that the first act done was with deliberate intent to kill.⁴²⁵

In a prosecution for killing the paramour of his wife, where the defendant pleaded an unsound mind, the government can introduce evidence of his criminal relations with another woman to show his mental attitude towards his wife.⁴²⁶

In an English case of murder of a wife by arsenic in February, an attempt to kill another person by arsenic eight months later was admitted to negative the defendant's innocent possession of arsenic in February although the defendant relied on the defense of suicide rather than accident.⁴²⁷ This case was cited favorably in a decision of the Second Circuit.⁴²⁸

2. Assault

In a prosecution for perjury arising from a hearing on an injunction against a strike with violence, assault on another person contemporaneously was admitted.⁴²⁹ It had become an issue of fact whether the defendant had committed an assault. The evidence was admissible as a part of the *res gestae*.

3. Sexual Offenses

In a prosecution for assault on a female child aged nine by her physician, a prior similar instance with another child almost three years before was held inadmissible.⁴³⁰

It has been held that while evidence of other similar offenses is admissible to show intent in cases of assault with intent to rape and crimes involving a depraved sexual instinct, this is not true as to rape.⁴³¹ In a rape prosecution, where intercourse was admitted

⁴²⁵ *Copeland v. United States*, 152 F.2d 769 (D.C. Cir. 1945). The court cited 1 WIGMORE, EVIDENCE §§ 216-17 (3d ed. 1940). See also *Swann v. United States*, 195 F.2d 689, 692 (4th Cir. 1952).

⁴²⁶ *Bell v. United States*, 210 F.2d 711 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 956 (1953).

⁴²⁷ *Rex v. Armstrong*, 2 K.B. 555 (1922).

⁴²⁸ *United States v. Shurtleff*, 43 F.2d 944, 948 (2d Cir. 1930). But the federal case did not involve homicide.

⁴²⁹ *West v. United States*, 258 Fed. 413, 419 (6th Cir. 1919).

⁴³⁰ *Hall v. United States*, 235 Fed. 869, 870 (9th Cir. 1916). One judge dissented. The court cited 2 WIGMORE, EVIDENCE § 357 (1st ed. 1904). See 40 MINN. L. REV. 694 (1956).

⁴³¹ *Fairbanks v. United States*, 226 F.2d 251, 253 (D.C. Cir. 1955). One judge dissented. Compare *United States v. Stirone*, 262 F.2d 571, 576 n.9 (3d Cir. 1958); See also *Smith v. United States*, 173 F.2d 181, 184 (9th Cir.

and the only issue was that of consent, it is improper to admit evidence of a prior rape on another woman. However, the defendant by his own testimony may invite proof of other offenses.⁴³²

In an abortion prosecution, it is not proper to show motive by showing another abortion, particularly where it appears that the defendant had been granted a new trial as to such other abortion.⁴³³ But, in a subsequent case it was held that where the physician admitted treating the complaining witness at the time and place alleged by her and in the manner described by her, but claimed that the treatment was not designed to cause an abortion, testimony of two other women that the defendant agreed to and performed an abortion on each in the same manner and about the same time, is admissible.⁴³⁴ Had the performance of the treatment been in issue, then the evidence could not have been admissible. One judge disagreed as to the latter point and would let the evidence in even then.

One exception to the rule against proof of other offenses is that allowing such proof to show a propensity of illicit sexual relations with the particular person concerned in the offense on trial.⁴³⁵ It has been so held as to statutory rape. A later offense may be shown.⁴³⁶ In a prosecution for statutory rape proof of other offenses to prove the identity of the defendant as the perpetrator of the offense now charged was refused where such proof would be doubtful to solve the issue of identity and proof of the other offense was not clear and definite.⁴³⁷ Evidence of other similar offense, where, offered to prove propensity for illicit sexual relations with a particular person, is admissible in incest prosecutions.⁴³⁸

1949); *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948), *reversing* 77 F.Supp. 619 (E.D.S.C. 1948), noted in 22 TEMP. L. Q. 459 (1949). The decision of second trial court was affirmed, 175 F.2d 312 (1948), *cert. denied*, 338 U.S. 834 (1948).

⁴³² *O'Neal v. United States*, 240 F.2d 700, 702 (10th Cir. 1957).

⁴³³ *Thompson v. United States*, 30 App. D.C. 352, 360 (1908).

⁴³⁴ *Harper v. United States*, 239 F.2d 945, 947 (D.C. Cir. 1956). The court cited 2 WIGMORE, EVIDENCE § 304 (3d ed. 1940). A concurring judge cited 2 WIGMORE, EVIDENCE § 359 (3d ed. 1940).

⁴³⁵ *McCORMICK*, EVIDENCE § 157, at 328 (1954).

⁴³⁶ *Miller v. United States*, 207 F.2d 33 (D.C. Cir. 1953). See also *United States v. Lovely*, 77 F. Supp. 619, 623 (E.D.S.C. 1948).

⁴³⁷ *Labiosa v. Government of Canal Zone*, 198 F.2d 282, 284 (5th Cir. 1952).

⁴³⁸ *Hodge v. United States*, 126 F.2d 849 (D.C. Cir. 1942). See *United States v. Stirone*, 262 F.2d 571, 576 n.9 (3d Cir. 1958), citing Annot., 167 A.L.R. 565 (1947). *But cf.* 2 WIGMORE, EVIDENCE § 360 (3d ed. 1940).

In a prosecution for transporting a woman in interstate commerce for prostitution, the testimony of a woman, not the victim, that the defendant had first employed her as a domestic servant and shortly thereafter raped her was held incompetent and prejudicial.⁴³⁹ In the Fifth Circuit, evidence of other sexual offenses has been admitted.⁴⁴⁰ The Ninth Circuit at first rejected such evidence,⁴⁴¹ but later cases admitted it.⁴⁴² The Second Circuit held that evidence of similar activities with the same woman should be admitted.⁴⁴³ The First Circuit held that testimony of one of the women involved that the defendant had beaten her was admissible, as well as pornographic photographs of women not named in the indictment.⁴⁴⁴ The Eighth Circuit has taken a similar view.⁴⁴⁵ Evidence that the defendant stole gasoline for the trip, and after ridding himself of the girl took another to his room is admissible.⁴⁴⁶ Evidence tending to show that the defendant engaged in prostitution is admissible.⁴⁴⁷ The receipt without objection of evidence of acts occurring shortly before or after the offense charged in an indictment for violation of the White Slave Act is not plain error under Rule 52(b) of the Federal Rules of Criminal Procedure since such evidence was material as to intent.⁴⁴⁸

D. PUBLIC WELFARE CRIMES

1. *Dealing in Liquors*

Where intent is not material, in selling or possessing intoxicating liquors, prior sales are not admissible.⁴⁴⁹ But admission was held harmless error as other evidence clearly warranted convic-

⁴³⁹ *United States v. Krulewitch*, 145 F.2d 76, 80 (2d Cir. 1944). One judge dissented.

⁴⁴⁰ *Lindsey v. United States*, 227 F.2d 113, 117 (5th Cir. 1955); *Cohen v. United States*, 120 F.2d 139 (5th Cir. 1941).

⁴⁴¹ *Bonness v. United States*, 20 F.2d 754, 756 (9th Cir. 1927).

⁴⁴² *Lawrence v. United States*, 162 F.2d 156, 159 (9th Cir. 1947); *Bush v. United States*, 267 F.2d 483, 488 (9th Cir. 1959), citing *McCORMICK*, EVIDENCE § 157 (1954).

⁴⁴³ *United States v. Pape*, 144 F.2d 778, 780 (2d Cir. 1944), citing 2 WIGMORE, EVIDENCE §§ 357, 360 (3d ed. 1940). See also *United States v. Ratley*, 284 F.2d 553 (2d Cir. 1960).

⁴⁴⁴ *Jarabo v. United States*, 158 F.2d 509, 513 (1st Cir. 1946).

⁴⁴⁵ *Neff v. United States*, 105 F.2d 688, 690 (8th Cir. 1939).

⁴⁴⁶ *Kirby v. United States*, 160 F.2d 373 (8th Cir. 1947).

⁴⁴⁷ *United States v. Sorrentino*, 79 F. Supp. 425, 430 (M.D. Pa. 1948).

⁴⁴⁸ *Flanagan v. United States*, 308 F.2d 841, 842 (5th Cir. 1962).

⁴⁴⁹ *Carpenter v. United States*, 280 Fed. 598, 600 (4th Cir. 1922).

tion. In a prosecution for transportation, possession of other liquor was admitted "to negative the claim of accident."⁴⁵⁰ Prosecuted for illegally making liquor, a prior similar offense was admitted to contradict the defendant's direct testimony that he never worked at a still.⁴⁵¹

In a prosecution for removing liquor subject to tax, admission of conviction of a liquor offense ten years before when the defendant was only sixteen years old was reversible error.⁴⁵² In a unregistered still prosecution, an instruction that a prior conviction on a moonshine still charge might be considered "as evidence of a tendency or predisposition on the part of the defendant to violate the law" was held erroneous and ground for new trial.⁴⁵³ Evidence of prior offenses is not admissible in a prosecution for possession of an unregistered still and untaxed liquor.⁴⁵⁴ The offense did not involve specific intent. Evidence concerning bribery is inadmissible in a prosecution for conspiracy to possess intoxicating liquors; as is evidence of sales of liquor at other times and places.⁴⁵⁵

In a prosecution for carrying on the business of a wholesale liquor dealer without paying a special tax in 1910 and 1911, the issue was whether the business belonged to the defendant's brother and the defendant acted only as agent. Four acts of ownership by the defendant in a prior year, 1909, were held inadmissible.⁴⁵⁶ A conviction for disorderly conduct was held improperly admitted in a prosecution for maintaining a public place where liquor was sold.⁴⁵⁷ But a prior conviction for the same sort of offense would have been admissible.

In a prosecution for carrying on the business of a malt retail liquor dealer, it is reversible error to permit evidence showing that the defendant was at the time also keeping a bawdy house.⁴⁵⁸ In

⁴⁵⁰ *Holt v. United States*, 42 F.2d 103, 106 (6th Cir. 1930).

⁴⁵¹ *Peden v. United States*, 54 F.2d 916 (10th Cir. 1931).

⁴⁵² *Caldwell v. United States*, 78 F.2d 282 (4th Cir. 1935). See also *Simpkins v. United States*, 78 F.2d 594, 597 (4th Cir. 1935), citing 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940); *Lynch v. United States*, 12 F.2d 193 (4th Cir. 1926).

⁴⁵³ *United States v. Richmond*, 57 F. Supp. 903, 906 (S.D. W.Va. 1944).

⁴⁵⁴ *Baker v. United States*, 227 F.2d 376 (5th Cir. 1955).

⁴⁵⁵ *Weil v. United States*, 2 F.2d 145 (5th Cir. 1924).

⁴⁵⁶ *Day v. United States*, 220 Fed. 818, 819 (4th Cir. 1915). One judge dissented. See criticism at 2 WIGMORE, EVIDENCE § 368, at 292 n.2 (3d ed. 1940).

⁴⁵⁷ *Hazelton v. United States*, 293 Fed. 384 (9th Cir. 1923).

⁴⁵⁸ *Taliaferro v. United States*, 213 Fed. 25, 27 (5th Cir. 1914).

a prosecution for a liquor nuisance, possession of similar liquor at another time and place was held admissible.⁴⁵⁹ Cross-examination as to former convictions for unconnected liquor offenses was held improper in a prosecution for conspiracy to possess and transport.⁴⁶⁰ In a conspiracy prosecution to violate the internal revenue laws by manufacturing non-taxed liquor, evidence of a similar offense committed fifteen years previous was admissible only as to guilty knowledge and intent. It was reversible error not to give the defendant's requested instruction to that effect.⁴⁶¹

Former sales are admissible in a prosecution for maintaining a liquor nuisance, even prior to the Volstead Act.⁴⁶² In a prosecution for a liquor nuisance, a cab driver's testimony as to the furnishing by the defendant of liquor to his passengers brought there, was admitted although it also tended to show prostitution on the premises.⁴⁶³

In a prosecution for removing and concealing contraband whiskey, where the defendant testified on direct examination that whiskey had been placed in her automobile by another without her knowledge, cross-examination of the defendant about recent arrests for whiskey violations was proper on the issue of her knowledge of presence of the whiskey in the automobile.⁴⁶⁴

2. *Dealing In Drugs*

Convictions for similar sales in state courts prior to the date of the federal statute were admitted in a drug prosecution to show "state of mind and motive."⁴⁶⁵ Sales to other persons under similar circumstances may be admitted to show intent.⁴⁶⁶ Other sales are admissible where "there is some real connection between the

⁴⁵⁹ *Basich v. United States*, 276 Fed. 290 (9th Cir. 1921). Compare *Heitman v. United States*, 5 F.2d 887, 888 (9th Cir. 1925).

⁴⁶⁰ *Jianole v. United States*, 299 Fed. 496, 499 (8th Cir. 1924). See also *Crowley v. United States*, 8 F.2d 118, 119 (9th Cir. 1925). *But see* *Cook v. United States*, 28 F.2d 730, 732 (8th Cir. 1928); *Means v. United States*, 6 F.2d 975, 977 (2d Cir. 1925); *Rossini v. United States*, 6 F.2d 350, 352 (8th Cir. 1925).

⁴⁶¹ *Orloff v. United States*, 153 F.2d 292, 294 (6th Cir. 1946).

⁴⁶² *Carpenter v. United States*, 280 Fed. 598, 600 (4th Cir. 1922). See also *Brown v. United States*, 6 F.2d 522 (4th Cir. 1925).

⁴⁶³ *Harris v. United States*, 13 F.2d 849 (6th Cir. 1926).

⁴⁶⁴ *Ray v. United States*, 255 F.2d 473, 475 (4th Cir. 1958).

⁴⁶⁵ *Wallace v. United States*, 243 Fed. 300, 306 (7th Cir. 1917).

⁴⁶⁶ *Thompson v. United States*, 258 Fed. 196, 203 (8th Cir. 1919).

extraneous crime and the crime charged."⁴⁶⁷ Sales nine months before in another district were excluded.⁴⁶⁸ Where the defendant was a physician his issuance of prescriptions to a large number of other persons was admitted.⁴⁶⁹ The defendant's illegal prescription of liquor fifteen to twenty-five years previously is not admissible.⁴⁷⁰ The defendant's stealing shortly before of morphine from a drug store is not admissible.⁴⁷¹ Other offenses when admissible, must first be proved clearly and convincingly.⁴⁷² Acts prior to the period named in the indictment are admissible in a prosecution for conspiracy.⁴⁷³ A prior act may be shown to weaken the defendant's claim of no criminal intent.⁴⁷⁴

In a prosecution for selling paragonic in violation of the narcotics act, evidence of other sales was admissible.⁴⁷⁵ Prosecuted for concealing drugs, defendant's subsequent transactions were excluded.⁴⁷⁶ Evidence of previous possession is admissible in a prosecution for possession of marihuana.⁴⁷⁷

In a prosecution for selling narcotic drugs, evidence of similar subsequent acts was held admissible.⁴⁷⁸ In a prosecution for sale of heroin, evidence of a prior transaction was admitted to show intent, design, knowledge or lack of innocent purpose.⁴⁷⁹ But it has recently been held reversible error to present evidence as to

⁴⁶⁷ *Workin v. United States*, 260 Fed. 137, 140 (2d Cir. 1919).

⁴⁶⁸ *Paris v. United States*, 260 Fed. 529, 531 (8th Cir. 1919).

⁴⁶⁹ *United States v. Abdallah*, 149 F.2d 219, 223 (2d Cir. 1945); *Strader v. United States*, 72 F.2d 589, 591 (10th Cir. 1934); *Harris v. United States*, 273 Fed. 785, 791 (2d Cir. 1921); *Dysart v. United States*, 270 Fed. 77, 79 (5th Cir. 1921).

⁴⁷⁰ *Manning v. United States*, 287 Fed. 800, 805 (8th Cir. 1923).

⁴⁷¹ *Newman v. United States*, 289 Fed. 712, 716 (4th Cir. 1923).

⁴⁷² *MacLafferty v. United States*, 77 F.2d 715, 720 (9th Cir. 1935); *Gart v. United States*, 294 Fed. 66, 67 (8th Cir. 1923).

⁴⁷³ *Enriquez v. United States*, 188 F.2d 313, 316 (9th Cir. 1951), citing 2 WIGMORE, EVIDENCE §§ 302, 303 (3d ed. 1940); *Hood v. United States*, 23 F.2d 472, 475 (8th Cir. 1927).

⁴⁷⁴ *Gowling v. United States*, 64 F.2d 796, 799 (6th Cir. 1933).

⁴⁷⁵ *Morris v. United States*, 123 F.2d 957, 959 (5th Cir. 1941) (cross-examination).

⁴⁷⁶ *Hubby v. United States*, 150 F.2d 165, 168 (5th Cir. 1945).

⁴⁷⁷ *Wright v. United States*, 192 F.2d 595, 597 (9th Cir. 1951).

⁴⁷⁸ *United States v. Prince*, 264 F.2d 850, 853 (3d Cir. 1959).

⁴⁷⁹ *Medrano v. United States*, 285 F.2d 23, 25 (9th Cir. 1960).

other narcotics offenses not set forth in the indictment even though such other offenses occurred only a week later.⁴⁸⁰

E. CRIMES AGAINST THE STATE

1. *Treason*

In a prosecution for treason, it is not competent to prove that the defendant in the course of the treasonous acts joined with others in robbing the public mails, when there is already pending a separate indictment against him for the latter offense and there is no evidence that the mail was intercepted and rifled with a traitorous intent.⁴⁸¹

Where the overt act of treason has been proved by two witnesses, it is proper to go into evidence to show the course of the defendant's conduct at other places, and the purpose with which he went to the place where the treason occurred; and if he went, with a treasonable design, then the proof of treason is complete.⁴⁸² District Judge Peters, in his charge to the jury, stated that "evidence may be given of other circumstances, or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the one mentioned . . . to show the *quo animo*—the intent with which the act laid was committed."⁴⁸³

Chief Justice Marshall held, in the trial of Aaron Burr, that acts of treason elsewhere than charged are admissible since they "by showing a general evil intention, render it more probable that the intention in the particular case was evil."⁴⁸⁴

2. *Sedition*

In a prosecution under the Espionage Act of 1917, it was held that the defendant's utterances of pro-German sentiments from 1915 to the date of the indictment should be admitted to show intent.⁴⁸⁵ The defendant's contention that the statute did not re-

⁴⁸⁰ *Erwing v. United States*, 296 F.2d 320, 323 (9th Cir. 1961).

⁴⁸¹ *United States v. Mitchell*, 26 Fed. Cas. 1282 (No. 15789) (C.C.D. Pa. 1795).

⁴⁸² *Case of Fries*, 9 Fed. Cas. 826, 914 (No. 5126) (C.C.D. Pa. 1799) (such an instruction to the petit jury given by Circuit Justice Iredell).

⁴⁸³ *Id.* at 909.

⁴⁸⁴ *United States v. Burr*, 25 Fed. Cas. 52, 54 (No. 14692h) (C.C.D. Va. 1807).

⁴⁸⁵ *United States v. Schulze*, 253 Fed. 377, 381 (S.D. Cal. 1918), citing 1 WIGMORE, EVIDENCE § 367 (1st ed. 1904). See also *Dierkes v. United States*,

quire intent was rejected. In a prosecution for obstructing the recruiting service, threats that "he would like to shoot the President" were excluded as the offense was distinct.⁴⁸⁶ Prosecuted for publishing a circular opposing military service, the defendant's conversations expressing similar opinions were admitted to show intent.⁴⁸⁷ A resolution introduced by the defendant after the passage of the Selective Service Act was admitted to show his "attitude of mind towards the Conscription Act."⁴⁸⁸ Statements made at other times and places "not too remote" are admissible to show intent.⁴⁸⁹ It made no difference that another indictment was pending as to these other statements. Other similar statements "made at near-by times and places" were admitted to show intent and also to show the actual utterance of the words charged.⁴⁹⁰ But another case excluded other similar acts to show "whether it happened or did not happen."⁴⁹¹ Certain letters and documents written by one of the defendants similar to those mentioned in the indictment were admitted against one in a prosecution for conspiracy to cause insubordination and disloyalty.⁴⁹²

274 Fed. 75, 81 (6th Cir. 1921); *Boehner v. United States*, 267 Fed. 562, 563, (8th Cir. 1920); *Albers v. United States*, 263 Fed. 27, 31 (9th Cir. 1920); *Bold v. United States*, 265 Fed. 581, 584 (9th Cir. 1920); *Howenstine v. United States*, 263 Fed. 1, 5 (9th Cir. 1920); *Equi v. United States*, 261 Fed. 53, 56 (9th Cir. 1919), *cert. denied*, 251 U.S. 560 (1920); *Shidler v. United States*, 263 Fed. 1, 5 (9th Cir. 1920); *Equi v. United States*, 261 Fed. 53, 56 (9th Cir. 1919), *cert. denied*, 251 U.S. 560 (1920); *Shidler v. United States*, 257 Fed. 620, 623 (9th Cir. 1919); *Coldwell v. United States*, 256 Fed. 805, 811 (1st Cir. 1919); *Rhuberg v. United States*, 255 Fed. 865, 867 (9th Cir. 1919); *Kirchner v. United States*, 255 Fed. 301, 304 (4th Cir. 1918); *Deason v. United States*, 254 Fed. 259, 260 (5th Cir. 1918). *Contra*, *Kammann v. United States*, 259 Fed. 192, 194 (7th Cir. 1919); *Wolf v. United States*, 259 Fed. 388, 393 (8th Cir. 1919).

⁴⁸⁶ *Hall v. United States*, 256 Fed. 748, 749 (4th Cir. 1919).

⁴⁸⁷ *Herman v. United States*, 257 Fed. 601, 603 (9th Cir. 1919). See also *American Socialist Soc'y v. United States*, 266 Fed. 212, 214 (2d Cir. 1920); *Anderson v. United States*, 264 Fed. 75, 77 (8th Cir. 1920), *cert. denied*, 253 U.S. 495 (1920); *Lockhart v. United States*, 264 Fed. 14, 17 (6th Cir. 1920); *Wimmer v. United States*, 264 Fed. 11, 13 (6th Cir. 1920); *Seebach v. United States*, 262 Fed. 885, 887 (8th Cir. 1919); *Partan v. United States*, 261 Fed. 515, 517 (9th Cir. 1919), *cert. denied*, 251 U.S. 561 (1920).

⁴⁸⁸ *Wells v. United States*, 257 Fed. 605, 614 (9th Cir. 1919).

⁴⁸⁹ *White v. United States*, 263 Fed. 17, 20 (6th Cir. 1920).

⁴⁹⁰ *Schoborg v. United States*, 264 Fed. 1, 7 (6th Cir. 1920).

⁴⁹¹ *Holzmacher v. United States*, 266 Fed. 979, 981 (7th Cir. 1920). Compare 2 WIGMORE, EVIDENCE § 304 (3d ed. 1940).

⁴⁹² *United States v. Gordon*, 138 F.2d 174, 176 (7th Cir. 1943).

The defendants should have the right to offer his other utterances and acts to show his loyal intent.⁴⁹³ Where the defendant's possession of the German Kaiser's portrait was shown by the Government, questions were permitted as to whether he had kind feelings to the Kaiser and whether he had an intent to foster sentiment in favor of Germany.⁴⁹⁴ But in one case, the defendants' statements prior to and during the war "evidencing their opposition to Germany and the German cause and their patriotism towards the United States" were excluded.⁴⁹⁵

F. CONSPIRACY

Prior overt acts not charged in the indictment were admitted in a prosecution for conspiracy to defraud by collusive bids.⁴⁹⁶

The government has considerable leeway in offering evidence of other offenses in conspiracy prosecutions. In a prosecution for conspiracy to violate the prohibition and tariff laws, evidence of attempted bribery of an officer is admissible as part of the arrangements to carry out the conspiracy.⁴⁹⁷ In a major conspiracy prosecution, evidence is admissible although it also tends to show a minor conspiracy not charged in the indictment.⁴⁹⁸

In an antitrust prosecution, evidence that in a number of instances over several years preceding the indictment the defendant induced several hospitals to exclude physicians from their staffs because of their connection with low cost plans for medical services was admitted to show intent.⁴⁹⁹ In a conspiracy prosecution to violate the Public Utility Holding Company Act the court stated: "It was permissible however, to prove the acts of the earlier dates. They tended to prove the existence of the conspiracy and the intent of the conspirators."⁵⁰⁰ In a prosecution for conspiracy to obtain money by the use of force, testimony as to what had occurred during other strikes was admitted "to show that the scheme proved successful as a part of the proof that there had been a scheme."⁵⁰¹

⁴⁹³ 2 WIGMORE, EVIDENCE § 369, at 299 (3d ed. 1940).

⁴⁹⁴ *Erhardt v. United States*, 268 Fed. 326, 328 (7th Cir. 1920).

⁴⁹⁵ *Howenstine v. United States*, 263 Fed. 1, 7 (9th Cir. 1920).

⁴⁹⁶ *Houston v. United States*, 217 Fed. 852, 858 (9th Cir. 1914).

⁴⁹⁷ *Hogan v. United States*, 48 F.2d 516, 518 (5th Cir. 1931).

⁴⁹⁸ *Haffa v. United States*, 36 F.2d 1, 3 (7th Cir. 1929).

⁴⁹⁹ *American Medical Ass'n v. United States*, 130 F.2d 233, 250 (D.C. Cir. 1942).

⁵⁰⁰ *Egan v. United States*, 137 F.2d 369, 381 (8th Cir. 1943).

⁵⁰¹ *United States v. Compagna*, 146 F.2d 524, 528 (2d Cir. 1944).

Testimony as to the relationship of the companies prior to the dissolution decree of 1911 was held admissible in a prosecution for conspiracy to violate the Anti-Trust Act.⁵⁰² But it seems improper to go back three decades.

G. MISCELLANEOUS

1. *Perjury*

In a prosecution for perjury by falsely valuing imported goods, thirty-five letters indicating a general design of the kind, covering more than three years, were admitted as showing a false swearing with intent to defraud.⁵⁰³ Acquisition of state school lands by similar methods was admitted to show intent, purpose, design, or knowledge in a prosecution for conspiracy to suborn perjury in proceedings for the purchase of public lands.⁵⁰⁴

2. *Bribery*

In a prosecution for offering and giving a bribe to two prohibition agents, it is reversible error to introduce evidence that on an independent occasion he offered a bribe to a United States commissioner for accepting a bond for some unidentified person.⁵⁰⁵ Where there is no question of a prohibition officer's intent in taking a bribe and the only question is whether or not he solicited and took it, on which the testimony is in direct conflict, evidence of a prior violation of the liquor law is irrelevant and inadmissible.⁵⁰⁶

3. *Arson*

In a prosecution for arson of a yacht for insurance in October, 1910, evidence of the burning of another yacht in October, 1909, and of an automobile in September, 1910, under similar circumstances to insurance was held reversible error.⁵⁰⁷

4. *Miscellaneous Offenses*

In a prosecution for keeping a house of ill-fame, the defendant's previous conduct of houses of ill-fame was admitted to show guilty knowledge.⁵⁰⁸

⁵⁰² *American Tobacco Co. v. United States*, 147 F.2d 93, 119 (6th Cir. 1944).

⁵⁰³ *United States v. Wood*, 39 U.S. (14 Pet.) 430 (1840).

⁵⁰⁴ *Williamson v. United States*, 207 U.S. 425, 451 (1908).

⁵⁰⁵ *Cucchia v. United States*, 17 F.2d 86 (5th Cir. 1927).

⁵⁰⁶ *Crinnian v. United States*, 1 F.2d 643, 645 (6th Cir. 1924). See, as to conspiracy to accept bribes, *Harvey v. United States*, 23 F.2d 561, 563 (2d Cir. 1928).

⁵⁰⁷ *Fish v. United States*, 215 Fed. 544, 551 (1st Cir. 1914).

⁵⁰⁸ *De Four v. United States*, 260 Fed. 596, 598 (9th Cir. 1919).

Other fraudulent acts at the time were admitted in a prosecution for fraud by election inspectors in counting votes.⁵⁰⁹

The subsequent adultery of the defendant with the receiver of the letter was held irrelevant in a prosecution for mailing lewd letters.⁵¹⁰ In a prosecution for unlawful destruction of salmon, takings of salmon after the date charged was admitted to show intent.⁵¹¹ In an abstrusion of justice prosecution, another related and inseparable offense was admitted.⁵¹² Charged with aiding and abetting and counselling to evade the draft, defendants similar transactions with another person were admitted.⁵¹³ In a prosecution for violating ration orders and maximum price regulations, admissions of the defendant as to other similar offenses were excluded.⁵¹⁴

VI. EXPERIMENTAL AND SCIENTIFIC EVIDENCE

In a murder prosecution, it was held to be within the discretion of the court to refuse a request of the defendant that a gun might be shot off in the presence of a deputy marshal in order to test how it threw the shot.⁵¹⁵ In a prosecution for conspiracy to violate the National Prohibition Act, in which a government witness testified to conversations heard on tapping telephone wires, refusal of an application of the defendants to make an experimental test of the witness' ability to identify voices heard over telephone was held not erroneous, as being in the discretion of the trial judge. The conditions would not be similar.⁵¹⁶ In a trial for conspiracy

⁵⁰⁹ *United States v. Pleva*, 66 F.2d 529, 531 (2d Cir. 1933).

⁵¹⁰ *Safer v. United States*, 87 Fed. 329 (8th Cir. 1898).

⁵¹¹ *Alaska Packers' Ass'n v. United States*, 244 Fed. 710, 713 (9th Cir. 1917).

⁵¹² *Astwood v. United States*, 1 F.2d 639, 642 (8th Cir. 1924).

⁵¹³ *United States v. Bradley*, 152 F.2d 425, 426 (3d Cir. 1945).

⁵¹⁴ *Kempe v. United States*, 151 F.2d 680, 687 (8th Cir. 1945).

⁵¹⁵ *Ball v. United States*, 163 U.S. 662, 673 (1896). See 2 WIGMORE, EVIDENCE § 457, at 468 (3d ed. 1940).

On experimental and scientific evidence, see 1 WIGMORE, EVIDENCE §§ 165(a), 165(b) (3d ed. 1940); 2 WIGMORE, EVIDENCE §§ 441-60 (3d ed. 1940); 3 WIGMORE, EVIDENCE §§ 997-99 (3d ed. 1940); MCCORMICK, EVIDENCE 359-83 (1954); 2 WHARTON, CRIMINAL EVIDENCE §§ 666-70, 682-83 (12th ed. 1955); 2 JONES, EVIDENCE §§ 455-57 (5th ed. 1958); 1 UNDERHILL, CRIMINAL EVIDENCE §§ 135-55 (5th ed. 1956); 2 UNDERHILL, CRIMINAL EVIDENCE § 517 (5th ed. 1956); 34 ILL. L. REV. 206 (1939); 9 N.C.L. REV. 453 (1931); Annot., 8 A.L.R. 18 (1920); Annot., 85 A.L.R. 479 (1933).

⁵¹⁶ *Green v. United States*, 19 F.2d 850, 852 (9th Cir. 1927), *affirmed without discussion of the point*, 277 U.S. 438 (1928). See 2 WIGMORE, EVIDENCE § 443, at 428 (3d ed. 1940); 34 ILL. L. REV. 206 (1939).

to manufacture intoxicating liquor, tests of alcoholic contents may be made by means of an ebulliometer, a method used throughout the country in liquor cases, the accuracy of which has not been challenged.⁵¹⁷

A physician who had long experience as a medical examiner could express his own opinion that a man had been killed with a .38 caliber bullet, although the experiment was conducted out of the presence of the jury.⁵¹⁸

Where the government conducts tests and experiments, there seem to be no cases permitting the defendant to have discovery before trial.⁵¹⁹ On principle such discovery should be available. In December, 1952, the Advisory Committee on Criminal Rules of the Judicial Conference proposed to give the defendant discovery before trial as to objects "which are within the possession, custody or control of the government, including . . . the results of or reports of physical examinations and scientific tests, experiments and comparisons." Rule 16 would be amended to that effect. Under existing law in civil cases, notice to the adversary and opportunity to be present are not required.⁵²⁰ But a federal court has contrasted, as to reliability, experiments where such opportunity and notice is given and where they are not.⁵²¹ Perhaps notice should be required and an impartial person be appointed to conduct the experiment.⁵²²

Fingerprints may be taken at the time of arrest even though no authorization is given either by a federal or state statute.⁵²³ Where fingerprints are voluntarily taken of a person not yet arrested, a

⁵¹⁷ *Clift v. United States*, 22 F.2d 549 (6th Cir. 1927).

⁵¹⁸ *United States v. Rees*, 193 F. Supp. 849, 858 (D. Md. 1961). The court cited *McCORMICK*, EVIDENCE ch. 20 (1954).

⁵¹⁹ *Orfield*, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 250 (1957).

⁵²⁰ *McCORMICK*, EVIDENCE § 169, at 362 (1954).

⁵²¹ *Waters-Pierce Oil Co. v. Van Elderen*, 137 Fed. 557, 570 (8th Cir. 1905). See 34 ILL. L. REV. 206, 208 (1939); 60 YALE L. J. 626, 640 (1951).

⁵²² *McCORMICK*, EVIDENCE § 169, at 362 (1954). For cases not requiring notice see *Goodall v. United States*, 180 F.2d 397, 402 (D.C. Cir. 1950), *cert. denied*, 339 U.S. 987 (1950), discussed in Annot., 17 A.L.R. 2d 1070 (1951); *Laney v. United States*, 294 Fed. 412, 415 (D.C. Cir. 1923).

⁵²³ *United States v. Keegan*, 141 F.2d 248, 255 (2d Cir. 1944); *United States v. Kelly*, 55 F.2d 67, 68 (2d Cir. 1932) discussed in Annot., 83 A.L.R. 122 (1933). See 1 WIGMORE, EVIDENCE § 151(a) (3d ed. 1940); 2 WIGMORE, EVIDENCE §§ 414, 414(a) (3d ed. 1940); 8 WIGMORE, EVIDENCE § 2265, at 387 (rev. ed. 1961); *Inbau*, *Scientific Evidence in Criminal Cases, Finger Prints and Palm Prints*, 25 J. CRIM. L., C. & P.S. 500, 514 (1934).

motion to suppress will not lie.⁵²⁴ Footprints and the shoes of the defendant may be introduced in evidence by the government.⁵²⁵

There may be chemical analyses of poisons and narcotics.⁵²⁶ There may be testimony as to ballistics. Expert testimony that the bullet extracted from the decedent's head was shot from the pistol found in the defendant's possession is admissible.⁵²⁷ The science of spectroscopy was used to determine that the particles of metal contained in a fingernail file were from a bullet where it was shown that the noses of the bullets and those found in the defendant's possession had been similarly scraped.⁵²⁸

A federal district court has stated:⁵²⁹

[Use] of radar equipment in determining the speed of a motor vehicle . . . like the use of speedometers, cameras, and x-rays, has now reached such general acceptance . . . that its no longer necessary for the prosecution to offer expert testimony . . . to explain the theory and operation of the radar equipment It is sufficient to show that the equipment has been properly tested and checked, that it was manned by a competent operator, that proper operative procedures were followed, and that proper records were kept."

In one of the Hiss trials, the judge held that psychiatric testi-

⁵²⁴ *United States v. McCarthy*, 297 F.2d 183 (7th Cir. 1961).

⁵²⁵ *Downey v. United States*, 263 F.2d 552 (10th Cir. 1959). On footprints see 1 WIGMORE, EVIDENCE § 151(a) (3d ed. 1940); 2 WIGMORE, EVIDENCE §§ 415, 660 (3d ed. 1940); 8 WIGMORE, EVIDENCE § 2285, at 389 (rev. ed. 1961).

⁵²⁶ *W. B. Wood Mfg. Co. v. United States*, 292 Fed. 133 (8th Cir. 1923); *Samuels v. United States*, 232 Fed. 536, 542 (8th Cir. 1916).

⁵²⁷ *Laney v. United States*, 294 Fed. 412, 416 (D.C. Cir. 1923). See *Goodall v. United States*, 180 F.2d 397, 402 (D.C. Cir. 1950), *cert. denied*, 339 U.S. 987 (1950), discussed in Annot., 17 A.L.R.2d 1070 (1951).

⁵²⁸ *Medley v. United States*, 155 F.2d 857, 860 (D.C. Cir. 1946), *cert. denied*, 328 U.S. 873 (1946). See 21 NOTRE DAME LAW. 354 (1946); Annot., 66 A.L.R. 373 (1930); Annot., 26 A.L.R.2d 892 (1952); 2 WIGMORE, EVIDENCE § 417(a) (3d ed. 1940); Conrad, *Evidential Implications of the Dermal Nitrate Test for Gunpowder Residues*, 44 MARQ. L. REV. 500 (1961).

⁵²⁹ *United States v. Dreox*, 156 F. Supp. 200, 208 (D. Md. 1957). The court cited *Kopper, Symposium: Radar Speedometers*, 16 MD. L. REV. 1, 17 (1956); 33 N.C.L. REV. 343 (1955). See also 30 N.C.L. REV. 385 (1952). See MCCORMICK, EVIDENCE 363 (1954); 2 WHARTON, CRIMINAL EVIDENCE 597-99 (12th ed. 1955); 2 WIGMORE, EVIDENCE §§ 417(b), 665(a) (3d ed. 1940); 23 TENN. L. REV. 784 (1955).

mony was admissible to impeach the credibility of the government's key witness.⁵³⁰

The subject of handwriting and questioned documents has been dealt with by the author in a separate discussion of the Opinion Rule.

When faced with the question of the admissibility of the results of a lie detector examination, the first American case on the problem announced the determinative test to be whether the supporting theory had gained "general acceptance" among "physiological and psychological authorities."⁵³¹ The court held that the test was not met, and rejected the evidence. When the defendant selects his own examiner and without any agreement with the government, submits to the test, and offers the result in evidence, it will be excluded.⁵³² A defendant charged with indecent assault cannot compel the complaining witness to undergo a lie detector test.⁵³³

A policeman was permitted to testify that the defendant was told that the lie detector indicated that he was lying.⁵³⁴ The defendant had confessed after taking a polygraph test. The testimony was admissible to prove that the defendant's confession was voluntary. But it was not receivable to show that the defendant was lying. Possibly the decision should be extended to using such evidence to impeach or rehabilitate witnesses.⁵³⁵ In a civil action the trial court admitted the results of the lie detector test for the limited purpose of impeaching the credibility of the insured claimant.⁵³⁶

⁵³⁰ *United States v. Hiss*, 88 F. Supp. 559, 560 (S.D.N.Y. 1950). The court cited 3 WIGMORE, EVIDENCE §§ 924(a), 931, 932, 935, 997(b), 998(b) (3d ed. 1940); see also MODEL CODE OF EVIDENCE rules 106, 401, 409 (1942).

⁵³¹ *Frye v. United States*, 293 Fed. 1013, 1014 (D.C. Cir. 1923); noted approvingly 24 COLUM. L. REV. 429 (1924), 37 HARV. L. REV. 1138 (1925), 33 YALE L.J. 771 (1924). But see McCORMICK, EVIDENCE §§ 170, 174 (1954); 3 WIGMORE, EVIDENCE § 999 (3d ed. 1940); 8 WIGMORE, EVIDENCE § 2265, at 400 (rev. ed. 1961). Compare Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L. J. 694 (1961). See Newsweek, April 29, 1963, pp. 82-83.

⁵³² See McCORMICK, EVIDENCE § 174, at 370-71 (1954).

⁵³³ *Larkin v. United States*, 144 A.2d 100, 104 (D.C. Munic. Ct. of App. 1958).

⁵³⁴ *Tyler v. United States*, 193 F.2d 24, 31 (D.C. Cir. 1951), cert. denied, 343 U.S. 908 (1952).

⁵³⁵ 24 GA. B.J. 286, 291 (1961).

⁵³⁶ *California Ins. Co. v. Allen*, 235 F.2d 178, 180 (5th Cir. 1956), citing many writings.

Where a witness testified that the defendant first agreed to take a lie detector test, but later refused, the trial judge in sustaining objection to part of the answer on the grounds that there was a difference of opinion as to the scientific validity of such a test, did not create any unfavorable inference.⁵³⁷ A new trial was denied for newly discovered evidence when the defendant submitted the results of a lie detector test.⁵³⁸ Evidence of the defendant as to the result of a lie detector test was excluded in a prosecution for bribery.⁵³⁹ Under Rule 52 of the Federal Rules of Criminal Procedure a remark by the United States Attorney in cross-examination of a defendant as to the defendant's offer to take a lie-detector test that he "would not give a nickel for a dozen of them," while not commendable, was not reversible error.⁵⁴⁰

In 1962, the Supreme Court of Utah held, subject to specified qualifications, that a lie detector test is admissible on stipulation.⁵⁴¹

In one case, the prosecutrix in a statutory rape case was impeached by letters admitting that her accusations were false. For the sole purpose of rehabilitating the witness, the government introduced a recording of her subsequent interview with a psychiatrist while she was under the influence of sodium-pentothal. The court of appeals reversed.⁵⁴² The court cited an article,⁵⁴³ prepared jointly by two Yale Law School and two Yale Medical School professors, concluding that narcoanalysis is by no means an infallible tool nor should it be regarded by psychiatrists as truth. The court held it

⁵³⁷ *United States v. Bando*, 244 F.2d 833, 841 (2d Cir. 1957). See also *Aetna Ins. Co. v. Barnett Bros.*, 289 F.2d 30, 34 (8th Cir. 1961), noted 24 GA. B.J. 286 (1961).

⁵³⁸ *United States v. Stromberg*, 179 F. Supp. 278, 279 (S.D.N.Y. 1959). The court cited 3 WIGMORE, EVIDENCE § 999 (3d ed. 1940).

⁵³⁹ *Marks v. United States*, 260 F.2d 377, 382 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959). See Highleyman, *The Deceptive Certainty of the "Lie Detector"*, 10 HASTINGS L.J. 47, 50 (1958).

⁵⁴⁰ *Horton v. United States*, 256 F.2d 138, 141 (6th Cir. 1958).

⁵⁴¹ *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962), noted 15 ALA. L. REV. 248 20 WASH. & LEE L. REV. 173 5 ARIZ. L. REV. 76. Many cases and writings are cited. See Highleyman, *The Deceptive Certainty of the "Lie Detector"*, 10 HASTINGS L. J. 47, 49 (1958).

⁵⁴² *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956), noted 23 BROOKLYN L. REV. 316 (1957); 46 KY. L. J. 165 (1957); 35 TEXAS. L. REV. 600 (1957); 1957 U. ILL. L.F. 138. See McCORMICK, EVIDENCE § 175 (1954); 3 WIGMORE, EVIDENCE §§ 998, 999 (3d ed. 1940); 8 WIGMORE, EVIDENCE § 2265, at 400 (rev. ed. 1961).

⁵⁴³ Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation*, 62 YALE L.J. 315, 319 (1953).

unnecessary to determine whether the expert could testify that in his opinion the victim's testimony was true and accurate or to the test results as the basis of his opinion. It was prejudicial error to refer several times, at the trial, to the drug as "truth serum." A tape-recording of the narcoanalysis was not admissible either. Here the prior consistent statement was not made at the time when the witness had no motive to fabricate. Due process of law was violated.⁵⁴⁴ Likewise responses to questions obtained from the defendant while he is asleep are not admissible.⁵⁴⁵ In 1963, the Supreme Court held that a state court confession induced by drugs is inadmissible.⁵⁴⁶

In a prosecution for manslaughter from operation of an automobile in which it was claimed that the defendant was intoxicated, the defendant after arrest complied with a direction to furnish a urine specimen. His subsequent motion to suppress was denied. Judge Holtzoff stated: "The privilege against self-incrimination is limited to the giving of oral testimony."⁵⁴⁷ In 1957, the Supreme Court upheld a state court conviction based on blood removed from the defendant while unconscious.⁵⁴⁸

A court has stated that Congress can pass legislation providing for the use of chemical analysis to determine alcohol in blood. Congress may⁵⁴⁹

[c]arve out a new exception to the hearsay rule, without violating constitutional rights, where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under long established exceptions to the hearsay rule.

In a prosecution for murder, it is competent to show by blood

⁵⁴⁴ As to due process, see Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683 (1956).

⁵⁴⁵ *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955), noted 34 TEXAS L. REV. 472 (1956).

⁵⁴⁶ *Townsend v. Sain*, 272 U.S. 293 (1963). See MacDonald, *Truth Serum*, 46 J. CRIM. L. (Eng.) 259 (1955).

⁵⁴⁷ *United States v. Nesmith*, 121 F. Supp. 758, 762 (D.D.C. 1954), noted 4 J. PUB. L. 202 (1955). See MAGUIRE, EVIDENCE OF GUILT 28 n.18 (1959).

⁵⁴⁸ *Breithaupt v. Abram*, 352 U.S. 432 (1957) (three dissents). Noted 71 HARV. L. REV. 94, 161 (1957); 42 MINN. L. REV. 662 (1958); 35 TEXAS L. REV. 813 (1957); 1957 U. ILL. L.F. 315; 11 VAND. L. REV. 196 (1957).

⁵⁴⁹ *Kay v. United States*, 255 F.2d 476, 480 (4th Cir. 1958), cert. denied, 358 U.S. 825 (1958), noted 4 VILL. L. REV. 448 (1959); 16 WASH. & LEE L. REV. 62 (1959). See McCORMICK, EVIDENCE § 176 (1954); 8 WIGMORE, EVIDENCE § 2265 (rev. ed. 1961).

tests that the victim's blood was type A while the defendants blood was type O and that fresh blood spots of both types were found on the defendant's clothing shortly after the fatal shooting of the victim.⁵⁵⁰

VII. CONCLUSION

No general enveloping summation is possible on the subject of relevancy of evidence. As this article has attempted to indicate, it is the facts, not the general rules, which must be examined and weighed. The cases presented here are not intended to be exhaustive but rather indicative of the growth and development in this area and illustrative of the viewpoints pertinent to relevancy of federal criminal evidence.

⁵⁵⁰ *Kemp v. Government of Canal Zone*, 167 F.2d 938, 939 (5th Cir. 1948). See 1 WIGMORE, EVIDENCE §§ 165(a), 165(b) (3d ed. 1940); McCORMICK, EVIDENCE 377-83 (1954). See also *People v. Tashman*, 233 N.Y.S.2d 744 (1962), noted 23 Md. L. Rev. 286 (1963); *Commonwealth v. Statti*, 166 Pa. Super. 577, 73 A.2d 688 (1950), noted 13 Ga. B.J. 253, 19 J.B.A. Kan. 271; 3 S.C.L.Q. 176; 14 U. Det. L.J. 37; 12 U. Pitt. L. Rev. 122; *Shanks v. State*, 185 Md. 437, 45 A.2d 85 (1945); *Williams v. State*, 143 Fla. 826, 197 So. 562 (1940); *State v. Damm*, 62 S.D. 123, 252 N.W. 7 (1933), noted 20 CORNELL L.Q. 232 (1935); 19 IOWA L. REV. 625 (1934); 32 MICH. L. REV. 987 (1934); 82 U. PA. L. REV. 654 (1934); 43 YALE L.J. 651 (1934); *aff'd on rehearing*, 64 S.D. 309, 266 N.W. 667 (1936), noted 21 MINN. L. REV. 602 (1937); 9 MISS. L. J. 234 (1936).