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JUDICIAL ADMISSIONS: THEIR USE IN CRIMINAL TRIALS

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Counsel for the defense in a criminal case may sometimes prefer that the defendant admit a fact involved in the prosecution's case rather than have the prosecution present to the jury evidence relating to the fact. In what circumstances may a judicial admission be particularly useful to the defendant? When may the prosecutor employ a judicial admission to prevent defense counsel from presenting evidence? And how do the courts rule when, despite a defendant's or prosecutor's judicial admission of a fact, the other nevertheless chooses to present his evidence of the fact? Mr. Wall discusses these questions and other related matters in the following article, which reviews and evaluates the case law with respect to the use of judicial admissions in attempting to prevent the presentation of evidence.—EDITOR.

One of the most important tasks of defense counsel in a criminal case is to prevent the introduction of evidence prejudicial to the defendant. The task is often an impossible one: witness the plight of counsel who must put on the witness stand an accused with prior convictions. If he does so, then, by the almost unanimous American rule, the prosecutor may introduce evidence of the prior crimes.[1] The jury will be instructed, of course, that it may use this evidence only for the purpose of determining the credibility of the accused, and not as an indication that he is the type of person who would commit the crime charged. However, as Judge Learned Hand once stated in describing a similar limiting instruction, this is a "recommendation to the jury of a mental gymnastic which is beyond not only their powers, but anybody's else."[2]

Similar problems may present themselves at many stages of the trial. The prosecutor may seek to introduce, on any one of a number of recognized theories of admissibility, evidence highly prejudicial to the accused. Often, defense counsel's only recourse is to request the judge to give proper limiting instructions to the jury. In some situations, however, defense counsel may have a far more formidable weapon in his arsenal—a formal judicial admission or stipulation of the fact which the prejudicial matter tends to prove.

It is quite clear that such an admission of the *factum probandum* will dispense with the necessity of its proof. The almost universal rule in the United States was stated thusly by the New York Court of Appeals:

> "[W]hen a fact, even of great importance, is admitted by the defendant or his counsel in open court during the trial, that fact is established by the admission, and no evidence need be given in relation to it."[3]

In such a case, defendant is bound by the admission, and the prosecutor may safely fail to introduce evidence in support of the fact.[4] A problem arises, however, where the prosecutor prefers to resort to his proof; the issue then is whether the admission can prevent him from doing so. A review of the cases indicates that a large majority of courts leave the question to the discretion of the

[1] See 1 WIGMORE, EVIDENCE §61 (3d ed. 1940); 3 *id.* §890; MCCORMICK, EVIDENCE §43, at 93-94 (1954). The general rule in Pennsylvania, however, is to the contrary. *Id.* at 94 & n.38. And UNIFORM RULE OF EVIDENCE 21 provides in part, "If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

[2] Nash v. United States, 54 F.2d 1006,1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932). See also the remarks of Circuit Judge Hastie, concurring in United States v. Price, 258 F.2d 918, 922 (3d Cir.), *cert. denied*, 358 U.S. 922 (1958): "Because men often cannot or will not channel their thinking as directed by another person, even a learned, solemn and berobed judge, there is always some risk that legally improper considerations, if known to the jurors, will influence their verdict."

[3] People v. Walker, 198 N.Y. 329, 335, 91 N.E. 806, 808 (1910).

[4] State v. Wood, 99 Vt. 490, 134 Atl. 697 (1926). The rule is not one-sided. It has been held error for a judge to submit to the jury, as controverted, matters which had been the subject of a formal admission by the prosecutor. People v. Blanck, 212 App. Div. 578, 209 N.Y. Supp. 459 (1st Dept. 1925).

trial judge,[5] as Wigmore has advised,[6] and, in effect, allow the prosecutor to ignore the admission and introduce his proof.[7]

The purpose of this article is to suggest that the courts, in deciding this issue, have often done so on doubtful theories and with an excessively optimistic opinion of the jury's ability to make fine distinctions and to decide fairly in the face of prejudicial evidence. Situations where the issue has arisen will be illustrated, and occasionally suggestions will be made as to the areas in which defense counsel may attempt to exclude prejudicial material by means of judicial admission.

There is virtually no limit to the number of situations which may impel defense counsel to seek to prevent the introduction of evidence in such a manner. In most cases, however, they will more or less correspond with the categories listed below.

Gruesome Exhibits

If a valid judgment may be based upon the number of reported decisions, it appears that judicial admissions are resorted to most often where the prosecutor, in homicide cases, seeks to introduce photographs of the victim taken after commission of the crime, or the victim's blood-stained clothing. The usual reasons advanced by the prosecutor for the admission of the exhibits is that they illustrate the nature and extent of the wounds, prove the corpus delicti and, where the exhibits are photographs, establish the identity of the victim. Where the judge has admitted the exhibits despite a stipulation, a large number of appellate courts have nevertheless affirmed the conviction, on a number of grounds which, it is submitted, are clearly unreasonable. Some examples follow, and the list could be multiplied many times over.

In *State v. Edwards*,[8] the prosecutor was allowed to introduce a photograph of the head and torso of the female murder victim, showing the wound infected with maggots and the body in an advanced state of decomposition. The South Carolina Supreme Court, in finding no error, stated that the photograph could not possibly have prejudiced the defendant, for everything it depicted was later testified to in detail by other witnesses. It agreed that gruesome exhibits calculated to inflame should be excluded if irrelevant or not substantially necessary to prove a material fact, but stated that the photograph here in question proved the identity of the deceased. Two judges dissented on the grounds that the exhibit was clearly inflammatory and unnecessary as well, for there had never been any real issue of identity in the case.

Although no judicial admission was involved, the decision is significant because the reasoning would apply even had one been made. In denying the existence of prejudice merely because other witnesses testified to everything depicted in the photograph (including the identity of the deceased), the majority seems to have missed the point completely; even if identity had been in issue, the abundance of other evidence which proved all that the photograph could have proved made the introduction of the gruesome photograph unnecessary and thus prejudicial. Under no circumstances could the submission of the photograph to the jury be considered necessary to prove identity, and its introduction could not have helped but inflame the jury.

A violent murder is always capable of causing revulsion on the part of a jury, but the danger of prejudice is perhaps greatest when the violence is directed against the young and the helpless. *State v. Leland*,[9] a case in which the death penalty

[5] It is as rare as it is unreasonable for a court to say that the judge is unjustified in excluding proof of a fact already admitted, as was said in State v. Campbell, 93 Conn. 3, 104 Atl. 653 (1918).

[6] 9 Wigmore, Evidence §2591 (3d ed. 1940) reads in part:

"A fact that is judicially admitted *needs* no evidence from the party benefiting by the admission.

"But his evidence, if he chooses to offer it, *may* even be *excluded*; first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy . . . ; next, because it may be superfluous and merely cumber the trial . . . ; and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be always entitled to.

"Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances."

[7] See 22A C.J.S. *Criminal Law* §640 (1961), and cases cited therein.

[8] 194 S.C. 410, 10 S.E.2d 587 (1940).

[9] 190 Ore. 598, 227 P.2d 785 (1951), *aff'd on other grounds*, 343 U.S. 790 (1952).

was imposed, involved the killing of a fifteen year old girl. Defendant had confessed the crime to the police, but had pleaded not guilty by reason of insanity. Despite the defendant's judicial admissions, made in open court during the trial, as to the nature of the wounds, the prosecutor was allowed to introduce the victim's blood-stained clothes, showing the tears made by the knife, as well as photographs of the victim's nude body, showing the wounds themselves. The conviction was affirmed by the Oregon Supreme Court, which stated that as long as the defendant's plea of not guilty stood,[10] the state had the right to prove its case "up to the hilt," and to choose its own way of doing so. "There is no rule," the court added, "which requires the district attorney to be mealy-mouthed. . . ."[11] The clothes and pictures were relevant, said the court, because they tended to show that the wounds were inflicted in the manner described in defendant's confession and because they tended to show premeditation and deliberation.

The facts of the *Leland* case illustrate a point too often neglected. The introduction of gruesome exhibits is dangerous enough when the defendant denies any connection with the crime; but where, as here, defendant admits the acts which resulted in death and relies on another defense, the exhibits may so inflame the jury as to blind them to the merits of that defense. The history of the criminal law is not barren of cases in which an insane defendant has been found sane not so much on the basis of the psychiatric testimony as upon the jury's revulsion at the hideous nature of his acts. Where the acts are admitted by defendant, only the clearest necessity should impel the court to allow proof so prone to misuse by the jury.

State v. Stansberry[12] involved a prosecution for assault with intent to murder. Defendant pleaded self-defense. Despite defendant's judicial admission that it was he who inflicted the wounds, the prosecutor was allowed to introduce the victim's clothing which was "grewsomely stained with blood." A doctor had already testified as to the nature of the wounds. The Iowa Supreme Court affirmed the conviction, stating that the admission or exclusion of such evidence is a matter for the discretion of the trial judge, and no admission by defendant should be able to prevent the introduction of evidence by the prosecutor. A contrary rule, said the court, would work harm in the following way: if a prosecution witness made the case for the state less strong than the facts justified and less strong than it could be made by other available evidence, then the defendant could end further inquiry on the point by stipulating that the witness had said all there was to say. It takes no lengthy analysis of this argument to realize that the court had an erroneous conception of the nature of a judicial admission. An admission has no validity unless it admits all the relevant facts which the evidence sought to be excluded tends to prove. Whatever relevant fact is not admitted may be proved, unless inadmissible on other grounds.

State v. Upton[13] involved a conviction for murder and an imposition of the death penalty. The defense was insanity. The prosecutor was allowed to introduce photographs showing the wounds on the victim's body despite defendant's stipulation as to the nature and location of the wounds. The New Mexico Supreme Court affirmed, stating that the photographs were not gruesome and were admissible for the purpose of clarifying and illustrating the testimony, proving the corpus delicti, and corroborating the identity of the deceased. It should be noted, however, that there appeared to be not the slightest question about the corpus delicti or the victim's identity. And it is doubtful whether the illustrative value of the photographs was so great as to offset the possibility of their misuse against a defendant who had admitted the killing but had claimed insanity as a defense.

In *Rivers v. United States*,[14] a prosecution for murder in which defendant had admitted dismembering the body of the victim but had denied commission of the murder, the prosecutor was permitted to introduce pictures of the dismembered body in the morgue. On appeal to the Court of Appeals for the Ninth Circuit, the trial judge was held not to have abused his discretion in admitting the evidence. The pictures were relevant, said the court, because they showed the mode and thoroughness of the cutting (factors which the defendant had not admitted), and this would bear

[10] In Oregon, a plea of guilty to murder will be accepted. ORE. REV. STAT. ch. 163, §130 (1955). In other states, however, this may not be the case. See, *e.g.*, N.Y. CODE CRIM. PROC. §332.

[11] 190 Ore. at 630, 227 P.2d at 799.

[12] 182 Iowa 908, 166 N.W. 359 (1918).

[13] 60 N.M. 205, 290 P.2d 440 (1955).

[14] 270 F.2d 435 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960).

upon whether the dismemberment had been done "wildly, or in a calculated manner." Although reasonable in theory, the decision may rest on an overly-optimistic appraisal of the jury's ability to make such a fine distinction when confronted with such a gruesome exhibit.

Occasionally, gruesome exhibits are introduced despite appropriate judicial admissions by the defendant, and the resulting convictions are affirmed on the ground that defendant has no right to prevent, by a mere judicial admission, the introduction of relevant evidence by the prosecutor.[15] Such an attitude, it is submitted, is clearly unreasonable and allows a defendant to be seriously and unnecessarily prejudiced because of a misguided deference to what are considered the merits of the adversary system.

In other cases, however, a contrary rule has been applied, and a judicial admission has been held sufficient to prevent introduction of gruesome exhibits. In *State v. Long*,[16] the prosecutor was allowed to introduce the bloody clothes of a murder victim despite defendant's judicial admission that the crime (with which he denied connection) was committed by shooting and stabbing. On appeal, the conviction for second degree murder was reversed. The court stated that the defendant had admitted all valid facts to be drawn from the evidence. An examination of the clothes would not aid the jury, connect defendant with the crime, prove the identity of the deceased, or show the nature of the wound. Under the circumstances, the creation of prejudice would be the only effect of the submission of the clothes to the jury.

The court's view in the *Long* case is shared by other courts. Indeed, some decisions have gone even further. In *Lacoume v. State*,[17] it was held error to admit, in a prosecution for aggravated assault, the bloody clothes of the victim, where the defendant did not dispute the nature and position of the wounds. This decision goes further than that in the *Long* case, for the defendant made no formal admission and the jury was thus free to reject what other evidence the prosecutor may have introduced concerning the wounds.[18] And in *People v. Burns*,[19] an exceedingly gruesome picture of a murder victim, taken after autopsy, was held improperly admitted at the trial. Here the court acknowledged that there was a genuine dispute as to the cause of the wounds shown, but stated that the dispute could not have been resolved by an examination of the photographs.

In considering whether to make a judicial admission, therefore, defense counsel should realize that gruesome exhibits are *sui generis*, largely because of their inflammatory nature. Ordinarily, counsel should admit the truth of all matters which the exhibits may tend to prove. Cases may arise, however, where the exhibits are so gruesome and their probative value so slight that an appeal court would prohibit their use even in the absence of an admission. The difficulty inherent in predicting such a prohibition, and the harm done if the prediction is incorrect, should cause most counsel to make the admission.

Proof of Other Crimes

With respect to the proof of other crimes, the general rule in the United States, as stated by McCormick, is:

> "The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character. There are numerous other purposes for which evidence of other criminal acts may be offered, and when so offered the rule of exclusion is simply inapplicable."[20]

Where the prosecutor seeks to introduce evidence of defendant's other crimes for a purpose other than to show a propensity to commit crime, defense counsel may often prevent him from doing so by means of a judicial admission. Whether defense counsel may do so is determined by the theory of admissibility upon which the prosecutor relies, and by the nature of the defense.

One of the exceptions to the general rule of exclusion exists where proof of similar crimes is

[15] See State v. Powell, 21 Del. 24, 61 Atl. 966 (Ct. of Oyer & Terminer 1904); State v. Griffin, 218 Iowa 1301, 254 N.W. 841 (1934).

[16] 336 Mo. 630, 80 S.W.2d 154 (1935).

[17] 65 Tex. Cr. 146, 143 S.W. 626 (1912).

[18] See also State v. Porter, 276 Mo. 387, 207 S.W. 774 (1918) (introduction of bloody clothes error where they proved nothing not already known); Oxendine v. State, 335 P.2d 940 (Okla. Cr. 1958) (exhibition on large screen of colored slides showing nude body of victim in morgue, autopsy incisions clearly visible, error where no issue existed as to cause of death or details of wounds); Chapman v. State, 66 Tex. Cr. 489, 147 S.W. 580 (1912) (exhibition of actual wounds of assault victim error where they proved nothing not already known).

[19] 109 Cal. App. 2d 524, 241 P.2d 308 (1952).

[20] McCormick, Evidence §157, at 327 (1954). See also 1 Wigmore, Evidence §215 (3d ed. 1940).

introduced "to show . . . that the act on trial was not inadvertent, accidental, unintentional or without guilty knowledge."[21] The issue, however, must not be a specious one. There must actually be a doubt as to the circumstances of the act said to constitute the crime. In *People v. Molineaux* the New York Court of Appeals stated:

> "It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake."[22]

However, where there may be a substantial doubt as to the intent of the defendant in committing the act charged, such evidence is admissible for the purpose mentioned.

Where the prosecutor proposes to introduce such evidence to prove the required intent, the defendant may, under the authority of certain cases to be discussed, resort to a judicial admission, stipulating that if the act was done, it was done with the requisite criminal intent (or guilty knowledge). Once this admission has been made, proof of the similar acts is unnecessary and therefore prejudicial. And, of course, the only remaining logical connection between similar acts and commission of the act charged is the tendency of the former to show a propensity to crime—a forbidden inference unless the defendant first introduces evidence of his good character. Thus, an admission that if the act was done it was done with the necessary *mens rea* should, logically and fairly, prevent all proof of the similar acts.

Where such an admission is made, however, in most states the defendant should not become a witness in his own behalf. For if the defendant becomes a witness, his previous crimes will, in most states, become admissible as bearing upon his credibility. Thus, he will have kept them out when they were to be used for one purpose, only to see them introduced for another, and the jury may misuse the evidence in precisely the same way. However, in those states which allow only certain crimes to be used for impeachment purposes,[23] defendant may often be able to stipulate and testify as well.

An example of an admission of this type is found in *State v. Vance*,[24] which involved a conviction for indecent exposure. At the trial, the prosecutor attempted to prove previous indecent exposures in order to negative accident and prove intent. Defendant objected, and admitted in open court that if the act was done, it was designedly done. The evidence was admitted. On appeal, introduction of the evidence was held reversible error, even though the court had instructed the jury as to its proper use. There was no issue of mistake, said the court, and even if mistake or intent had been an issue, defendant's admission had removed it from the case.

In *State v. Strum*,[25] a similar decision was rendered. There, the Iowa Supreme Court held that, in a prosecution for knowingly receiving stolen goods, defendant's admission that whatever he did was done designedly and with knowledge was sufficient to require exclusion of the prosecutor's evidence that defendant had received other stolen goods not related to the transaction for which he was on trial.

Unfortunately, the *Vance* and *Strum* cases were discredited by *State v. Kappen*.[26] There, in a prosecution for the possession of burglar's tools, the prosecutor refrained from showing prior crimes, relying on the defendant's stipulation that if he had actually possessed the tools, he had done so with a burglarious intent, and not by accident. The judge, relying on the rule of the *Vance* and *Strum* cases, had accepted the admission and prevented the proof of previous burglaries. On appeal, the defendant reversed his position and claimed that the evidence was insufficient to convict, because there was no proof of intent. The court quite correctly held that defendant was bound by his admission, for it was the admission alone which caused the prosecutor to withhold his proof. The defendant was precluded from stating that his admission was less effective than would have been the proof which the admission obviated.

Had the court stopped here, no one could find fault with its decision. But it continued, and specifically disapproved the rule of the *Strum* case in these words:

> "No admission should be deemed to control the sound discretion of the court to permit

[21] McCORMICK, EVIDENCE §157, at 329 (1954).
[22] 168 N.Y. 264, 305, 61 N.E. 286, 298–99 (1901). See also State v. Gilligan, 92 Conn. 526, 103 Atl. 649 (1918).
[23] See 3 WIGMORE, EVIDENCE §980 (3d ed. 1940); McCORMICK, EVIDENCE §43 (1954).
[24] 119 Iowa 685, 94 N.W. 204 (1903).
[25] 184 Iowa 1165, 169 N.W. 373 (1918).
[26] 191 Iowa 19, 180 N.W. 307 (1920).

evidence otherwise admissible. Much less should a hypothetical admission have such effect."[27]

There was a strong dissent by Salinger, J., which deserves extensive quotation not only because of its logic, but also because it makes a well-merited but seldom heard criticism of prosecutors who misuse such dangerous evidence. Judge Salinger stated:

"It was confessed in the *Strum* case that such evidence is admissible for nothing except to show guilty knowledge. And it was thereupon held that there could be no legitimate reason for forcing such evidence upon the consideration of an untrained jury, when its only proper purpose was to prove what was confessed. It is now said that there should be a discretion as to whether such testimony . . . should be received. Why? For whom, and for what, should such discretion be permitted? For use by just one kind of lawyer. The sort of lawyer that would put [such testimony] in evidence . . . on the pretense that it was done to prove intent, although he knew intent was confessed, the purpose being in fact the hope that the jury would treat this evidence, not as mere evidence of intent, but as tending to prove that the particular . . . [crime] charged in the indictment had been . . . [committed]. Decisions of this court which leave to the state every legitimate right it has should not be overruled to give pettifoggers a chance to which they are not entitled—a chance to take away liberty wrongfully because juries reason as juries do."[28]

The logic of these words is unassailable and would apply to almost all instances where a judicial admission is proper.[29]

In *Commonwealth v. Miller*,[30] defendant had been convicted of passing three forged notes. At the trial, the prosecutor, for the purpose of proving guilty knowledge and the forgery itself, sought to introduce 30 other notes passed by defendant at about the time the three notes were passed, and also alleged to be forgeries. The defendant stipulated that he passed the three notes mentioned in the indictment, and that if they were forgeries, he knew them to be so. The trial judge stated that considering the peculiar characteristics of the alleged forgery, it would aid the jury to see other notes passed by him at about the same time, and alleged to have been forged in the same manner, and thus the evidence was admissible for this purpose despite the defendant's admission. The purpose of showing guilty knowledge was not discussed by the judge, but it is clear that if such was the sole purpose the evidence should have been excluded.

Assuming a strong similarity between the methods used in forging the two sets of notes, the judge ruled quite correctly, for as McCormick has stated, it is permissible for the prosecutor "to prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused."[31] No admission could have been made by defendant except one conceding the very fact he wished to exclude. On appeal, however, the Supreme Court of Massachusetts affirmed on the ground that the checks were admissible to prove guilty knowledge despite defendant's admission, upon which, said the court, the prosecutor was not required to rely.

People v. Sindici[32] is quite similar to the *Miller* case. There, in a prosecution for forgery, defendant offered to stipulate that if he had signed his name to the check in question, he did so with an intent to defraud. The prosecutor was nevertheless allowed to show other fraudulent checks issued at about the same time and endorsed by defendant. On appeal, the California District Court of Appeal held the evidence admissible either to prove intent or to show the existence of a common scheme or plan.[33] The California Supreme Court, in a per curiam decision, denied a hearing, stating that the evidence was proper to show a common scheme, but that it would express no opinion as to the admissibility of the evidence for the purpose of proving intent. Although the admission should have removed the issue of intent from the case, it was quite correct to hold that the admission could not exclude evidence aimed at proving a common scheme.

In *State v. Morgan*,[34] a similar issue was presented and, it is submitted, erroneously decided. Defendant was convicted of incest committed with

[27] *Id.* at 29, 180 N.W. at 312.
[28] *Id.* at 34-35, 180 N.W. at 314.
[29] Nevertheless, Iowa courts still follow the rule of the *Kappen* case. See, *e.g.*, State v. Simpson, 243 Iowa 65, 50 N.W.2d 601 (1951).
[30] 57 Mass. (3 Cush.) 243 (1849).
[31] McCormick, Evidence §157, at 328 (1954).
[32] 54 Cal. App. 193, 201 Pac. 975 (1921).
[33] McCormick, Evidence §157, at 328 (1954), states that proof of prior crimes is permissible where the purpose is "to prove the existence of a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a part."
[34] 42 S.D. 517, 176 N.W. 35 (1920).

his niece in South Dakota, where the trial took place. During the course of the trial, the prosecutor wished to prove that immediately prior to the commission of the crime in South Dakota, defendant had committed incest with that same niece in Colorado. The purpose of the evidence of the prior crime was "to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial."[35] Defendant formally admitted that at the previous time and place mentioned by the prosecutor he was cohabiting with his niece, knowing of her relationship to him. Despite this admission, the prosecutor was allowed to prove the very same fact by means of letters written by defendant to his niece's parents. The letters were highly prejudicial to the defendant because in them he not only admitted cohabiting with his niece in Colorado but also dared the parents to do something about it. On appeal, admission of the letters was held proper. The court stated that the reasoning of the *Strum* case did not apply, for there the proffered evidence related only to the question of intent, while in the instant case the evidence went to the issue of whether the crime had in fact been committed. This, of course, makes no sense at all, for the defendant's formal admission also went to that same issue, by conceding a fact tending to prove the commission of the crime, and indeed the same fact which the letters tended to prove. The only possible justification for admitting the letters was that the defendant's defiance made it more likely that he would persist in his conduct (i.e., until he reached South Dakota) than if the letters had been of a merely informative nature. This, however, was not mentioned by the court. And, considering the admission, it is quite doubtful whether the value of admitting the letters even for that purpose would have been so great as to justify the placing of such prejudicial matter before the jury.

However, in *People v. Washburn*,[36] evidence of a prior offense offered for the purpose of proving guilty knowledge was held improperly received where the defendant had made an admission indicating that he would rely not upon a claim of a lack of the requisite knowledge, but only upon a denial of the act charged.

Under another theory, evidence of other crimes is admissible to show that defendant had a motive to commit the crime charged.[37] The efficacy of a judicial admission to preclude proof for such a purpose is doubtful, for it may be quite important for a jury to be able to estimate the strength of the motive. In *People v. Scheck*,[38] for example, the accused in a murder prosecution offered to stipulate that at the time he was alleged to have killed a policeman, he was "under indictment," and therefore possessed a motive to kill. Despite this offer to stipulate, the prosecutor was allowed to prove that at the time of the crime, the accused was under indictment for murder and robbery. The admission of this proof was upheld on appeal, the court emphasizing that the nature of the indictment was important, for the strength of the motive to kill in order to avoid arrest depended largely upon the seriousness of the crime for which the arrest was to be made. One is not likely to kill in order to avoid arrest for a petty offense. The court's logic seems unassailable on this issue, although the facts of the case so overwhelmingly proved the defendant's guilt that the trial judge might reasonably have excluded the proof of motive as unnecessary.

Similarly, in *McHenry v. United States*[39] it was held proper to reject an accused's admission that at the time he was alleged to have murdered a policeman in order to avoid arrest, he was suspected of a felony and that therefore the policeman had a right of arrest. Further, it was held proper to allow the prosecutor to show that the felony referred to was murder, and that defendant had actually committed it.

However, even in the absence of an admission, it has been held reversible error to allow proof of prior crimes to establish a motive already fully established by other proof.[40] This seems a fair decision, but except in such a case, where motive has already been established, it appears that prior crimes will remain admissible where they tend to show a motive. The nature of the concept of motive precludes recourse, in most cases, to a judicial admission.

Evidence of other crimes may also be introduced where they tend to prove consciousness of guilt.[41] Thus it is permissible to show that after the crime charged was committed, defendant committed

[35] McCORMICK, EVIDENCE §157, at 328–29 (1954).
[36] 104 Cal. App. 662, 286 Pac. 711 (1930).
[37] McCORMICK, EVIDENCE §157, at 330 (1954).
[38] 356 Ill. 56, 190 N.E. 108 (1934).
[39] 276 Fed. 761 (D.C. Cir. 1921).
[40] People v. Mangano, 375 Ill. 72, 30 N.E.2d 428 (1940).
[41] McCORMICK, EVIDENCE §157, at 330 (1954).

certain other crimes while fleeing[42] or that he murdered the only eye-witness to the crime charged.[43] A judicial admission is useless where the damaging evidence tends to prove consciousness of guilt, for the defendant must either admit the commission of other crimes or his consciousness of guilt, thus keeping nothing prejudicial away from the jury.[44] The only possible exception would occur in the rare case where defendant claims he was in error in thinking he had committed the crime. Under such circumstances he should stipulate to consciousness of guilt and seek to prevent the then unnecessary proof thereof.

Another accepted reason for introducing evidence of other crimes is to prove the identity of the accused.[45] This may be done in a number of ways, but two should serve as examples for our purpose here. First, the prosecutor may wish to show that the crime charged was committed in an unusual and distinctive manner identical with the method defendant used in committing other crimes.[46] Here, it would seem that no judicial admission could possibly preclude the proof. An admission that the method used in the crime charged is the one that defendant would have used had he committed the crime simply does not admit all that the prosecutor may licitly prove, and any stronger admission would have to include acknowledgment of the other crimes.

A second method of proving identity is by the introduction of evidence connecting defendant with a weapon used during the crime charged. Most often, the state will merely prove purchase of the weapon by defendant, and no judicial admission is available. However, the state will occasionally attempt a method of proof involving other crimes, and defendant then should be able to resort successfully to a stipulation. For example, in *State v. Creighton*,[47] the prosecutor sought to prove defendant's possession of the murder weapon by the testimony of a policeman who stated that the weapon was his own, but that when he had attempted previously to arrest the defendant for a bank robbery, the defendant had taken the gun from him. Although the defendant stated he would not deny that he had committed the crime charged with that particular weapon (if indeed he had committed the crime), the judge agreed with the prosecutor's contention that the state had a right to prove every element of the crime as it saw fit, and allowed the introduction of the testimony. The decision was reversed on appeal, the court stating that the proof would have been proper had defendant's possession of the weapon been in issue, but was improper in the face of the admission. It should be noted that the admission need not have gone so far. A mere stipulation by defendant that he had come into possession of the weapon on a particular date (mentioning the date when it was taken from the policeman) would have sufficed to prevent the testimony, according to the reasoning of the court.

Occasionally, a prosecutor will attempt to convey to the jury the fact that defendant has committed other crimes without actually introducing proof of the crimes themselves under any exception to the general rule of exclusion. For example, in the murder trial popularly known as the "Reader's Digest Murder Case," the district attorney wished to show that the crime was the result of a plan of long standing. Under the theory that it was relevant to show the time and place of the inception of the plan, the judge allowed proof that one defendant commenced his plot while in jail—obviously for some other offense.[48] No judicial admission was made, but if defendant had stipulated that the plot was of long-standing (even giving the date of its inception), could it be reasonably held that mention of the place where the plot began was not improper?

In another case,[49] where the defendant's identity was in issue, the prosecutor introduced a witness who claimed he knew defendant. (The witness was an official of a prison in which defendant had previously served a sentence for another crime.) Although sustaining an objection to a question calling for *defendant's* status at the time the witness knew him, the witness was allowed, over objection, to relate that his *own* status had been

[42] People v. Johnson, 286 Ill. 108, 121 N.E. 246 (1918).

[43] People v. Spaulding, 309 Ill. 292, 141 N.E. 196 (1923).

[44] See, *e.g.*, Shelton v. United States, 169 F.2d 665 (D.C. Cir.), *cert. denied*, 335 U.S. 834 (1948), where evidence of defendant's flight was held properly received, even though he admitted flight. It is difficult to understand what defendant hoped to gain by the admission, or what prejudice could have been created by the mere proof of what he had conceded. For a similar case, see People v. Fredericks, 106 Cal. 554, 39 Pac. 944 (1895).

[45] McCormick, Evidence §157, at 330 (1954).

[46] *Id.* at 328.

[47] 330 Mo. 1176, 52 S.W.2d 556 (1932).

[48] Oursler, The Reader's Digest Murder Case 242 (1952).

[49] State v. Bartlett, 55 Me. 200 (1867).

that of a prison official. No doubt the jury caught the point, despite the necessity of drawing an all-too-obvious inference. The ruling was upheld. No admission was made that the witness actually knew the defendant, but it is submitted that had it been done, it would have been highly improper for the court to allow the witness to mention what his status had been when he became acquainted with defendant.

Moreover, suppose that during the course of a trial it becomes important to determine whether the accused knew how to operate a particular type of machine. If the defendant stipulates as to his ability, can it fairly be said that the prosecutor may properly reject the admission and prove that defendant actually operated such a machine at a prison workshop? The language used in some of the cases already cited would give the prosecutor the right to do just that, although such a course of action involves unfairness of the grossest sort.

Stipulations have often been attempted in prosecutions under the various Habitual Offender Acts, many of which either allow or require the inclusion of prior convictions in the indictment and their proof upon trial. The procedure most often followed by defense counsel is to offer to admit the prior crimes out of the presence of the jury, and to ask the judge to inflict the heavier penalty if the verdict is guilty or, if the jury fixes the penalty, to charge the jury only as to the heavier penalty. The judges' invariable refusal to accept the admission has been invariably upheld by the courts.[50] Proof of prior crimes for this purpose, however, has recently come under attack as violative of due process. In *United States v. Price*,[51] the constitutionality of the procedure was upheld by a divided court, although Circuit Judge Hastie, in a concurring opinion, stated:

> "I am unable to avoid the conclusion that a procedure so likely to prejudice the accused and at the same time so easy to avoid without the sacrifice of any interest of the state is fundamentally unfair."[52]

In stating that the prejudicial procedure was "easy to avoid," Judge Hastie was referring to the method used in some states of having a "separate trial" on the question of punishment after the finding of a verdict of guilty.[53] Such a procedure clearly removes all due process objections. In the absence of statutory authority for such a procedure, however, fairness can be assured by reliance upon a judicial admission such as the type already mentioned.

Qualifications of Expert Witnesses

Where a witness for the prosecution is an expert of eminent qualifications, the defendant may seek to prevent the experience and ability of the expert from becoming known to the jury by stipulating that the witness is qualified to give his opinion. If such an admission were allowed to prevent proof of qualification, a great disservice would be done to the jury, who would then often be without proper means to judge between conflicting opinions on a subject of which they may be completely ignorant. Moreover, it would sometimes prevent a jury which must determine a question of sanity from learning that one expert is a qualified psychiatrist, while the other is a doctor with no psychiatric experience. Such results are clearly to be avoided.

In dealing with this issue, an Assistant United States Attorney has stated:

> "The qualifications of the prosecution psychiatrist should never be stipulated. Juries are extremely interested in the qualifications of expert witnesses. The prosecution psychiatrist should testify as to his educational background and experience in great detail."[54]

Here, the jury's interest must be satisfied. There is already too much seriously wrong with our system of expert evidence to allow a procedure depriving the jury of information necessary for a proper evaluation of the expert's opinion.

On occasion, however, these considerations have been ignored. In *State v. Douglas*,[55] a prosecution

[50] See, *e.g.*, Berry v. State, 51 Ga. App. 442, 180 S.E. 635 (1935). It is encouraging to note, however, that in 1959 the New York State District Attorneys' Association introduced and sponsored a bill "which would prohibit the district attorney from alluding to the previous conviction if the defendant would admit the same on the court record outside of the hearing of the jury." Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 Minn. L. Rev. 835, 851, 852 n.59 (1960). This solution to the problem is now included in N. Y. Code Crim. Proc. §275-b.

[51] 258 F.2d 918 (3d Cir.), *cert. denied*, 358 U.S. 922 (1958).

[52] 258 F.2d at 923.

[53] See, *e.g.*, Pa. Stat. Ann. tit. 18, §4701 (Supp. 1959).

[54] Flannery, *Meeting the Insanity Defense*, 51 J. Crim. L., C. & P.S. 309, 314 (1960). See also Bowler, *Oral Argument in Criminal Prosecution*, 52 J. Crim. L., C. & P.S. 203, 207 (1961).

[55] 78 R.I. 60, 78 A.2d 850 (1951).

for cruelty to animals, the defendant called a veterinarian to the stand. The prosecutor admitted that the witness was a qualified expert, and then objected when counsel sought to elicit the qualifications of the witness. The judge sustained the objection and prevented proof of qualifications, even though the prosecution experts had not been veterinarians, but merely people with long practical experience in the handling of animals. On appeal, the conviction was affirmed. The court stated that the purpose of evidence concerning qualifications is to enable the judge to pass upon the competency of the expert. If competency is admitted, nothing further is gained by additional questions. This reasoning, clearly erroneous, has rarely been followed elsewhere.

Prevention of Undue Sympathy

No jury can truly immunize itself from feelings of sympathy for the relatives of the victim of a homicide. Yet, if the accused is to receive a fair trial, these feelings should be kept out of the trial as completely as possible. Occasionally, however, a prosecutor will seek to play upon such emotions by placing the victim's kin on the stand unnecessarily, or by indirectly placing the grief of the relatives before the jury by the introduction of other evidence. Because of the great danger of prejudice, one would suspect that the policy of the courts would be to discourage such conduct. Often, however, the courts have done exactly the opposite.

In *State v. Seyboldt*,[56] the court allowed the prosecutor to place the victim's widow on the stand for the sole purpose of identifying the victim's watch, which had been stolen, despite the fact that defendant had admitted the identity of the watch. On appeal, the ruling was upheld.[57] In *People v. MacPherson*,[58] the court upheld a judge's ruling which permitted the prosecutor to place the victim's widow upon the stand, mainly for the purpose of proving that her husband was alive prior to the automobile collision which was the foundation of the crime charged, despite defendant's stipulation of that fact. The court stated that no admission can preclude the prosecutor from offering competent evidence. In cases similar to these, courts would earn greater respect by seeing through the rather transparent conduct of the prosecutor, and by allowing the admission to prevent him from pursuing a course of action which his own sense of propriety should have forbidden.

In *People v. Parisi*,[59] the prosecutor was allowed to introduce the dying declaration of the homicide victim, despite the defendant's admission that he had committed the crime. Normally, the introduction of a dying declaration will not prejudice one who has admitted the crime, because of the rule that "the declarations are admissible only insofar as they relate to the circumstances of the killing and to the events more or less nearly preceding it in time and leading up to it."[60] Here, however, the declaration as introduced referred to the victim's "poor little children" and other matters calculated to arouse the sympathies of the jury. On appeal, the court relied on the argument that no admission can limit the prosecutor in determining how to prove his case, and affirmed the imposition of the death penalty.

Evidence of Defendant's Reputation

It has been stated as "generally agreed that the accused in all criminal cases may produce evidence of his good character as substantive evidence of his innocence."[61] In order to prevent a parade of witnesses as to defendant's good reputation for a particular quality (*e.g.*, peacefulness, in murder prosecutions), prosecutors have occasionally admitted that the defendant's reputation was good, and have thereby succeeded in precluding the testimony of the character witnesses. Such a procedure has been upheld by some courts.[62]

In theory, none of defendant's rights is denied by such a preclusion, for the prosecutor has admitted all that the testimony would tend to prove. Again in theory, the identity of the character witness is irrelevant, as his purpose is merely to convey the opinion of the community, and not his own.[63] In practice, however, the identity of the witness may play an important role, and it is far more advantageous to the defendant to have,

[56] 65 Utah 204, 236 Pac. 225 (1925).

[57] See also State v. Thorne, 41 Utah 414, 126 Pac. 286 (1912), where no error was found in permitting a prosecutor to place upon the stand the victim's mother, whose testimony was so irrelevant that, upon completion, it was stricken from the record.

[58] 323 Mich. 438, 35 N.W.2d 376 (1949).

[59] 190 Cal. 542, 213 Pac. 968 (1923).

[60] McCormick, Evidence §260, at 558 (1954). See also 5 Wigmore, Evidence §1344 (3d ed. 1940).

[61] McCormick. Evidence §158, at 333 (1954).

[62] See, *e.g.*, Davis v. State, 106 Tex. Cr. 46, 290 S.W. 163 (1927); Bowlin v. State, 93 Tex. Cr. 452, 248 S.W. 396 (1923).

[63] See McCormick, Evidence §158, at 334 (1954).

as character witnesses, prominent and respected persons, rather than unknowns. Perhaps it is this realistic consideration which has caused some trial judges, in precluding character witnesses after an admission by the prosecutor, to mention to the jury the names of the witnesses whose character evidence is being excluded,[64] and which has persuaded some appellate courts to prevent such an exclusion altogether.[65]

Method of Making Judicial Admissions

When defense counsel wishes to exclude proof, under proper circumstances, by means of a judicial admission, he must follow certain procedures, lest the admission be held to have no effect. First, the admission should be made formally in open court during the course of the trial, and its purpose (the exclusion of proof) should be stated. As a practical matter this is almost always done, if only in making an objection to the introduction by the prosecutor of the evidence which the admission was intended to exclude.

Of crucial importance is the requirement that defendant admit *the fact itself*, and not merely that the witness would testify to the fact, for exclusion of the proof would deprive the jury of the opportunity to judge the credibility of the witness by his appearance and demeanor. If an admission could merely keep a witness from the stand, the jury would have no way of determining whether to believe what they are informed he would have said. Thus, to give effect to a mere admission as to what a witness would say would unconscionably deprive the proponent of the witness of his right to present and prove his case. It is certain that such an "admission" has no effect,[66] although occasionally there is some confused thinking on the point.[67] The admission must be at least as broad as the relevant proof would have been,[68] and it will be held ineffective if made only after the fact sought to be excluded has been proved.[69] A mere failure to object is obviously not a formal judicial admission.[70] But it appears that a statement of a witness may effect an admission by the witness's proponent.[71]

Conclusions

In deciding upon the issue under consideration, courts have demonstrated a wide divergence of viewpoints. Some have simply denied that an admission may ever exclude proof in a criminal case.[72] Occasionally, the adversary system is used as a justification, as where one court stated that an offer to admit can be rejected by the prosecutor, who need not "accept the judgment of a stranger to the office."[73] And a defendant's request that certain prejudicial matters be excluded by his admission is occasionally denied on the grounds that he has a right to force the state to prove every element of the crime with which he is charged;[74] the accused is then in the strange position of having a right to insist on being unnecessarily prejudiced. The automatic denial of the right to preclude the introduction of evidence by means of stipulation is the result of a judicial formalism attuned to times and places other than our own. A court which rigidly adheres to such an attitude

[64] See Bowlin v. State, *supra* note 62. But a later case in the same state has upheld a trial judge's refusal to give the names to the jury. Griffith v. State, 145 Tex. Cr. 465, 169 S.W.2d 173 (1943).

[65] People v. Helms, 243 App. Div. 818, 278 N.Y. Supp. 366 (2d Dept. 1935) (per curiam).

[66] See State v. Boyer, 342 Mo. 64, 112 S.W.2d 575 (1937).

[67] See, *e.g.*, People v. Newman, 102 Cal. App. 2d 302, 227 P.2d 470 (1951). In that case, involving a robbery prosecution, defendant was said to have waived proof that a lethal weapon was used in the robbery by his counsel's statement that certain witnesses would testify that they had been robbed by persons armed with deadly weapons.

[68] See McHenry v. United States, 276 Fed. 761 (D.C. Cir. 1921); State v. Griffen, 218 Iowa 1301, 254 N.W. 841 (1934).

[69] People v. Palumbo, 127 Cal. App. 703, 16 P.2d 316 (1932); State v. Farley, 48 Wash. 2d 11, 290 P.2d 987 (1955), *cert. denied*, 352 U.S. 858 (1956).

[70] Housman v. State, 155 Tex. Cr. 49, 230 S.W.2d 541 (1950).

[71] For an example of this sort of admission in a civil case, see Hopper v. Comfort Coal-Lumber Co., 276 App. Div. 1014, 95 N.Y.S.2d 318 (2d Dept. 1950). There, in an action for negligence, defendant introduced a witness who admitted that he was a paid investigator acting in the interest and on behalf of defendant. On cross-examination, plaintiff was allowed, over objection, to elicit the further fact that the witness was an investigator for an insurance company. Ordinarily, such evidence would be admissible as showing possible bias, despite the highly prejudicial element of allowing the jury to learn that defendant is insured. However, on appeal, the verdict for plaintiff was reversed in a 3-2 decision. The majority stated that "this employment could not possibly serve to show a greater interest than the admitted status of the witness as a paid investigator for the defendant itself. It served only to bring the element of insurance before the jury." 276 App. Div. at 1014, 95 N.Y.S.2d at 319.

[72] See People v. Del Prete, 364 Ill. 376, 4 N.E.2d 484 (1936); State v. Griffen, 218 Iowa 1301, 254 N.W. 841 (1934).

[73] People v. Pollock, 25 Cal. App. 2d 440, 444, 77 P.2d 885, 887 (1938).

[74] People v. Ruiz, 403 Ill. 295, 86 N.E.2d 247 (1949). See also State v. Leitzke, 206 Iowa 365, 218 N.W. 936 (1928), where the court stated that admissions cannot do away with the presumption of innocence.

must soon realize that in so doing it is often allowing the indirect evasion of rules of evidence which, no doubt, it enforces just as rigidly on other occasions.

Other decisions reject admissions for far more rational reasons, perhaps best expressed in the following words of the Maine Supreme Court:

> "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deemed it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts,—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight."[75]

Later courts have echoed these ideas, and have upheld a trial judge's refusal to accept a stipulation.[76] Not all courts have agreed, however. In *Davis v. State*[77] it was stated that:

> "The purpose of introducing evidence upon any issue is to establish as a fact the matters testified to by the witnesses. If the opposite party admits unqualifiedly in open court the truth of the matter sought to be established, nothing can be added to it by testimony."[78]

As a general rule, the attitude of the *Davis* case appears the more realistic, especially when one examines some of the issues on which stipulations have been made and is able to determine just how effective an admission would be.

Still other decisions have, either explicitly or implicitly, recognized the general right to exclude prejudicial evidence by admission but have, in effect, denied the right by finding some issue, often specious, upon which the evidence is relevant, and which, so it is said, has become controverted by the plea of not guilty. No better answer to this attitude has been found than that contained in the following words of Lord Sumner:

> "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."[79]

This creation of issues by the court may sometimes present the defendant with a situation in which no effective admission can be made.

It is submitted that the proper judicial attitude is found in those cases which grant to the accused the right to exclude relevant but prejudicial material by a proper stipulation. The arguments opposed are, in the main, too doctrinaire and too indifferent to subtleties of thought to find a respected place in the administration of criminal justice. And although the avoidance of unnecessary prejudice is a sufficient reason in itself to give effect to judicial admissions, an even more persuasive reason exists; it will greatly decrease a practice indulged in by some prosecutors which can only cause disrespect for law—the introduction of prejudicial evidence ostensibly for a proper purpose but actually with the knowledge, and sometimes the desire, that it will be improperly used by the jury. It is to be hoped, therefore, that defense counsel will make increasing use of judicial admissions on the proper occasions, and that if prosecutors will not accept these admissions, the courts will eventually inform them that they must.

[75] Dunning v. Maine Central R.R., 91 Me. 87, 97, 39 Atl. 352, 356 (1897).

[76] See, *e.g.*, State v. Evans, 145 Wash. 4, 15, 258 Pac. 845, 849–50 (1927), where the court stated that "facts, when admitted, frequently lose their probative effect. . . ."

[77] 106 Tex. Cr. 46, 48, 290 S.W. 163, 164 (1927) (on motion for rehearing).

[78] See also Griffith v. State, 145 Tex. Cr. 465, 467, 169 S.W.2d 173, 174 (1943).

[79] Thompson v. The King, [1918] A.C. 221, 232. See also State v. Gilligan, 92 Conn. 526, 537–38, 103 Atl. 649, 653 (1918); People v. Molineaux, 168 N.Y. 264, 305, 61 N.E. 286, 298–99 (1901).