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EVIDENCE OF OTHER CRIMINAL ACTS IN SOUTH CAROLINA

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Every lawyer is familiar with the basic requirement for the admissibility of evidence: evidence is not admissible unless it is relevant to one of the issues in the litigation. The test for relevance is whether or not the evidence offered "tends to establish, or to make more or less probable, some matter in issue . . . ."[1] However, relevant evidence may be excluded if its effect unduly prejudices the feelings of the jury for or against one of the parties because of the introduction of a matter that is not at issue in the case on trial. When proffered evidence is objected to as being unduly prejudicial, "its relevancy, i.e. its tendency to prove an issue in dispute, must be weighed against [its] tendency . . . to produce passion and prejudice out of proportion to its probative value."[2]

The necessity for weighing or balancing relevance against prejudice frequently arises in criminal trials where the State offers evidence which tends to prove some essential element of its case, but which also prejudices the defendant by showing that he has committed a crime or bad act other than the one for which he is on trial. For example, a defendant is on trial for armed robbery of a service station at 1 a.m. on the night of January 1, and the State introduces the testimony of a witness who testifies that he saw the defendant at 12:30 a.m. on the same date rob an all-night grocery store two blocks from the service station. This testimony is relevant to the State's case insofar as it shows that the defendant was in the vicinity of the service station and armed with a pistol at the time the service station was robbed. However,

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1. Francis v. Mauldin, 215 S.C. 374, 378, 55 S.E.2d 337, 338 (1949).

2. State v. Flett, 234 Ore. 124, 127, 380 P.2d 634, 636 (1963).

this testimony is prejudicial to the defendant because it induces the jury to think that the defendant should be punished because he is a bad man who goes around robbing people, whether or not he actually committed the service station robbery. The South Carolina Supreme Court, Justice Marion delivering the opinion of the Court, addressed this issue in *State v. Lyle*:[3]

> Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence. It 'compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it.'[4]

A balance between relevance and undue prejudice must be struck, but what guidelines or standards should the court use in reaching such a balance? In *Lyle* the supreme court adopted the rule that such evidence is admissible where it is relevant to any one of five issues:

> 'Generally speaking, evidence of other crimes is 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.'[5]

Since *Lyle* the supreme court has applied this rule strictly, testing the evidence in each case on the basis of whether or not it is relevant to any one of the enumerated exceptions. A careful reading of the *Lyle* opinion, however, suggests that a degree of relevance greater than *mere* relevance must be shown for such evidence to be admissible. In *Lyle*, Justice Marion wrote:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be

3. 125 S.C. 406, 118 S.E. 803 (1923).
4. *Id.* at 416, 118 S.E. at 807 (citation omitted).
5. *Id.*, *quoting* People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

> introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the Courts to rigid scrutiny. Whether the requisite degree of relevance exists is a judicial question to be resolved in the light of the consideration that *the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged*, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.[6]

The "legally spurious presumption of guilt" that Justice Marion refers to is actually an inference rather than a presumption.[7] Thus, when a juror hears evidence that the defendant has committed some other criminal act, he is likely to infer that the defendant's character is criminal; the juror is then likely to infer, from the fact that the defendant is a criminal, that he committed the crime for which he is now on trial. Several South Carolina cases have recognized the danger that evidence of crimes unconnected with the crime on trial may unduly prejudice the rights of a defendant. These cases have held that "the State cannot in any way attack the character of a defendant in a criminal prosecution unless that issue is first tendered by him,"[8] and they have specifically held that his character cannot be attacked by evidence of other criminal acts committed by the defendant.[9] It is clear from *Lyle* and the later cases that where the juror can infer the defendant's guilt only by way of an intermediate inference of the defendant's character drawn from evidence of another criminal act, the evidence is not admissible.

Lyle, nevertheless, is precedent for the proposition that evidence of other crimes is admissible if it can reasonably lead to an inference of guilt by a chain of logic that does not include an inference link concerning the character of the defendant. It further stands for the proposition that this independent, non-

6. 125 S.C. at 416-17, 118 S.E. at 807 (emphasis added).

7. 9 J. WIGMORE, EVIDENCE § 2490 (3d ed. Supp. 1975).

8. State v. Gamble, 247 S.C. 214, 223, 146 S.E.2d 709, 714 (1966).

9. State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Anderson, 181 S.C. 527, 188 S.E. 186 (1936); State v. Bigham, 133 S.C. 491, 131 S.E. 603 (1926).

character inference chain must be "clearly perceive[d]" by the court in order for the evidence to be properly received against the defendant.

This article will seek to determine whether or not the Supreme Court of South Carolina has, in deciding appeals involving the admissibility of evidence of other criminal acts, adequately considered the requirement imposed by *Lyle* — that the court must "clearly perceive the connection between the extraneous criminal transaction and the crime charged."[10] Six such cases will be examined and discussed.

1. *State v. Lyle*[11]

The defendant was on trial for uttering a forged check upon The Farmers & Merchants Bank of Aiken, S.C., on January 12, 1922. The State first offered the testimony of a Farmers & Merchants Bank employee, who testified that the defendant Lyle had committed the forgery and had presented the check in the presence of the witness. This testimony was admitted into evidence without objection. The State then offered testimony of two employees of banks other than Farmers & Merchants to the effect that the defendant Lyle had on the same date as the date of the crime for which he was on trial passed forged checks in both of their banks in the city of Aiken. That testimony was admitted over the defendant's objection. The State then offered the testimony of bankers from three different towns in Georgia, each of whom was prepared to testify that the defendant Lyle had on a specific date, from one to six weeks prior to the date of the crime for which defendant was on trial, forged a check at the witness' bank. That testimony was also admitted over the defendant's objection.

Under the rule spelled out by Justice Marion,[12] the court must find a clear perception of the relevance of the offered testimony. Most people, experienced in the management of their business or personal affairs, would have little difficulty perceiving the relevance of this evidence. They would find that the forgery on occasion *A* clearly makes it probable that the actor committed the charged forgery committed on occasion *B*. In moving from occasion *A* to occasion *B* the chain of inferences is as follows:

10. 125 S.C. at 417, 118 S.E. at 807.
11. 125 S.C. 406, 118 S.E. 803 (1923).
12. *Id.* at 417, 118 S.E. at 807; *see* text accompanying note 6 *supra*.

(1) The defendant committed a forgery on occasion *A*.
(2) The defendant is a forger.
(3) The defendant committed the forgery on occasion *B*.

Link (2) in this chain of inferences is an inference of the character of the defendant, and such an inference is prohibited. When link (2) is removed, there is no longer a connection between link (1) and link (3), and the evidence of the forgery committed on occasion *A* is irrelevant.

But perhaps relevance can be found through a chain of inferences that does not depend upon the character link. In *Lyle* the evidence showed that the defendant committed another forgery on the same day and in the same town in which the charged crime was committed. The following inference chain suggests that the defendant is guilty without resorting to the character link:

(1) Defendant committed a forgery at the Bank of Western Carolina in Aiken, S.C., between 10 a.m. and 12 noon on January 12, 1922.
(2) Defendant was physically present in the business section of Aiken between 10 a.m. and 12 noon on January 12, 1922, near the Farmers & Merchants Bank.
(3) Since the defendant was in the vicinity of the Farmers & Merchants Bank at the time when a forgery was committed there, he is more likely to have committed that forgery than is someone of whose whereabouts at the time we know nothing.
(4) Defendant is the person who committed the forgery at the Farmers & Merchants Bank.

This inference chain was approved by Justice Marion, writing for the supreme court, on the ground that the evidence tended to establish the identity of the forger.[13] However, can we say that the court could "clearly perceive" the connection between link (1) and link (4) of the inference chain? "When an act is done, and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it."[14] In other words, evidence of the defendant's presence near the bank at a certain time is relevant to the issue on trial. But evidence of what he was doing at that time seems irrelevant; that portion of the other banker's evidence makes no

13. 125 S.C. at 417-18, 118 S.E. at 808.
14. 1 J. WIGMORE, EVIDENCE § 131 (3d ed. 1940).

contribution to the inference chain set out above. There is significant likelihood, as Justice Marion notes, that the jury is prone to use the character chain whenever it learns that the defendant has committed some other act that reflects on his character. The rule, as it was applied in *Lyle*, allowed the full evidence of the other act to be admitted even though only a portion of that evidence, Lyle's presence at the other bank, was clearly relevant to the issues then on trial. It therefore seems that the supreme court in *Lyle* misapplied the rule it was laying down by approving the admission of evidence that could not be clearly perceived as relevant to the issues then on trial.[15]

In *Lyle* the court held that evidence that defendant had committed other forgeries of a similar nature in other places in Georgia was improperly admitted by the trial court.[16] In considering the admissibility of this evidence the court tested the following inference chain:

> (1) Lyle, the defendant, committed in Athens, Ga., on December 30, 1921, a forgery involving a check stolen from a cotton merchant.
> (1a) The crime in question involved the forgery of a check stolen from a cotton merchant.
> (2) Lyle is more likely to have committed this crime than is one about whom we know nothing.
> (3) Lyle committed the crime in question.[17]

In its analysis of this inference chain, the court said:

> The mere fact that the Georgia crimes were similar in nature and parallel as to methods and techniques employed in their execution does not serve to identify the defendant as the person who uttered the forged check in Aiken as charged, unless his guilt of the latter crime may be inferred from its similarity to the former . . . . To warrant such inference the similarity must have established such a connection between the crimes as would logically exclude or tend to exclude the possibility that the Aiken crime could have been committed by another person . . . . There is nothing to indicate that the defendant held any monopoly of the methods and means used in passing the forged checks in Georgia, or that they were unique in the annals of crime. That the Aiken crime could have been committed by one

15. *See generally* State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969).
16. 125 S.C. at 430, 118 S.E. at 812.
17. *Id.* at 419-20, 118 S.E. at 808.

of innumerable other persons using like means and methods is obvious.[18]

It is interesting to note that the court, in considering evidence of the Georgia crimes, in effect stated that such evidence should not be used unless it and the inferences drawn from it would make it appear virtually certain that the defendant committed the crime charged.[19] This is a much more severe standard for admission than is the clear perception test that the court declared as the rule. Even under the clear perception test this inference chain would probably break at the drawing of inference (2), because, as the court observed, "many similar crimes [have] been committed by others in practically the same manner and by the same methods."[20] This is equivalent to saying that there are so many different individuals about whom statement (1) could be made that the likelihood of inference (2) being true is below the minimum level required.

2. *State v. Gregory*[21]

The defendant, secretary and treasurer of a municipal public works department, was on trial for the felonious embezzlement of $5,534.42 of public funds through checks and vouchers that had been issued in payment of bills. At trial the State was permitted, over defendant's objection, to introduce evidence that with the knowledge and consent of the defendant a "by-pass" had been installed around the water meter at defendant's residence and had been maintained there for several years. The "by-pass" was a device that permitted about three-fourths of the water that would ordinarily pass through and register on the meter to pass around it, thus reducing the defendant's water bill to about one-fourth of what it should have been. The use of such a device "with intention to cheat and defraud" the water works was a statutory misdemeanor.

The inference chain immediately suggested is:

(1) The defendant stole water from the water works.
(2) The defendant is a thief.
(3) The defendant embezzled funds from the water works through checks and vouchers.

18. *Id.* at 420-21, 118 S.E. at 808 (citations omitted).
19. *Id.* at 420, 118 S.E. at 808.
20. *Id.* at 421, 118 S.E. at 808.
21. 191 S.C. 212, 4 S.E.2d 1 (1939).

This inference chain is prohibited by the rule against attacking the character of a defendant, link (2) being a character link. There appears to be no way in which an inference chain can be built that would connect the use of the "by-pass" with the alleged embezzlement of funds without using a character link. Therefore, the evidence of the use of the "by-pass" was admitted erroneously. The supreme court came to the same conclusion, but by a different argument.[22]

3. *State v. Pittman*[23]

The defendant Alex Pittman and his son Holland Pittman were indicted, tried, and convicted for the murder of J. H. Howard, a state constable who was shot and killed while raiding a still. Two men had run from the still immediately after the shooting occurred but one, Holland Pittman, was captured. The State contended that Alex Pittman was the second man who had run from the still and that he had fired the fatal shots.

The State presented a great deal of circumstantial evidence, which included testimony that (a) Alex Pittman had for years been engaged in running distilleries, (b) his manner of operating distilleries was peculiar or distinctive, and (c) the deceased, J. H. Howard, had in the past interfered with Pittman's illicit liquor operations. The defense objected to this testimony, arguing it was evidence of other offenses not connected with the crime on trial and was therefore irrelevant, and further that the evidence prejudiced Pittman because it tended to show him to be a criminal. The trial court admitted the evidence, and the supreme court affirmed, holding the evidence to be properly admitted because it was relevant to motive and identity.

To reach this conclusion, however, it is necessary to choose

22. The court reasoned that

> it is the theory of [the State] that evidence of the commission by [the defendant] of a misdemeanor is evidence that [the defendant] intended to commit a felony . . . . But even conceding that evidence that [the defendant] had defrauded the Commissioners out of water would be some evidence that [defendant's] intent when he appropriated money belonging to the Commissioners was fraudulent (granting that he did appropriate such money), yet it is not [defendant's] defense that he didn't intend to cheat and defraud the Commissioners. His defense is that he didn't take the money; that he hasn't appropriated one cent. This being so, 'the inevitable tendency of such evidence is (was) to raise a legally spurious presumption of guilt in the minds of the jurors.'

Id. at 222-23, 4 S.E.2d at 5.

23. 137 S.C. 75, 134 S.E. 514 (1926).

carefully the elements upon which the inference chains are based. For example, the relevance of Pittman's past activities as a distiller may be established by the following inference chain:

(1) Alex Pittman had for years been engaged in running distilleries.
(2) Pittman was a distiller.
(3) Pittman was proprietor of the still at which Howard was killed.
(4) Pittman was present at the still when Howard was killed.
(5) Pittman killed Howard.

Is link (2) a statement of character, or is it simply a statement of Pittman's trade or profession? A statement that a person is a thief is clearly a statement of his character, but a statement that he is a shoe repairman is a statement of his trade. The trade of distilling, in the circumstances of this case, was an illegal trade and probably carried with it some implications of violent lawlessness. Therefore, the fact of Pittman's being a distiller would tend to cause the jurors to think of him as a lawless person likely to commit a murder. Link (2) would thus appear to be a character link; when that link is removed, the chain breaks.

If the evidence of Pittman's past activities is combined with the evidence of Howard's past interference, the following inference chain is established:

(1) Alex Pittman had for years been engaged in running distilleries, and the deceased J. H. Howard had in the past interfered with Pittman's illicit liquor operations.
(2) Pittman held a grudge against Howard because of Howard's interference with Pittman's enterprises.
(3) Pittman wanted to retaliate against Howard.
(4) Pittman killed Howard.

This chain is probably a sound one unless link (2) is a character link, the holding of a grudge perhaps being a character trait. However, prior conduct of the deceased in opposing or injuring the defendant is generally recognized to be admissible to show motive for the commission of murder.[24] Probably the characteristic of holding grudges generally is a character trait, while the holding of a grudge against one person or a small number of persons does not rise to that level.

24. 2 J. WIGMORE, EVIDENCE § 390 (3d ed. 1940).

The relevance of evidence establishing Pittman's distinctive manner as a distillery operator to prove identity is arguably established by the following chain of inferences:

(1) Pittman's manner of operating his distilleries was peculiar or distinctive (and the distillery at which the crime was committed was operated in that peculiar or distinctive manner).
(2) Pittman owned the distillery at which the killing occurred.
(3) Pittman was present at the distillery when the killing occurred.
(4) Pittman killed the deceased.

This chain seems to be a sound one, unless one would consider that Pittman's manner of designing his distilleries was an element of his character.

4. *State v. Thomas*[25]

The defendant was indicted, tried, and convicted of rape. At the trial, the State offered the testimony of the prosecutrix that the defendant entered her house and bedroom after midnight. She testified that when she heard him, she exclaimed, "Who in the world is this in my house at this time of night?", and the defendant answered, "It's me, and I have come to kill you. I have planned it every single day since you put me on the chaingang for stealing your watch."[26] The trial court admitted this testimony over the defendant's objection. On appeal, the supreme court held this evidence was properly admitted because it "tended directly and fairly to prove not only the identity of the appellant, but his motive as well."[27]

The inference chain connecting this evidence with the crime for which the defendant was on trial seems to be:

(1) The victim was instrumental in having the defendant prosecuted and convicted in the past for stealing the victim's watch.
(2) The defendant wanted to get even with the victim for that act.
(3) The defendant committed a crime of violence against the victim.

25. 248 S.C. 573, 151 S.E.2d 855 (1966).
26. *Id.* at 576, 151 S.E.2d at 857.
27. *Id.* at 583, 151 S.E.2d at 861.

This inference chain appears to pass both the character test and the clear perception test, unless link (2) is a character link. As *State v. Pittman* indicates, however, holding a grudge against one or a small number of persons is not generally considered a trait of character.[28]

There is also at least one other possible chain of inferences establishing the relevance of the defendant's past crime:

(1) The defendant made the statement about the victim's having put him on the chaingang for stealing her watch. (And the victim did in fact do that.)
(2) The defendant was the man who entered the victim's home and committed the rape.

This inference chain does not involve the character of the defendant. In addition, it passes the clear perception test without any difficulty, although the evidence of the defendant's presence on the chaingang for stealing the watch must also be admitted in order for the connection between links (1) and (2) to be manifest.

5. *State v. Thompson*[29]

The defendant was indicted, tried, and convicted on four counts of violating liquor laws. The four counts included (1) having in his possession unstamped liquor, (2) unlawful storing and keeping of liquor, (3) selling liquor without a license, and (4) having possession of liquor for an unlawful use. The State charged that these offenses had taken place on March 18, 1956. At the trial, the State offered as part of its case a police officer's testimony that on October 17, 1955, he went to the premises of the defendant with a search warrant and there found illegal corn whiskey. The same police officer also offered evidence of a similar incident that allegedly occurred in 1953. The defendant objected to both of these items of evidence, and the trial court admitted the evidence of the October 1955 search but excluded evidence of the 1953 episode, finding it to be too remote in time. Later in the trial, while the defendant was testifying in her own defense, she stated on cross-examination that the police "had a spite against her, that they 'picked on' her, and that on a majority of their visits to her home they found no liquor."[30] After she so testified

28. *See* text accompanying note 24 *supra*.
29. 230 S.C. 473, 96 S.E.2d 471 (1957).
30. *Id.* at 475, 96 S.E.2d at 472.

the State was permitted, over the defendant's objection, to introduce evidence of the 1953 incident for the purpose of "find[ing] out why they were picking on her."[31] On appeal the Supreme Court of South Carolina held that evidence of the October 1955 search was properly admitted because it tends "to show continuity or habit,"[32] but that evidence of the 1953 incident was improperly admitted because it was "remote in time," "does not fall within any of [the *Lyle*] exceptions," and involves an "altogether collateral issue."[33]

The chain of inferences that establishes relevance here could be:

(1) In October 1955 the defendant was illegally storing whiskey at her home.
(2) Defendant is by character a violater of liquor laws.
(3) Defendant committed the crimes charged, all of which are liquor law violations.

This inference chain may not be used because obviously link (2) is a character link. This was apparently recognized by the court, which relied upon a different chain:

(1) In October 1955 the defendant was illegally storing whiskey at her home.
(2) The likelihood that whiskey was illegally stored at the defendant's home in March 1956 is greater where such a condition existed in October 1955 than where nothing is known about conditions in October 1955.
(3) The defendant was illegally storing whiskey at her home in March 1956.[34]

Does link (2) partake of the nature of a character link? There is a generally accepted principle of relevance that the prior existence of a condition is evidence of the existence of that condition at a later time.[35] However, this principle is usually applied to the existence or condition of inanimate objects.[36] In this case the continuation of the condition depends upon the action or failure to act of a person, which in turn depends, to some extent at least,

31. *Id.* at 476, 96 S.E.2d at 472.
32. *Id.* at 475, 96 S.E.2d at 472.
33. *Id.* at 477, 96 S.E.2d at 472-73.
34. *Id.* at 475, 96 S.E.2d at 472.
35. 2 J. WIGMORE, EVIDENCE § 437 (3d ed. Supp. 1975); *see, e.g.*, Nimmer v. Northwestern R.R., 116 S.C. 190, 107 S.E. 479 (1921).
36. *See* note 35 *supra*.

on the inclination or character of that person. It, therefore, seems that link (2) of this inference chain is in reality a statement that since the defendant illegally stored whiskey in October 1955, she is a person proven to store illegal whiskey in her home, thereby making it more likely that she illegally stored whiskey in March 1956 than would be if nothing was known about her prior acts. This inference chain, so analyzed, contains a character link and therefore should not be used.

On the question of whether to admit the evidence derived from the 1953 search of defendant's premises, the court noted that "the evidence of the 1953 offense was not admitted to prove any of the crimes charged, but on the altogether collateral issue of whether the officers had a spite against the defendant."[37] This statement, although ambiguous, seemed to indicate that this evidence failed to meet the clear perception test laid down in *Lyle*. The court then properly ordered a new trial for the defendant, because the admission of this evidence "had the effect of depriving her of her right to be tried only for the crimes set forth in the indictment."[38]

6. *State v. Anderson*[39]

The defendant was on trial for murdering his wife of 10 weeks. The State offered evidence showing the circumstances of the woman's death from which it could be inferred that defendant had killed her. The State also offered evidence showing that some six months before Mrs. Anderson's death, the defendant had purchased a $50,000 life insurance policy on his then fiancee, making her parents the beneficiaries, but that immediately following the marriage the policy was amended to make the defendant the sole beneficiary. This evidence was admitted. The State then offerd evidence to show that less than one year before he had married the victim, he had discussed marriage with each of two other women successively, that he had made to them false representations as to his financial standing and education, and that he had applied for $50,000 life insurance policies on each of them. In addition, it was shown that the defendant had discussed marriage and life insurance with a fourth woman, after his marriage to the deceased but prior to her death. The offered evidence showed that

37. 230 S.C. at 477, 96 S.E.2d at 473.
38. *Id.*
39. 253 S.C. 168, 169 S.E.2d 706, *cert. denied*, 396 U.S. 948 (1969).

the policies on these women were not issued, in one case because the woman proved to be uninsurable and in the other case because the defendant was unable to pay the initial premiums. This evidence was objected to by the defendant on the grounds it was irrelevant and unfairly prejudiced his defense by showing him to be a liar and a promiscuous person. The evidence was admitted over the defendant's objection. On appeal, the supreme court affirmed the trial court's ruling on the ground that this evidence was admissible under the *Lyle* exception, as it "tended to prove circumstantially his overall plan"[40] "to find a young girl, insure her life for a large sum of money, marry her, murder her, and collect the insurance proceeds."[41]

The inference chain approved by the court seems to be:

> (1a) In early 1964 the defendant made false representations about his personal background and his financial standing to a woman with whom he discussed marriage, and he sought a large life insurance policy on her life, but she turned out to be uninsurable.
> (1b) In the summer of 1964 the defendant discussed marriage with a second woman and sought a large life insurance policy on her life, but the policy was never issued because the defendant declared to the agent that he was unable to pay the initial premium.
> (1c) In December 1964, the defendant secured a $50,000 life insurance policy on his then fiancee, whom he married in April 1965, and for whose murder in June 1965 he is on trial.
> (1d) After the marriage, but before the death of his wife, the defendant discussed marriage and life insurance with a fourth woman.
> (2) Defendant had in his mind an overall plan to purchase a life insurance policy on a woman, marry her, kill her, and collect the insurance money.
> (3) Defendant killed his wife in execution of his plan.

Is link (2) an inference that may properly be drawn from links (1a), (1b), (1c) and (1d) taken together? In order to answer this question we must consider two preliminary questions: Is link (2) a forbidden character link? If it is not, can we "clearly perceive" the connection between link (1) and link (2)?

What inferences can one reasonably draw from the fact that

40. *Id.* at 177, 169 S.E.2d at 710.
41. *Id.* at 174, 169 S.E.2d at 708.

within the period of 12 months the defendant discussed marriage with four different women in the circumstances set out above? These possible inferences come to mind:

> (1) Defendant is promiscuous. This is a character inference and is therefore not permissible.
> (2) From fact (1d) above it can be inferred that defendant was planning to dispose of his wife in some fashion, as he was discussing marriage with another woman. There is no character inference involved here, and also one may clearly perceive the connection between the proven fact and the crime charged.
> (3) From fact (1c) above, it may be inferred that the defendant killed his wife, as it is generally recognized that in a murder trial evidence is admissible that tends to show that the defendant had, prior to the death of the deceased, made arrangements that would cause the death to inure to his financial benefit.[42]
> (4) Facts (1a) through (1d), a series of attempts, one of which was successful, to purchase life insurance on a prospective wife, show that the defendant engaged in similar conduct on four different occasions in a relatively short period of time.

The fourth episode, (1d), discussed above as the second inference, provides a basis upon which one may infer what was intended by defendant in the transaction involving the woman that he married. And from defendant's intent it may be inferred that he committed the crime. The third episode, (1c), standing alone, is admissible as set out in the preceding paragraph. But do the first two episodes, (la) and (lb), provide a basis for any reasonable inference of defendant's guilt? At most the first two episodes show that the defendant had it in his mind that he would find a woman to marry and would purchase a large insurance policy on her life. The fact that he had such a plan would of course provide a basis for an inference that he carried out that plan, that is, the plan to buy life insurance on a woman and then marry her. However, that evidence is cumulative and therefore unnecessary where there is direct evidence, as there was in this case, that the defendant bought life insurance on the deceased and subsequently married her. Where such evidence provides a basis upon which a jury might draw an unfavorable inference about his character, as it does here, and the evidence is cumulative, the unfair prejudicial effect of the evidence outweighs its probative value,

42. 2 J. WIGMORE, EVIDENCE § 390 (3d ed. Supp. 1975).

and it should be excluded, particularly where the evidence in question is merely circumstantial.

The Supreme Court of South Carolina found in this entire pattern of conduct, plus other facts, evidence of an "intelligently conceived design . . . to find a young girl, insure her life for a large sum of money, marry her, murder her, and collect the insurance proceeds."[43] While it is true that facts (1c) and (1d) are relevant to the issue of whether or not the defendant killed the deceased, facts (1a) and (1b) are clearly not relevant to that issue, as it could not be said that one who buys life insurance on Miss *A* is more likely to have killed Miss *B* than is one about whom nothing is known. It is therefore submitted that the court should not have admitted facts (1a) and (1b) when they were objected to by the defendant on grounds of unfair prejudice.

Conclusion

The sum and substance of the above discussion is that, in determining whether or not to admit evidence of other crimes or bad acts, a court should trace the inference chain which supposedly connects the evidence with the issues in the case, looking for these flaws in the chain:

> (1) Is there a character link in the inference chain? If the answer to this question is "yes", the chain breaks and the evidence must be excluded, unless another chain that does not contain such a link can be built.
> (2) Does the court "clearly perceive" the connection of each link with the link that immediately precedes it in the chain? If the answer to this question is "no", the inference chain breaks between the two links and cannot be used.
> (3) Does the prejudicial effect of the evidence outweigh the probative value? If the court answers "yes" to this question, the evidence may not be used.

Whenever evidence of a crime or bad act is introduced there is a likelihood that the jury will build a character link onto the link that is made up of the offered evidence. Under the rule stated in (1) above, the chain must end with the character link, as the character link will not support the addition of another link leading in the direction of the issues in the case. The court should

43. 253 S.C. at 174, 169 S.E.2d at 708.

then consider whether another chain can be built between the evidence offered and one of the issues in the case which is not dependent upon the character link. After that chain is constructed, the court should apply the clear perception test to each link, and, as it applies that test, the court must at the same time measure the clarity of perception against the likelihood that the jury may draw the forbidden character inference chain. Or stated another way, the court should exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused.[44]

44. *See* FED. R. EVID. 403.