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Comments

ADMISSIBILITY OF CHARACTER EVIDENCE IN RAPE PROSECUTIONS IN MISSOURI

I. Introduction

The admissibility of character evidence in rape prosecutions is a topic of no small controversy. Prosecuting attorneys urge reform, alleging that present rules of evidence force victims to endure such humiliation and embarrassment that many women refuse even to report the crime.[1] Furthermore, they claim the evidence presented to juries to attack the victim's character is so prejudicial that guilty defendants are often set free.[2] However, defense attorneys argue that because of the nature of the crime, the fact that it is rarely witnessed, and the natural prejudice against one accused of such an offense, the only effective defense available is a probing inquiry into the credibility of the accuser.

Authors of several recent law review articles have presented both the prosecution's[3] and defense attorneys'[4] points of view. Legislation proposing reform has been introduced in several state legislatures, including Missouri.[5] The general public has been made increasingly aware of the topic by a number of books exploring the sociological and psychological causes and ramifications of rape.[6] Moreover, the entertainment media has dramatized, indeed in some instances exaggerated and distorted, the situation. In spite of, or perhaps because of, this burgeoning body of information, there exists a great deal of confusion and misinformation both about what the law is and what it should be.

This comment will attempt to present an unbiased summary of the present law in Missouri regarding the admissibility of character evidence in rape prosecutions. Missouri statutes divide the crime of rape into three separate offenses depending on the age and previous character of the woman. Because the rules of admissibility vary, each offense will be discussed individually. Different rules also govern the admissibility of evidence of general character as opposed to evidence of specific acts of immorality and the comment is subdivided accordingly.

II. Statutory Rape: Intercourse With A Female Under Age Sixteen

A. *Elements of the Crime*

Missouri law defines rape as either forcibly having intercourse with a female 16 years of age or older, or having intercourse with a female under that age regardless of her consent.[7] The latter act is commonly referred to as "statutory rape." The purpose of this part of the statute is clearly to protect a girl under the age of 16 from her own immaturity and weakness.[8] The protection is absolute. All that need be shown for a conviction is that the defendant had sexual intercourse with a female who was in fact under age 16 at the time.[9] It makes no difference how old the defendant thought the girl was or what basis he had for that belief.[10] It is immaterial whether force was used[11] or whether the girl consented.[12]

1. "[L]aw enforcement administrators recognize that this offense (Rape) is probably one of the most underreported crimes due primarily to fear and/or embarrassment on the part of the victims." Federal Bureau of Investigation, Uniform Crime Reports 22 (1975).

2. Out of every 100 reported rapes, approximately 51 men are arrested, 31 are prosecuted, 15 are acquitted, 11 are found guilty of the offense charged, and 5 are convicted of lesser offenses. *Id.*

3. Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 Calif. L. Rev. 919 (1973); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 Am. Crim. L. Rev. 335 (1973).

4. Comment, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 Am. Crim. L. Rev. 309 (1973).

5. Two bills were introduced in the 1976 session of the Missouri legislature, neither of which passed. They were typical of the types of reform being proposed nationally.

House Bill 1327 provided that in prosecutions for rape or attempted rape, opinion evidence, reputation evidence, and evidence of specific instances of sexual conduct of the complaining witness would not be admissible except in special instances. If a defendant wishes to offer such evidence under the permitted exceptions, he would have to make an offer of proof and the judge would have to hold an *in camera* hearing to determine what evidence may go to the jury.

Senate Bill 644 provided that in the prosecution of sexual offenses, the defendant may not offer evidence of the prior sexual conduct of the alleged victim, except in certain situations where a written motion has been filed by the defense regarding such prior conduct and a hearing has been held out of the presence of the jury to determine the relevancy of such prior conduct.

6. S. Brownmiller, Against Our Will: Men, Women and Rape (1975); M. Amir, Patterns in Forcible Rape (1971).

7. The primary Missouri statute on rape is section 559.260, RSMo 1969, which provides:

> Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upwards, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

8. State v. Blessing, 183 S.W. 279 (Mo. 1916).

9. An amendment to the statute in 1921 raised the age of consent from fourteen to sixteen, thereby extending the length of protection, but the same amendment lowered the minimum term of imprisonment upon conviction from five to two years.

10. State v. Basket, 111 Mo. 271, 19 S.W. 1097 (1892); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

11. State v. Weekly, 223 S.W.2d 494 (Mo. 1949); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Blessing, 183 S.W. 279 (Mo. 1916); State v. George, 214 Mo. 262, 113 S.W. 1116 (1908); State v. Ernest, 150 Mo. 347, 51 S.W. 688 (1899).

12. State v. Lawson, 136 S.W.2d 992 (Mo. 1940); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928); State v. Gruber, 285 S.W. 426 (Mo. 1926); State v. Nevitt, 270 S.W. 337 (Mo. 1924); State v. Ansel, 256 S.W. 762 (Mo. 1923); State v. Shellman, 192 S.W. 435 (Mo. 1917); State v. George, 214 Mo. 262, 113 S.W. 1116 (1908); State v. Allen, 174 Mo. 689, 74 S.W. 839 (1903); State v. Ernest, 150 Mo. 347, 51 S.W. 688 (1899); State v. Duffey, 128 Mo. 549, 31 S.W. 98 (1895); State v. Lacey, 111 Mo. 513, 20 S.W. 238 (1892); State v. Wray, 109 Mo. 594, 19 S.W. 86 (1892). The prosecution is entitled to a jury instruction that consent is no defense. State v. Mace, 278 S.W. 718 (Mo. 1925). Even a later marriage of

The question of what kind of evidence should be admissible is brought sharply into focus by the fact that the defendant can be convicted solely on the uncorroborated testimony of the victim,[13] unless such testimony is contradictory or totally unbelievable.[14] Because neither force nor lack of consent are elements of the crime,[15] evidence that the victim made outcry or complaint is immaterial and therefore inadmissible in some jurisdictions.[16] In Missouri, however, evidence that a complaint or outcry was made is always admissible where there is any evidence that the rape was accomplished by force,[17] and some decisions have held such evidence admissible even without any reference to force.[18] Likewise, evidence of a failure to make complaint or outcry is admissible,[19] but neither prosecution[20] nor defense[21] is entitled to a jury instruction concerning such evidence.

B. *Evidence of the Victim's Character*

1. Specific Acts of Immorality

Evidence of previous immoral conduct, short of actual intercourse, between the defendant and the prosecutrix is admissible when offered

the prosecutrix and the defendant will not bar a prosecution. However, as a practical matter, such a prosecution would be unlikely due to the husband-wife immunity which would prevent the wife from testifying but it has happened. State v. Evans, 138 Mo. 116, 39 S.W. 462 (1897).

13. State v. Lee, 404 S.W.2d 740 (Mo. 1966); State v. Nash, 272 S.W.2d 179 (Mo. 1954); State v. Wood, 355 Mo. 1008, 199 S.W.2d 396 (1947); State v. Burton, 355 Mo. 792, 198 S.W.2d 19 (1946); State v. Lawson, 136 S.W.2d 992 (Mo. 1940); State v. Ball, 133 S.W.2d 414 (Mo. 1939); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Mitchell, 86 S.W.2d 185 (Mo. 1935); State v. Gruber, 285 S.W. 426 (Mo. 1926); State v. Wade, 306 Mo. 457, 268 S.W. 52 (1924); State v. Smith, 237 S.W. 482 (Mo. 1922); State v. Hammontree, 177 S.W. 367 (Mo. 1915); State v. Hughes, 258 Mo. 264, 167 S.W. 529 (1914); State v. Stackhouse, 242 Mo. 444, 146 S.W. 1151 (1912); State v. Wilcox, 111 Mo. 569, 20 S.W. 314 (1892). In *Ball, supra*, the only evidence introduced was the girl's testimony, and she did not come forward until more than a year after the offense. If the testimony of the prosecutrix is contradictory and conflicts with physical facts, surrounding circumstances, and ordinary experience, then it must be corroborated.

14. State v. Tevis, 234 Mo. 276, 136 S.W. 339 (1911); State v. Goodale, 210 Mo. 275, 109 S.W. 9 (1908).

15. Cases cited notes 11 and 12 *supra*.

16. *See* 3 H. Underhill, Criminal Evidence § 757 at 1738 (5th ed. 1957); 4 J. Wigmore, Evidence § 1133 at 223 (3d ed. 1940) and cases cited therein.

17. State v. Hammontree, 177 S.W. 367 (Mo. 1915); State v. Palmberg, 199 Mo. 233, 97 S.W. 566 (1906). The details of a complaint made to a third person are clearly hearsay and therefore inadmissible unless the prosecutrix has been impeached by prior inconsistent statements and the statements made in the complaint are used as prior consistent statements to rehabilitate the prosecutrix on that specific point. State v. Fleming, 354 Mo. 31, 188 S.W.2d 12 (1945); State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

18. State v. Robinson, 106 S.W.2d 425 (Mo. 1937); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928).

19. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

20. An instruction that the jury should consider the failure of the prosecutrix to complain promptly has been held "a comment upon the prosecutrix' testimony on a point not within the issuable facts." State v. Bowman, 278 Mo. 492, 497, 213 S.W. 64, 65 (1919).

21. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

by the prosecution, because it tends to show the relationship between the parties and their inclination to engage in intercourse.[22] In *State v. Bascue*[23] the appellant, who had been convicted of the statutory rape of his 14 year old stepdaughter, argued that the trial court erred in admitting evidence of prior acts of "messing around" with the child because such acts constituted the separate crime of child molestation which was not reasonably related to the subsequent act of statutory rape. The general rule is that evidence of other criminal acts, if offered to prove the crime charged, is inadmissible except when it tends to establish motive, intent, or a common scheme or plan embracing the commission of separate similar crimes so interrelated that proof of one tends to prove the others.[24] The court in *Bascue* held these prior acts are so related to the act charged as to be admissible.[25] The court said these acts showed the state of intimacy between the parties and constituted "the foundation for an antecedent probability"[26] that the parties engaged in intercourse.[27]

A fortiori, evidence of prior acts of intercourse between the prosecutrix and the defendant is admissible as tending to create an "antecedent probability" of crime charged.[28] Previous acts of intercourse as remote as seven years prior to the act charged have been held admissible because they demonstrate a pattern of sexual misconduct continuing over an extended period.[29] The statute of limitations imposes no restrictions on admission into evidence of offenses barred by the statute.[30] An objection based on remoteness is untenable because this factor affects only the weight and not the admissibility of the testimony.[31] However, the state cannot introduce evidence of subsequent acts of intercourse,[32] even evidence that the defendant regularly had intercourse with the prosecutrix with her consent after she reached age sixteen[33] in a prosecution for one act of intercourse before the girl attained that age.

22. "[P]rior amorous acts, which ordinarily precede the sexual act, although actually constituting assaults and therefore separate offenses may properly be shown." State v. Cooper, 271 S.W. 471, 474 (Mo. 1923).

23. 485 S.W.2d 35 (Mo. 1972).

24. C. McCormick, Evidence § 42 at 82 (2d ed. 1972).

25. State v. Bascue, 485 S.W.2d 35 (Mo. 1972).

26. *Id.*

27. *See also* State v. Garner, 481 S.W.2d 239 (Mo. 1972); State v. Akers, 328 S.W.2d 31 (Mo. 1959); State v. Baker, 318 Mo. 542, 300 S.W. 699 (1927); State v. Pruitt, 202 Mo. 49, 100 S.W. 481 (1907).

28. State v. Tyler, 306 S.W.2d 452 (Mo. 1957); State v. Burkhart, 242 S.W.2d 12 (Mo. 1951); State v. King, 342 Mo. 975, 119 S.W.2d 277 (1938); State v. Hersh, 296 S.W. 433 (Mo. 1927); State v. Cooper, 271 S.W. 471 (Mo. 1925); State v. Cason, 252 S.W. 688 (Mo. 1923).

29. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).

30. *Id.*

31. State v. Bascue, 485 S.W.2d 35 (Mo. 1972). *See also* State v. Simerly, 463 S.W.2d 846 (Mo. 1971).

32. State v. Amende, 338 Mo. 717, 92 S.W.2d 106 (1936); State v. Bullington, 274 S.W. 18 (Mo. 1925); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Arnold, 267 Mo. 33, 183 S.W. 289 (1916); State v. Palmberg, 199 Mo. 233, 97 S.W. 566 (1906).

33. State v. Caldwell, 311 Mo. 534, 278 S.W. 700 (1925).

It is a felony to have carnal knowledge of a girl under the age of sixteen, regardless of whether others have had such knowledge of her. Therefore, evidence offered by the defendant of the victim's specific immoral acts with others is immaterial and inadmissible.[34]

2. General Reputation of the Victim

A number of old Missouri cases held that the general bad reputation of the prosecutrix could be shown to affect her credibility if she took the stand to testify.[35] This was consistent with the rule which existed at the time that the general bad reputation of any witness for morality could be shown to impeach.[36] This rule was reversed by *State v. Williams*,[37] which held that the general reputation for morality was inadmissible as bearing on the credibility of a witness. The rule in *State v. Williams* has been applied in prosecutions for forcible rape,[38] but no case has specifically held it applicable to statutory rape. Unless a different rationale is to be followed due to the age of the prosecuting witness, this rule rejecting general reputation for morality as bearing on the credibility of the prosecuting witness is applicable to statutory rape prosecutions. Moreover, because consent of the victim is immaterial, her general reputation for morality is inadmissible on that issue.

C. *Evidence of the Defendant's Character*

Missouri courts have recognized the precarious position of one who stands accused of statutory rape. In *State v. Seay*[39] the Supreme Court of Missouri stated:

> A crime of the character of the one with which the defendant is charged is so abhorrent that conviction is easy; in fact, the charge is almost equivalent to a conviction. So strong is the prejudice against a defendant in such case that the court must take every precaution to see that he obtains an impartial trial.[40]

1. Specific Acts of Immorality

Evidence of specific acts of immorality on the part of the defendant with anyone other than the prosecutrix is generally inadmissible. It is never permissible for the prosecution to prove that the defendant has had illicit relations with women over the age of consent.[41] Likewise, it is generally held to be reversible error to permit the introduction of evidence that the defendant has had illicit relations with females under the age of sixteen.[42] Such evidence is obviously highly prejudicial and does not tend to make it more probable that the defendant is guilty of the offense for which he is on trial.[43] However, in a few situations, evidence of a specific, prior, similar crime has been held properly admitted. For example, in *State v. King*[44] a porter in a private school was charged with the statutory rape of a pupil. Correspondence between defendant and another pupil indicating that defendant had committed a similar offense with the second pupil, although inadmissible as part of the state's case in chief, was admissible in rebuttal when defendant raised the issue by testifying that he never "got smart" with any other pupils.

2. General Reputation of the Defendant

The general rule in all criminal prosecutions is that the prosecution cannot introduce evidence that the defendant's general reputation for morality is bad, unless the defendant, in an attempt to bolster his own credibility, calls a witness to testify to his good character and reputation.[45] In such a case, the state may call witnesses to show that his general reputation for morality is bad. It is also proper for the state to cross-examine thoroughly defendant's character witness for the purpose of testing the witness' knowledge of the defendant's reputation, the witness' sources of information, and the witness' credibility. The extent of permissible cross-examination of the defendant's character witness is largely within the trial court's discretion.[46] This type of questioning is proper even if it relates to crimes other than the one charged.[47] In order to determine upon what the character witness bases his judgment, it is permissible to inquire of the witness whether he had heard it rumored that defendant was involved in other criminal acts which would reflect upon defendant's character.[48] However, such questions are improper unless such rumors are actually being circulated.[49] It is not permissible for the prosecutor,

34. State v. Smith, 289 S.W. 590 (Mo. 1926); State v. Shobe, 268 S.W. 81 (Mo. 1924); State v. Ansel, 256 S.W. 762 (Mo. 1923); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Loness, 238 S.W. 112 (Mo. 1922); State v. Devorss, 221 Mo. 469, 120 S.W. 75 (1909).

35. State v. Stevens, 325 Mo. 434, 29 S.W.2d 113 (1930); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Loness, 238 S.W. 112 (Mo. 1922); State v. Nibarger, 255 Mo. 289, 164 S.W. 453 (1914); State v. Duffey, 128 Mo. 549, 31 S.W. 98 (1895).

36. State v. Shields, 13 Mo. 236 (1850).

37. 337 Mo. 889, 87 S.W.2d 175 (1935).

38. State v. Kain, 330 S.W.2d 842 (Mo. 1960).

39. 282 Mo. 672, 222 S.W. 427 (1920).

40. *Id.* at 679, 22 S.W. at 429.

41. State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947); State v. Cox, 268 S.W. 215 (Mo. 1924); State v. Bowman, 272 Mo. 491, 199 S.W. 161 (1917); State v. Burgess, 259 Mo. 385, 168 S.W. 740 (1914).

42. State v. Spinks, 344 Mo. 105, 125 S.W.2d 60 (1939); State v. Bowman, 272 Mo. 491, 199 S.W. 161 (1917); State v. Smith, 250 Mo. 274, 157 S.W. 807 (1913); State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1913); State v. Teeter, 239 Mo. 475, 144 S.W. 445 (1912).

43. Cases cited note 42 *supra*.

44. 342 Mo. 975, 119 S.W.2d 277 (1938).

45. State v. Williams, 337 Mo. 884, 87 S.W.2d 175 (1935).

46. State v. Cooper, 271 S.W. 471 (Mo. 1925); State v. Seay, 282 Mo. 672, 222 S.W. 427 (1920); State v. Phillips, 233 Mo. 299, 135 S.W. 4 (1911); State v. Harris, 209 Mo. 423, 108 S.W. 28 (1908); State v. Parker, 172 Mo. 191, 72 S.W. 650 (1903).

47. State v. Seay, 282 Mo. 672, 222 S.W. 427 (1920).

48. *Id.*

49. *Id.*

under the pretext of testing the credibility and information of the character witness, to bring before the jury bad acts or crimes which occurred after the offenses charged or about which the character witness would have no way of knowing.[50]

III. Statutory Rape: Intercourse With a Female of Previously Chaste Character Between the Ages of Sixteen and Eighteen

A. *Elements of the Crime*

Missouri law extends, by a separate statutory rape statute, the period of protection an additional two years for young women of "previously chaste character."[51] Being of "previously chaste character" means simply that the young woman was a virgin prior to the act charged.[52] This fact must be proved affirmatively by the state.[53] Although earlier Missouri cases held that chastity was presumed until the contrary was shown,[54] the clear rule today is that there is no presumption that the prosecutrix was chaste.[55] However, defendant is not entitled to an instruction that no presumption exists, because such an instruction would have a tendency to mislead the jury into assuming that a contrary presumption exists.[56] If the state establishes that the young woman was of "previously chaste character," the same protection given a female under age sixteen is applicable—*i.e.*, both the consent of the prosecutrix[57] and the use of force[58] are immaterial.

In a prosecution under this statute the defendant can be convicted

50. *Id.* It is, of course, improper for the prosecutor to state to the jury during closing argument, or at any other time, his personal belief in the guilt of the defendant, because the jury may put undue weight on this opinion and assume that it is based on information not in evidence. *Id. See also* State v. Reppley, 278 Mo. 333, 213 S.W. 477 (1919); State v. Webb, 254 Mo. 414, 162 S.W. 622 (1914); State v. Hess, 240 Mo. 147, 144 S.W. 489 (1912).

51. § 559.300, RSMo 1969, provides:

> If any person over the age of seventeen years shall have carnal knowledge of any unmarried female, of previously chaste character, between the age of sixteen and eighteen years of age, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of two years, or by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in the county jail for not less than one month or more than six months, or by both such fine and imprisonment, in the discretion of the court.

52. State v. Luckett, 246 S.W. 881 (Mo. 1922); State v. Cook, 207 S.W. 831 (Mo. 1918). The defendant is not entitled to an instruction on the meaning of "previously chaste character" because "an ordinary intelligent juror would understand that the phrase referred to a female who had never indulged in an act of sexual intercourse." State v. Wells, 367 S.W.2d 652, 655-56 (Mo. 1963).

53. State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Kelly, 245 Mo. 489, 150 S.W. 1057 (1912); State v. McMahon, 234 Mo. 611, 137 S.W. 872 (1911).

54. State v. Kelly, 191 Mo. 680, 90 S.W. 834 (1905).

55. State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Kelly, 245 Mo. 489, 150 S.W. 1057 (1912).

56. State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916).

57. State v. Wells, 367 S.W.2d 652 (Mo. 1963); State v. Volz, 269 Mo. 194, 190 S.W. 307 (1916); State v. Taylor, 267 Mo. 41, 183 S.W. 299 (1916).

58. Cases cited note 57 *supra*.

solely on the testimony of the prosecutrix.[59] Corroboration is not necessary unless her testimony is contradictory or unconvincing when "applied to the admitted facts and ordinary experiences of mankind."[60]

B. *Evidence of the Victim's Character*

1. Specific Acts of Immorality

Because virginity of the prosecutrix is an essential element of the offense, prior specific acts of intercourse on her part are clearly relevant and admissible.[61] Any prior act of intercourse with others[62] or with the defendant[63] is, if proved, a complete defense to a prosecution under this statute. If the evidence indicates more than one act of intercourse with the defendant, he can only be convicted of the first act, because the woman was not "of chaste character" at the time of the later acts.[64] The statute of limitations starts to run as of the first act of intercourse.[65]

Courts have stated that prior specific acts of immorality are inadmissible to impeach the credibility of the prosecutrix,[66] but this prohibition is meaningless because specific prior acts are admissible on the issue of chastity.[67] However, evidence of specific acts of intercourse occurring subsequent to the crime charged is inadmissible for any purpose.[68]

2. General Reputation of the Victim

The defendant may offer evidence that the general reputation of the prosecutrix for chastity was bad prior to the offense charged because such evidence is relevant to the issue of chastity.[69] The rationale for admitting such evidence is that, although "chaste character" and a "reputation for chastity" are not the same, reputation is still some evidence of actual character.[70] Likewise, the prosecution may offer evidence that the prosecutrix' general reputation for morality was good prior to the offense because it tends to prove her "previously chaste character."[71] Evidence

59. State v. Clark, 353 Mo. 470, 182 S.W.2d 619 (1944); State v. Cox, 263 S.W. 215 (Mo. 1924); State v. Wade, 306 Mo. 457, 268 S.W. 52 (1924); State v. Hughes, 258 Mo. 264, 167 S.W. 529 (1914); State v. Tevis, 234 Mo. 276, 136 S.W. 339 (1911); State v. Day, 188 Mo. 359, 87 S.W. 465 (1905).

60. *See* cases cited note 59 *supra*.

61. State v. Foster, 225 S.W. 671 (Mo. 1920); State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Weber, 272 Mo. 475, 199 S.W. 147 (1917).

62. Cases cited note 61 *supra*.

63. State v. Foster, 225 S.W. 671 (Mo. 1920); State v. Schenk, 238 Mo. 429, 142 S.W. 263 (1911); State v. McMahon, 234 Mo. 611, 137 S.W. 872 (1911).

64. State v. Schenk, 238 Mo. 429, 142 S.W. 263 (1911).

65. State v. McMahon, 234 Mo. 611, 137 S.W. 872 (1911).

66. *See, e.g.*, State v. Luckett, 246 S.W. 881 (Mo. 1922).

67. State v. Cook, 207 S.W. 831 (Mo. 1918); State v. Weber, 272 Mo. 475, 199 S.W. 147 (1917).

68. State v. Perrigin, 258 Mo. 233, 167 S.W. 573 (1914).

69. Character refers to what a person really is while reputation is only what public opinion reputes him to be. State v. Cook, 207 S.W. 831, 833 (Mo. 1918).

70. *Id.*

71. State v. Taylor, 267 Mo. 41, 183 S.W. 299 (1916). State v. Kelley, 191 Mo. 680, 90 S.W. 834 (1905), contains dictum to the contrary, but was expressly overruled by *Taylor*.

of the general reputation of the prosecutrix subsequent to the offense charged is inadmissible.[72]

Older Missouri cases held that if the prosecuting witness testified, evidence of her general bad reputation for morality would be admissible to impeach her credibility.[73] This rule has not been followed in Missouri since 1935 when the supreme court held in *State v. Williams*[74] that the general reputation of a witness is inadmissible as bearing on the issue of credibility. Presently, the only general reputation evidence admissible to impeach a witness is general reputation for truth and veracity.[75]

C. *Evidence of Defendant's Character*

Despite the dearth of cases on this issue, it appears that the rules governing the admissibility of evidence of the defendant's character when the charge is statutory rape of a "chaste" 16 to 18 year old are the same as those applicable in a prosecution for the statutory rape of a girl under the age of 16.[76] Because the only difference between the two offenses is the characteristics of the victim, there is no reason to treat evidence of the defendant's character any differently.

IV. Forcible Rape

A. *Elements of the Crime*

In Missouri the essential elements of forcible rape[77] are: (1) penetration (however slight) of a female's sexual organs;[78] (2) accomplished by force or threats;[79] and (3) against the will of the woman.[80] The state, of course, must prove these elements beyond a reasonable doubt.[81]

The force used must be sufficient to overcome the "utmost resistance" of the woman—*i.e.*, to overpower the mind, thereby negating consent.[82]

72. State v. Day, 188 Mo. 359, 87 S.W. 465 (1905).

73. State v. Shearon, 183 S.W. 295 (Mo. 1916).

74. 337 Mo. 884, 87 S.W.2d 175 (1935). *See also* State v. Kain, 330 S.W.2d 842 (Mo. 1960).

75. State v. Williams, 492 S.W.2d 1 (Mo. App., D. St. L. 1973).

76. Evidence that the defendant proposed marriage, either before or after the alleged act of intercourse is admissible on the theory that a subsequent promise of marriage shows a "consciousness of guilt and a desire to conceal the offense" and a prior promise bears on the issue of chastity in that it indicates why the woman submitted. State v. Walker, 357 Mo. 394, 208 S.W.2d 283 (1948); State v. Oliver, 337 Mo. 1087, 87 S.W.2d 644 (1935); State v. Reed, 237 Mo. 224, 140 S.W. 909 (1911).

77. § 559.260, RSMo 1969.

78. State v. Oliver, 333 Mo. 1231, 64 S.W.2d 118 (1933); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D.K.C. 1976).

79. State v. Garrett, 494 SW.2d 336 (Mo. 1973); State v. Deckard, 426 S.W.2d 88 (Mo 1968); State v. Egner, 317 Mo. 427, 296 S.W. 145 (1927); State v. Catron, 317 Mo. 894, 296 S.W. 141 (1927); State v. Johnson, 316 Mo. 86, 289 S.W. 847 (1926); State v. Barbour, 234 Mo. 526, 137 S.W. 874 (1911); State v. Neal, 178 Mo. 63, 76 S.W. 958 (1903); State v. Cunningham, 100 Mo. 382, 12 S.W. 376 (1889); State v. Ruhr, 533 S.W.2d 656, (Mo. App., D.K.C. 1976)

80. *See* cases cited note 79 *supra*.

81. State v. Moore, 435 S.W.2d 8 (Mo. En Banc 1968).

82. State v. Gray, 423 S.W.2d 776 (Mo. 1968); State v. Schuster, 282 S.W.2d 553 (Mo. 1955).

Such force need not be actually applied, but may be merely an "array of force."[83] Unless the woman demonstrates the "utmost reluctance" to engage in the act and presents the "greatest resistance" of which she is capable, she will be deemed to have consented.[84] However, consent induced by a fear of personal violence is no consent,[85] and thus the utmost resistance doctrine is not applicable when the woman is put in fear of injury.[86] In other words, the amount of resistance necessary depends on the uselessness of resistance.[87]

A conviction of forcible rape may generally be sustained on the uncorroborated testimony of the prosecutrix.[88] However, if the prosecutrix' testimony is in conflict with surrounding circumstances and ordinary experience, it must be corroborated. [89] Thus the need for corroboration must be decided on a case by case basis.[90]

Evidence that the prosecutrix made an outcry or complaint following the alleged rape is not excluded by the hearsay rule.[91] Likewise, evidence

83. State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Wynn, 357 S.W.2d 936 (Mo. 1962); State v. Schuster, 282 S.W.2d 553 (Mo. 1955); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D.K.C. 1976).

84. State v. Abron, 492 S.W.2d 387 (Mo. App., D. St. L. 1973); State v. Cottengim, 12 S.W.2d 53 (Mo. 1928); State v. Egner, 317 Mo. 427, 296 S.W. 145 (1927); State v. McChesney, 185 S.W. 197 (Mo. 1916).

85. State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Schuster, 282 S.W.2d 553 (Mo. 1962); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D.K.C. 1976).

86. State v. Walker, 484 S.W.2d 281 (Mo. 1972); State v. Neal, 484 S.W.2d 270 (Mo. 1972); State v. Gray, 423 S.W.2d 776 (Mo. 1968); State v. Beck, 368 S.W.2d 490 (Mo. 1963); State v. Moore, 143 S.W.2d 288 (Mo. 1940); State v. Catron, 317 Mo. 894, 296 S.W. 141 (1927); State v. Barbour, 234 Mo. 526, 137 S.W. 874 (1911).

The doctrine is also not applicable where the woman is rendered insensible by intoxicants or drugs. State v. Dusenberry, 112 Mo. 277, 20 S.W. 461 (1892).

It is also rape to have intercourse with a woman of unsound mind. Her mental condition must be so severe as to totally destroy her capacity to consent, and the defendant must know of her infirmity. A woman who is too weak-minded legally to enter into a contract can still consent to sexual intercourse. The burden is on the state to prove both the severity of the woman's mental condition and the defendant's knowledge of her incapacity. State v. Robinson, 345 Mo. 897, 136 S.W.2d 1008 (1940); State v. Helderle, 186 S.W. 696 (Mo. En Banc 1916); State v. Warren, 232 Mo. 185, 134 S.W. 522 (1911).

87. State v. Beck, 368 S.W.2d 490 (Mo. 1963).

88. State v. Gray, 423 S.W.2d 776 (Mo. 1968); State v. Quinn, 405 S.W.2d 895 (Mo. 1966); State v. Baugh, 323 S.W.2d 685 (Mo. En Banc 1959); State v. Roddy, 171 S.W.2d 713 (Mo. 1943); State v. Lawson, 136 S.W.2d 992 (Mo. 1940); State v. Dilts, 191 Mo. 665, 90 S.W. 782 (1905); State v. Welch, 191 Mo. 179, 89 S.W. 945 (1905); State v. Harris, 150 Mo. 56, 51 S.W. 481 (1899); State v. Marcks, 140 Mo. 656, 41 S.W. 978 (1897); State v. Dusenberry, 112 Mo. 277, 20 S.W. 461 (1892); State v. Davis, 497 S.W.2d 201 (Mo. App., D. St. L., 1973).

89. State v. Burton, 355 Mo. 467, 196 S.W.2d 621 (1946); State v. Marshall, 354 Mo. 312, 189 S.W.2d 301 (1945); State v. Gruber, 285 S.W. 426 (Mo. 1926); State v. Donnington, 246 Mo. 313, 151 S.W. 975 (1912); State v. Tevis, 234 Mo. 276, 136 S.W. 339 (1911).

90. State v. Thomas, 351 Mo. 801, 174 S.W.2d 337 (1943). If the conviction was obtained solely on the uncorroborated testimony of the prosecutrix, the appellate court will closely scrutinize that evidence and reverse if it appears incredible or too insubstantial. State v. Goodale, 210 Mo. 275, 109 S.W. 9 (1908).

91. The theory applied in admitting the evidence is that "womanly instinct"

that the alleged victim failed to do so is admissible,[92] and the accused is entitled to a cautionary instruction advising the jury that her failure to make prompt complaint is a factor to consider in assessing her believability.[93]

B. *Evidence of the Victim's Character*

1. Specific Acts of Immorality

Prior specific acts of voluntary intercourse between the prosecutrix and the defendant are admissible as tending to show the inclination of the woman to consent.[94] Likewise, evidence of continued friendly intercourse between defendant and prosecutrix after the alleged rape is admissible to impeach her testimony.[95] However, evidence of prior acts of forcible rape by the accused upon the prosecutrix is inadmissible.[96] Such acts are held not to have a tendency to constitute an "antecedent probability" that defendant committed the act charged.[97] This approach is consistent with the rule prohibiting the admission of evidence of prior criminal acts against a defendant in a criminal case.

Except in very limited circumstances, evidence of prior specific acts of intercourse between the prosecutrix and men other than the defendant is inadmissible for any purpose.[98] The prosecuting witness may not be cross-examined with regard to specific acts of immorality with others, either

prompts the outraged female to make outcry. State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942). Such evidence is not a necessary element of the state's case. State v. Garrett, 494 S.W.2d 336 (Mo. 1973); State v. Miller, 191 Mo. 587, 90 S.W. 767 (1905). Such evidence is admissible only in corroboration of the prosecutrix and not as independent proof of the crime. State v. Marshall, 354 Mo. 512, 189 S.W.2d 301 (1945); State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942); State v. Wilkens, 100 S.W.2d 889 (Mo. 1936); State v. Conrad, 322 Mo. 246, 14 S.W.2d 608 (1928); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Atkins, 292 S.W. 422 (Mo. 1926); State v. Lawhorn, 250 Mo. 293, 157 S.W. 344 (1913). As a general rule, the details of the outcry or complaint are inadmissible. State v. Marshall, 354 Mo. 512, 189 S.W.2d 301 (1945); State v. Parsons, 285 S.W. 412 (Mo. 1926); State v. Burgess, 259 Mo. 383, 168 S.W. 740 (1914); State v. Yocum, 117 Mo. 622, 23 S.W. 765 (1893). However, the details may come in when drawn from the complainant on cross-examination or introduced to rehabilitate the witness after the introduction of prior inconsistent extrajudicial statements. State v. Fleming, 354 Mo. 31, 188 S.W.2d 12 (1945); State v. Lawhorn, 250 Mo. 293, 157 S.W. 344 (1913); State v. Bateman, 198 Mo. 212, 94 S.W. 843 (1906).

92. State v. Palmer, 344 Mo. 1063, 130 S.W.2d 599 (1939); State v. Wilkens, 100 S.W.2d 889 (Mo. 1936); State v. Bigley, 247 S.W. 169 (Mo. 1922).

93. State v. Thomas, 351 Mo. 804, 174 S.W.2d 337 (1943).

94. State v. Northern, 472 S.W.2d 409 (Mo. 1971). *See also* 1 J. WIGMORE, EVIDENCE § 200 at 688 (3d ed. 1940); 2 J. WIGMORE, EVIDENCE § 402 at 369 (3d ed. 1940).

95. State v. Patrick, 107 Mo. 147, 17 S.W. 666 (1891).

96. State v. Lebo, 339 Mo. 960, 98 S.W.2d 695 (1936).

97. *Id.*

98. State v. Ball, 527 S.W.2d 414 (Mo. App., D. St. L. 1975); State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Pyle, 343 Mo. 876, 123 S.W.2d 166 (1938); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Hewitt, 259 S.W. 773 (Mo. 1924); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Osborne, 246 S.W. 878 (Mo. 1922); State v. White, 35 Mo. 500 (1865).

for impeachment purposes or as bearing on the issue of consent.[99] However, the Missouri Supreme Court has recognized that there may be a few situations justifying the admission of evidence of specific acts of unchastity with others.[100] These situations are limited to the rebuttal of corroborating circumstantial evidence. For example, evidence of a specific act of intercourse with another would be relevant to explain medical evidence introduced by the state showing a ruptured hymen, venereal disease, or pregnancy.[101] Evidence of a specific act of intercourse the same day with another has been held admissible because it would account for the presence of sperm in the vagina of the prosecutrix.[102] Whenever specific acts of lewdness and unchastity on the part of the prosecutrix are shown by the defense for the limited purpose of explaining corroborating circumstances, such constitutes an attack on the good character of the prosecutrix.[103] The state may then introduce evidence of the prosecutrix' good reputation for morality and chastity.[104]

2. General Reputation of the Victim

The majority of jurisdictions which have considered the question, including Missouri, have held evidence of the prosecutrix' general reputation for morality and chastity admissible as bearing on the issue of her consent.[105] In fact, the Fourth Circuit has held that an attorney's failure to investigate the character of a complainant in a rape case constitutes ineffective assistance of counsel.[106] However, a bad reputation for chastity is not always admissible; it is not admissible in Missouri as a defense or in mitigation[107] because the lack of chastity may only be shown when *consent* is "in issue."[108] The phrase "in issue" is not defined, but a good argument can be made that if the defendant denies intercourse and introduces no evidence concerning consent, evidence of the prosecutrix' bad general reputation for morality would be inadmissible.

The person testifying as to the general reputation of the prosecutrix must possess the necessary testimonial qualifications—*i.e.*, acquaintance with the general reputation of the prosecutrix for morality in the neighbor-

99. State v. Kain, 330 S.W.2d 842 (Mo. 1960); State v. Whipkey, 215 S.W.2d 492 (Mo. 1948); State v. Osborne, 246 S.W. 878 (Mo. 1922).

100. State v. Kain, 330 S.W.2d 842 (Mo. 1960).

101. 75 C.J.S., *Rape* § 63 at 535 (1952), *cited with approval* in State v. Kain, 330 S.W.2d 842 (Mo. 1960).

102. State v. Daugherty, 126 S.W.2d 237 (Mo. 1939).

103. *Id.*; State v. Lovitt, 243 Mo. 510, 147 S.W. 481 (1912); State v. Jones, 191 Mo. 653, 90 S.W. 465 (1905); State v. Speritus, 191 Mo. 21, 90 S.W. 459 (1905).

104. *Id.*

105. 1 J. WIGMORE, EVIDENCE § 62 at 464 (3d ed. 1940).

106. Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).

107. State v. Catron, 317 Mo. 891, 296 S.W. 141 (1927).

108. State v. Yowell, 513 S.W.2d 397 (Mo. En Banc 1974); State v. Kirkpatrick, 428 S.W.2d 513 (Mo. 1968); State v. Kain, 330 S.W.2d 842 (Mo. 1960); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Ruhr, 533 S.W.2d 656 (Mo. App., D. St. L. 1976); State v. Ball, 527 S.W.2d 414 (Mo. App., D. St. L. 1975).

hood or among people with whom the prosecutrix associates.[109] The testimony given must be general and not specific. For example, testimony that the prosecutrix was reputed to have given birth to an illegitimate child is evidence of a specific act and therefore not admissible.[110]

The general rule in Missouri and most jurisdictions is that the credibility of a witness may not be impeached by a showing that his general reputation for morality is bad. An attack on credibility must be addressed to the reputation of the witness for truth and veracity.[111] Many writers, notably Professor Wigmore,[112] advocate an exception to the general rule which would admit general reputation evidence to impeach the testimony of the alleged victim in prosecutions of men charged with sexual crimes against women. Wigmore's rationale for the exception was to provide protection against "the sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny."[113] Wigmore's fear was that women who have what he called an "unchaste mentality" tend to contrive false charges of sexual offenses by innocent men, and the sympathy naturally felt for a wronged female would "give easy credit to such plausible tale."[114] In *State v. Kain*[115] Missouri rejected Wigmore's proposed exception and adopted the general rule even in rape prosecutions:

> The prosecutors and trial courts already have a considerable latitude in dealing with the abuses suggested by Professor Wigmore. There is no assurance that permitting the witness' credibility to be attacked by proof of her bad repute for chastity would remedy the situation and it might open the door to other and greater abuses.[116]

C. *Evidence of the Defendant's Character*

1. Specific Acts of Immorality

As a general rule, specific acts of immorality are not admissible against the defendant. However, there are a few limited exceptions. Evidence of prior convictions can be used to impeach,[117] but evidence of other crimes, absent a conviction, is only admissible if it tends to establish motive, intent, absence of mistake or accident, common scheme or plan, or the identity

109. State v. Kain, 330 S.W.2d 842 (Mo. 1960). *See also*, State v. Deshon, 334 Mo. 862, 68 S.W.2d 805 (1934); State v. Fairlamb, 121 Mo. 137, 25 S.W. 895 (1894).
110. State v. Yowell, 513 S.W.2d 397 (Mo. En Banc 1974).
111. State v. Rand, 496 S.W.2d 30 (Mo. App., D. St. L. 1973); State v. Lora, 305 S.W.2d 452 (Mo. 1957); State v. Whipkey, 358 Mo. 565, 215 S.W.2d 492 (1948); State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947); State v. Menz, 314 Mo. 74, 106 S.W.2d 440 (1937); State v. Williams, 337 Mo. 884, 87 S.W.2d 175 (1935).
112. 3 J. WIGMORE, EVIDENCE § 924 (a) at 459 (3d ed. 1940).
113. *Id.* at 460.
114. *Id.* at 459.
115. 330 S.W.2d 842 (Mo. 1960). *See also* State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947).
116. 330 S.W.2d at 845.
117. § 491.050, RSMo 1969; State v. Byrth, 395 S.W.2d 133 (Mo. 1965).

of the person on trial.[118] In *State v. Mitchell*[119] defendant made an issue of his identity. Therefore, evidence of a second rape which occurred a few minutes after the rape for which he was on trial, was held admissible to show the opportunity to commit the first rape and the identity of the defendant as the rapist. Also, crimes committed in a chain of events are admissible because they tend to establish the crime charged.[120] For example, when the defendant shot one person, kidnapped two others, and eventually raped one of the hostages, evidence of the shooting and the kidnapping was held admissible in the rape prosecution.[121]

2. General Reputation of Defendant

Missouri courts recognize that when a person is being prosecuted for a crime such as forcible rape, the trial must be conducted with "scrupulous fairness" in order to avoid adding additional prejudice to that which the charge itself frequently produces.[122] However, if the defendant takes the stand in his own behalf, he is subject to the same impeachment as any other witness.[123] There is an old line of cases holding that any witness could be impeached by a showing of his general bad reputation for morality (as opposed to reputation for truth and veracity).[124] The same rule was applied to defendants,[125] including defendants in rape prosecutions.[126] This rule was reversed in 1935 as to both witnesses[127] and defendants in *State v. Williams*:[128]

> [To] avoid ambiguity and injustice to the defendant as far as possible, it seems better that the impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity.[129]

Thus, the present rule is that the only general reputation evidence

118. State v. Mitchell, 491 S.W.2d 292 (Mo. En Banc 1973).
119. 491 S.W.2d 292 (Mo. En Banc 1973).
120. State v. Pollard, 447 S.W.2d 249 (Mo. 1969).
121. *Id.* Any crime committed as a part of the res gestae is admissible. State v. Moore, 353 S.W.2d 712 (Mo. 1962) (stealing the victim's purse).
122. State v. Gentry, 320 Mo. 389, 8 S.W.2d 20 (1928).
123. § 546.260, RSMo 1969; Berra v. United States, 221 F.2d 590 (1955), *aff'd*, 351 U.S. 131 (1956); State v. Hammilton, 310 S.W.2d 909 (Mo. 1955); State v. Baker, 209 Mo. 444, 108 S.W. 6 (1908); State v. Shanks, 150 Mo. App. 370, 130 S.W. 451 (St. L. Ct. App. 1910).
124. State v. Shields, 13 Mo. 236 (1850).
125. State v. Clinton, 67 Mo. 380 (1878).
126. State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); State v. Gentry, 320 Mo. 389, 8 S.W.2d 20 (1928).
127. The *Williams* opinion refers to Professor Wigmore's theory proposing an exception when impeaching a prosecutrix in a rape prosecution and specifically states that the opinion does not apply to this situation. However, Wigmore's theory has been rejected in Missouri. State v. Kain, 330 S.W.2d 842 (Mo. 1960).
128. 337 Mo. 884, 87 S.W.2d 175 (En Banc 1935).
129. *Id.* at 898, 87 S.W.2d at 182. In so holding, the court reversed a second degree murder conviction because the trial court permitted the state in rebuttal to appellant's testimony to prove that appellant had a bad general reputation for morality in the community.

admissible to impeach the credibility of a defendant charged with forcible rape is his general reputation for truth and veracity.[130]

V. Conclusion

Although the present law in Missouri regarding the admissibility of character evidence in rape prosecutions is not as irrational nor anti-victim as some have alleged, there are some areas in need of reform. In determining what evidence should go to the jury, a careful weighing of the competing interests must be made. Rape subjects the victim to tremendous psychological damage as well as physical injury. Few men, save those prisoners subjected to brutal homosexual attack, can really understand the fear, humiliation, and shame suffered by the victim of a rape. Introduction of evidence attacking the victim's character aggravates this psychological damage. Yet, such evidence may be the only defense available. Rape is rarely witnessed by anyone other than the victim and the rapist. Because a rape trial is often by necessity a swearing match between the victim and the defendant, evidence of credibility is often essential. Moreover, the defendant in a rape prosecution faces the mose severe penalty the law can impose[131] and must be guaranteed a fair trial.

The jury is normally required to decide one of two questions in forcible rape prosecutions: (1) whether the defendant is the man who committed the crime, a question of identity; or (2) whether the woman voluntarily engaged in the act, a question of consent. If the issue is identity, character evidence has no relevance and should be inadmissible. The Missouri courts have properly recognized this by allowing such evidence only when consent is "in issue." However, this phrase should be more clearly defined and there should be a clear prohibition of character evidence when consent is not the issue.

When consent is the question, Missouri courts have properly recognized that prior acts of intimacy between defendant and prosecutrix have some relevance and may therefore be considered by the jury. They have also properly recognized that specific acts with others are normally irrelevant. However, Missouri courts have improperly assumed that the general reputation of the victim for morality is *always* indicative of whether she consented to the act in question. There should be a presumption against the admissibility of this type of evidence. An absolute prohibition may prejudice a defendant in the rare case where there is some special reason for its relevance. Therefore, the logical solution is to provide for the judge to hear, out of the presence of the jury, the evidence which the defendant wishes to offer together with the reasons for its relevance in that particular

130. State v. Williams, 492 S.W.2d 1 (Mo. App., D. St. L. 1973).

131. The maximum penalty stated in the statute is death. However, in light of Furman v. Georgia, 408 U.S. 238 (1972) which held the imposition and carrying out of the death penalty at the discretion of the jury to be cruel and unusual punishment in violation of the eighth and fourteenth amendments, presently the maximum penalty is life imprisonment.

case. If the judge determines that the evidence is relevant, he can enter an order as to what part of the evidence may be introduced and the exact questions to be permitted. The same procedure should be followed when there are circumstances making specific acts of intercourse with others relevant. Determining these issues initially out of the hearing of the jury serves to insulate them from such prejudicial evidence in those cases where it is ultimately determined to be inadmissible. Such a procedure would more effectively enable Missouri courts to minimize psychological damage to the victim and maximize protection to the defendant.

Joel Wilson

COLLATERAL ESTOPPEL: THE CHANGING ROLE OF THE RULE OF MUTUALITY

I. Introduction

The term res judicata traditionally refers to the effect given a prior judgment in a later action between the same parties on the same cause of action.[1] Professor Vestal has given this effect the more descriptive title of "claim preclusion."[2] As a general rule, the plea of res judicata or claim preclusion prevents the same parties or their privies from relitigating the same cause of action and bars not only all the issues previously decided, but also every matter which might have been offered and received to sustain or defeat the claim.[3]

The term collateral estoppel refers to the effect given a prior adjudication in a second action based upon a different claim or cause of action. Collateral estoppel is similar to res judicata in that its purpose is also the prevention of relitigation.[4] It is, however, more limited than res judicata because only those issues or facts actually litigated and determined in the previous suit are precluded.[5] Professor Vestal describes this effect as "issue preclusion."[6] At common law and in the majority of jurisdictions today, the doctrine of collateral estoppel also requires that the parties to the second action be the same as, or in privity with, the parties to the first

1. Restatement of Judgments § 45 (1942).

2. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964) (hereinafter cited as Vestal).

3. *Accord*, Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974); Hauber v. Halls Levee Dist., 497 S.W.2d 175 (Mo. 1973). *See also* Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973).

4. F. James, Civil Procedure § 11.18 (1965).

5. *See* Cromwell v. County of Sac, 94 U.S. 351 (1876); Stickle v. Link, 511 S.W.2d 848 (Mo. 1974). As a general rule, default judgments will not be given collateral estoppel effect. *Contra*, Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499 (E.D. Mich. 1974); Braxton v. Litchalk, 55 Mich. App. 708, 223 N.W.2d 316 (1974).

6. *See* Vestal, *supra* note 2, at 28.