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Charter Evidence in Criminal Law

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CHARACTER EVIDENCE IN CRIMINAL CAUSES

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When the defendant in a criminal case takes the witness stand, his general moral character may be attacked for the purpose of affecting his credibility. Section 2272 of Burns' Statutes, 1926 Revision, provides that: "In all questions affecting the credibility of a witness, his general moral character may be given in evidence." This originally was Section 1803 of the Revised Statutes of 1881, and has been in force ever since the 19th of September, 1881. It must be understood that the character of the accused in a criminal case is not in issue unless he chooses to bring it into question by himself first offering evidence in support of his good character but it has become the rule ever since *Fletcher v State,*[1] that if he avails himself of the privilege of testifying, he testifies under the same rules and may be impeached in the same manner as other witnesses.[2]

If the defendant in a criminal cause has testified, the State may, if such evidence is available, prove that the general moral reputation of the defendant is bad. It is competent for the State to impeach him in the same manner in which it might impeach any other witness. The statute is probably intended to be cumulative and does not take away the right of a party seeking to impeach a witness to prove his general character for truth and veracity. *Robinson v. State.*[3]

Moral character can be shown only by proof of the general reputation of the accused and cannot be shown by proof of specific acts of immorality.[4]

When the defendant in a criminal prosecution introduces evidence of his good character as a defense, the evidence should be limited to that particular trait of character that is relevant to the crime charged. The word "character" as used above was used in the sense of reputation and under the provision of Burns' 1926 Statutes, Section 2272, the reputed general moral character of a witness may be shown without being confined to his general reputation for truth and veracity.

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1 49 Ind. 124.

2 *Mershon v. State,* 51 Ind. 14.

3 84 Ind. 452 at 455.

4 *Griffith v. State,* 140 Ind. 163 at 166. *Drew v. State,* 124 Ind. 9 at 13.

General character is shown by general reputation and not by specific acts of one's life but the general reputation must be confined to the particular traits of character that are supposed to render to some extent the commission of the crime charged improbable. When evidence is admitted touching the general character of a party, it ought to bear reference to the nature of the charge against him, for instance; if he is accused of theft —that he is reputed to be an honest man or if accused of treason —a man of loyalty.

On a charge of stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct which however much they might operate on other occasions would not be likely to operate on that which is alone the subject of inquiry. It would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried and is therefore totally inapplicable to the point in question.[5]

In *Walker v. State*,[6] the defendant was prosecuted and convicted of murder. At the close of the testimony offered by the defense, the accused attempted to prove that his general moral character was good. This evidence was excluded and on appeal, the Supreme Court held that the evidence that the previous character of the appellant for peace and quietude was good would have been admissible but that the previous moral character of the appellant was not a proper subject of inquiry. It will be noticed that the State had not attacked the character of the defendant as a witness. It is settled law in Indiana that a party charged with crime who undertakes to introduce evidence of his character must confine that evidence to the particular trait of character involved in the charge against him.[7]

As a general rule, it is the character of the living and not the deceased nor the person on whom the crime was committed that is in issue and as to which, therefore, evidence is admissible but where the question arises whether the accused acted upon grounds that justify him in the deed, the character of the deceased might be the circumstance to be taken into consideration, especially might this be the case where the accused knew that

[5] *State v. Bloom*, 68 Ind. 54.

[6] 102 Ind. 502.

[7] *Kahlenbeck v. State*, 119 Ind. 118 at 121.

character and also knew at the time the individual by whom the attack upon him or his property was made.

In a homicide case or in a case of like nature, if the deceased was in the habit of becoming intoxicated and when in that condition was quarrelsome and violent and that fact was known to the defendant and if it is further claimed that the deceased was intoxicated at the time of the clash between him and the defendant and that the defendant's conduct on that occasion is claimed to have been influenced by a knowledge of the alleged violent habits of the deceased when so intoxicated, the question of such habits or disposition would seem to be one of fact rather than of general character.

Whenever it is shown that a person is himself attacked, it is admissible for him to put in evidence whatever would show such attack to be felonious. He may introduce proof that the person assailing him had with him burglar's instruments; he may prove him to have been armed with deadly weapons; he may prove him to have been lurking in the neighborhood on other plans of violence. He is entitled to reason with himself in this way: "This man comes to my house masked or with his face blacked. He is the same one who has been prowling about in the neighborhood and is connected with other felonious plans. I believe that such is his object now," and if so, he is also entitled to say, "This man now attacking me is a notorious ruffian. He has no peaceful business with me. His character and relations forbid any other conclusion than that his present attack is felonious," and if such could be a legitimate reason for him to expect and defend himself against a desperate conflict, the facts are such that he is entitled to avail himself of them on trial.[8]

Not even the defendant in a murder case or cases of like nature may bring forward in evidence the bad character of the deceased in general where he does not particularize the trait or prove an evil trait not related to the special matter of the defense. He cannot show the trait until a foundation for it is laid in the contentions and other proofs of the case but where the foundation is laid, as that he acted in self-defense, he may then give evidence of a generally known evil trait of a sort which might properly influence his conduct, as, that the attacking person was in character quarrelsome and dangerous. On the other hand where the defendant made the attack as appears on the direct proofs and he persisted in the quarrel, evidence of the quarrelsome character of the deceased is not admissible.

[8] *Boyle v. State*, 97 Ind. 322 at 324.

One has no greater right to attack or kill a quarrelsome person than a peaceful one but in self-defense a man set upon may adapt his measures to the seeming danger which increases with the dangerous character of the assailant.[9]

If no attack is made on the character of the defendant and he has not put the same in issue in any particular, it is presumed to be good but he is not entitled to have the jury so instructed. His character is not taken into consideration unless the defendant first introduces evidence in support of it. In that event, the question of character has to be decided upon the evidence in the same manner as any other question in the cause and the Court will not instruct the jury in an assault and battery case that the character of the defendant for peace and quietude is presumed to be good until the contrary is shown.[10]

Evidence as to character must relate to the general character and must be confined to those peculiar traits which make it improbable that defendant would commit the crime charged, and must be directed to his reputation or character among those with whom he, and not the witness, associates. The moral character of defendant, or whether he is a grave man or a coward, is not a proper subject of inquiry.

It is not always necessary to establish character by proof of reputation in the community. It may be shown by the testimony of those who know the accused; but a witness as to the character of defendant must have some personal knowledge of the fact to render him competent to testify with respect thereto. It may be shown by negative testimony, but cannot be established by proof of particular facts and circumstances; and a witness who testifies to his quiet and peaceable character should not be permitted to state what his disposition was when crossed or abused. Evidence of character at a period remote from the date of the crime may properly be excluded. Where a person is accused of murder by firearms, evidence of his familiarity with the use of firearms is admissible. Where a conspiracy is charged defendant cannot show the good character of his co-defendants. If defendant refuses to put his general character in issue, he will not be permitted to prove by his jailer what his character was while confined in prison.[11]

The state should not be permitted to introduce evidence of the bad character of defendant, where he has not made his charac-

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[9] *Osburn v. State*, 164 Ind. 262 at 272.

[10] *Knight v. State*, 70 Ind. 375 at 380.

[11] 21 Cyc. 906; 29 S. E. 153.

ter an issue, nor may it show that he lived expensively or had not occupation or means. However, it is not improper for the state to show what defendant's business was or where he lived. But when defendant introduces evidence of his good character the state may oppose it by proof that his previous character was bad. However, state witnesses will not be permitted to give testimony of such bad character based on what they heard after the homicide. While the state cannot, primarily or in rebuttal, offer evidence of specific acts of defendant involving the trait of character evidenced by the crime charged, it may on cross-examination properly test the credibility or information of a witness testifying to defendant's good character by inquiry as to his knowledge of particular acts of defendant involving such trait. If such examination results in proof that defendant has been prosecuted for a disturbance of the peace, he cannot be permitted to meet it by showing the details of his arrest and the offense.

The general rule excluding evidence of the character of the deceased applies with equal force against the state and defendant. The state will not be permitted to offer primary evidence of the character of the deceased for morals, or for peace and quietude, although defendant offers evidence of his own good reputation. But where defendant attempts to show that deceased was a violent and dangerous man the state may properly offer proof of his peaceable and law-abiding character, although defendant does not attack the general reputation of deceased for peaceableness and good disposition. The evidence offered by the state should be confined to the question of deceased's character for peaceableness. His general moral character or piety are not material to the issue. If the accused undertakes to justify the homicide on the ground of threats made by deceased, the state may prove that the general character of deceased was that of an inoffensive man, and one not reasonably to be expected to execute the threats. When it is admitted that deceased was sitting down when shot, testimony as to the habit of deceased of sitting down when conversing is not prejudicial. Evidence that the deceased who died from a pistol wound, was an expert with a pistol, is immaterial. Evidence as to where deceased lived, with whom he lived, and his family relations is admissible.

In *Robinson v. State*,[12] the Court there held that the statute which provided that in all questions affecting the credibility of

[12] 84 Ind. 452.

a witness, his general moral character may be given in evidence, Statutes 1881, Sec. 1803, which became operative on September 19, 1881, should apply to criminal cases as well as civil ones and further decided that the law was not an *ex post facto* law, the Court saying, "So far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the Courts in existence when those facts arose. The legislature may abolish Courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion though it cannot lawfully dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.

Stewart v. State,[13] is a very short case and sets out the law fully and clearly as to the rights of the State and the defendant in introducing character evidence. The Court in that case says, "It is a well recognized legal principle that the character and reputation of a defendant on trial for murder for peace and quietude is not in issue and cannot be attacked by the State in the first instance. Such reputation is in issue only when the defendant himself puts it in by offering evidence of his good character in that respect." The Court further held that if evidence was erroneously admitted at the instance of the State as to the defendant's bad character, the error would not be cured by the introduction of evidence by the defendant to show his good character for the trait upon which the State had made its attack.

Mere contradiction among witnesses examined in Court supplies no ground for admitting evidence of general character. If, in the multiplicity of contradictions daily occurring, each witness was permitted to bring in other witnesses to sustain his general character and they contradicting each other should be permitted to bring in others and so on, the whole time of our Courts would be taken up in hearing these side questions until the matters originally in litigation would be lost sight of to the great detriment of litigants.[14]

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[13] 184 Ind. 367.

[14] *Pruett v. Cox,* 21 Ind. 15 at 16.

The party producing a witness shall not be allowed to impeach his claim by evidence of bad character unless it was indispensable that the party should produce him or in case of manifest surprise when the party shall have this right. This statute is but the enactment of the common law rule.[15]

In *Presser v. State*,[16] testimony to prove the good character of a witness whose testimony had been contradicted by other witnesses was refused. The Court held that it was well settled law that a witness who is contradicted by evidence disproving the matters of fact testified to by him could not call witnesses to prove good character. A witness whose general character has not been impeached and whose testimony has only been contradicted by other witnesses cannot introduce witnesses to prove his general moral character and the introduction of such testimony is good cause for reversing the judgment. Such testimony not only tends unnecessarily to extend the raising and investigating of collateral issues but it tends to give additional weight and undue influence to the testimony of such witnesses whose characters have been proven to be good over and above the same testimony by the same witnesses under the legal presumption of good character.[17]

The law presumes the general character of a witness to be good until it shall be impeached.[18]

In the impeachment of a witness, the subject of the inquiry, whether upon the examination in chief or the cross-examination is his general moral character and where an impeaching witness has testified in chief that as to one of the elements of moral character, the reputation of a party sought to be impeached is good, it is within the discretion of a trial court to allow such witness to be cross-examined in regard to the party's reputation as to any other or all of the essential and constituent elements of good moral character.[19]

If a reputation witness on cross-examination names the person or persons whom he heard say that the defendant's reputation in a certain particular was bad, it is generally believed that the person named may be called to testify in denial of what the witness quoted him as saying. This belief is erroneous. In other words if A says that B is a thief and is reputed to be dis-

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[15] *Diffenderfer v. Scott*, 5 Ind. App. 243 at 247.

[16] 77 Ind. 274.

[17] *Brann v. Campbell*, 86 Ind. 516 at 517; *Johnson v. State*, 21 Ind. 329.

[18] *Fitzgerald v. Goff*, 99 Ind. 28 at 33 and 34.

[19] *Wachstetter v. State*, 99 Ind. 290.

honest and that C told the witness that B was dishonest, C will not be permitted to testify in denial of what A said. Where the impeaching witness on direct examination states that the general reputation for truth and veracity as well as the general moral character of one of defendant's witnesses is bad and upon cross-examination by the defendant names the persons who have spoken disparagingly of the impeached witness, the defendant will not be permitted to call such persons in order to contradict the impeaching witness.[20]

One who testifies to the good reputation of another may on cross-examination be asked whether he has heard about other crimes of the defendant.[21]

It is only after an effort has been made to impeach a witness that he may then introduce evidence in support of his reputation on the particular trait of character involved in the attack made by the opposing party. *Johnson v. State,* 21 Ind. 329.

The reputation of a place cannot be proved in the first instance by the State unless such evidence is made admissible by statute.[22] The acts of 1926, Chap. 48, Sec. 28, Page 156, makes such evidence admissible in the prosecution of a defendant for maintaining a nuisance under the intoxicating liquor law of Indiana.

There are some exceptions to the above rule. In a prosecution under Sec. 2562 of Burns' 1926 Statutes for keeping a house of ill fame, the courts have held that the term "ill fame" itself opened the way for the introduction of such evidence. So too, evidence in the first instance is admissible upon the part of the state in a prosecution where the defendant is charged with keeping a gaming house. *Betts v. State,*[23] is a very well reasoned case though it is not in entire accord with some of the cases from other Courts. See also *Christison v. State.*[24]

In the case of *Robinson v. State,*[25] evidence in the trial Court was offered and admitted in the first instance to show that the defendant who was charged with violating the intoxicating liquor law of Indiana was known and reputed to be a bootlegger. On appeal to the Supreme Court, that Court held in an opinion written by Chief Justice Ewbank that evidence of that nature

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20 *Robbins v. Spencer,* 121 Ind. 594.
21 *Shears v. State,* 147 Ind. 51 at 56.
22 *Schacklett v. State,* 145 N. E. 554.
23 93 Ind. 375.
24 177 Ind. 363.
25 149 N. E. 891.

would not affect the credibility of the defendant who was a witness in his own behalf and that it was error to admit such testimony.

Upon the theory that the declarant of a dying declaration stands on the same footing as any other witness called into Court and examined, it is held that dying declarations may be impeached by showing the bad character and reputation of the deceased either generally or for truth and veracity.[26]

In the Michigan Law Review for May, 1926, the following statement appeared: "In an action for malicious prosecution, the witness was allowed to testify that so far as he knew, the reputation of the plaintiff was good. On cross-examination, he testified that he had never heard anything for or against the plaintiff. Held, error to admit the testimony as evidence of good reputation, the court saying 'reputation of a man, which the law admits as evidence is the common report which others make about him, the talk about him, which shows the opinion in which he is held in the community * * * and if the witness offered has not heard the person discussed or spoken of, he cannot testify to his reputation.'[27]

The question is thus clearly raised: is the fact that one's character is not discussed evidence that his reputation is good? In *Commonwealth v. Rogers,* 136 Mass. 158, cited in the principal case, the witness who had testified he had heard the party's reputation discussed only twice, was held incompetent to testify to his general reputation. To similar effect, *Commonwealth v. Lawler.*[28] (The witness in latter case was called to impeach and not sustain the principal.) The notion apparently was, as the court in *Walker v. Moors,*[29] said, that general reputation is a fact 'and what establishes it is that the subject has been so discussed and considered that there is in the public mind a uniform and concurrent sentiment that can be stated as a fact.' The conclusion the courts draw from this doctrine is that one who has not heard these reports is not qualified to testify to reputation. It is submitted, however, that general reputation which a party has may be proved to be good by the fact that a witness, otherwise qualified to testify, has never heard anything

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26 Wharton on Homicide, 3rd Edition, p. 1039.

27 *Clark v. Eastern Mass. St. Ry. Co.,* (Mass. 1926) 150 N. E. 184.

28 12 Allen (Mass.) 585.

29 122 Mass. 501.

against the principal.[30] In *Lenox v. Fuller*,[31] the witness' testimony that he had never heard defendant's reputation questioned, was held admissible as evidence of good reputation. The court said, 'The fact that a person's truthfulness has never been the subject of controversy is, according to general observation and experience, very cogent evidence to prove him worthy of credit, and when those who would be likely to know if it had been the subject of criticism, testify they have no knowledge that it has been criticised, the evidence is proper as conducive to the effect that such person could not have borne the bad reputation imputed.' The court, in addition, reaffirmed the doctrine that absence of such criticism is not evidence of bad reputation. In *People v. Davis*,[32] the witness had never heard the principal's reputation questioned, although he had known the principal for many years, and yet it was held that his testimony was evidence of the principal's good reputation. The court said that by a contrary rule 'the most respectable man in the community might fail at being supported if his character was attacked, for living all his life above suspicion, his truth would rarely be the subject of remarks.' It is, therefore, submitted that in the light of authority and reason opposing the principal case, the testimony of a witness, otherwise competent, that he has never heard the principal's character discussed is evidence of good reputation, on the theory that bad news travels faster than good news, a theory based on common observation of life and human nature, which justifies its being incorporated into the rules of evidence.[33] The Courts of Indiana are in accord with this last view.[34]

It is believed that much of the confusion and uncertainty arising over the effort to introduce character evidence will vanish if it is borne in mind that there is a great and well founded difference between the defendant as a defendant and the defendant in his status as a witness.

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30 3 Wigmore on Evidence, 2d ed. sec. 1614.

31 39 Mich. 268, 272.

32 21 Wend. (N. Y.) 309.

33 See Michigan Law Review, May 1926, Pages 722-723.

34 68 Ind. 238; 132 Ind. 254.