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A WORD ABOUT STARE DECISIS.

In recent centuries, we are familiar with two sets of functionaries, who are concerned in the making of what we term laws or law. These are parliament or legislature, and courts of judicature. Until a comparatively short time ago, the meetings of parliament in England were very few. Long intervals separated them, and the yield of laws, in any session, was extremely scanty.

But, in the ages during which there were no, or very few parliaments, courts were in action. In the absence of principles of decision furnished ab extra, they elaborated their own.

They adjudged men guilty of crimes, which had not previously been so defined, and sentenced them to penalties which had not been prescribed. Certain acts, or groups of acts were called by some Judge treason, murder, robbery, and he imposed the penalty of death for the doing of them. In recent times, when the principle antipathetic to ex post facto laws is spoken of with respect we wonder at the fact

that our criminal law was born in the ex post facto legislation of judges and other executive officers.

Similarly many laws, non-criminal in complexion, were invented by judges. Blackstone remarks: "As to general customs, or the common law, properly so called, this is that law by which proceedings and determinations in the king's ordinary Courts of justice are guided and decided. This, for the most part, settles the course in which lands descend by inheritance, the manner and form of acquiring and transferring property, the solemnities and obligation of contracts, the rules of expounding wills, deeds, and acts of parliament, the respective remedies of civil injuries, the several species of temporal offenses, with the manner and degree of punishment, and an infinite number of minuter particulars which diffuse themselves as extensively as the ordinary distributions of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the King's Bench, the Common Pleas and the Exchequer, that the eldest son alone is heir to his ancestor; that property may be acquired and transferred by writing; that deed is of no validity unless sealed and delivered; that wills shall be construed more favorably and deeds more strictly; that money lent upon bond is recoverable by action of debt; that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that were not set down in any written statutes or ordinances, but depend merely upon immemorial usage, that is, upon common law, for their support." 1 Blackstone, Comm. p 68.

It is evident that if Judge A. in one case decided that one who killed a human being was a murderer. and that he should be put to death, it was still conceivable that in another case similar in content, he would make a different decision. Still easier would it be to imagine that another Judge, B. would define homicide differently and impose on it a different penalty. The formation of a settled rule, in the absence of so-called legislation, would depend on the propensity of the judges to repeat their own decisions in similar

cases, and to decide in harmony with the judgments of their antecessors.

What led to this consentaneousness? Conceivably the considerations which operated on the mind of the judge and induced his decision, led to a similar result in a later similar case, before the same judge or another. Identity of adjudication was not the thing aimed at. The facts were alike. They operated in a like way on the mind. The mind reacted towards them, in a like fashion. What we have in such a case, is not an application of the precept stare decisis, but a psychological likeness in the judges, responding, in like ways to like influences.

At times, the author of a decision may, among jurists contemporary or successive, have an ascendency, owing to unusual learning, or logical power, or will. He is deferred to by others, not from any desire to produce a series of harmonious judgments, but from a wish to do, as he has done, to think as he has thought, from an unwillingness to be detected in deviating from the example that he has set. In all trades and professions, a few get to be acknowledged as masters, and members of the common herd find satisfaction in taking cover under authority. That eminent men have been greatly deferred to, is the sign not of an anxiety to secure unity of decision, for the benefit of the state, but of a timorousness or reverence based, not on the intrinsic merits of the paragons but on the felt inferiority of their imitators.

Occasionally, the justification of adherence by the later judge, to the decisions of the earlier, is found in the labor-saving resulting from that process. To other reasons for following the earlier decisions, says Justice Cardozo, "I may add that the labor of judges would be increased almost to the breaking point, if every past decision could be reopened in every case and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who has gone before him." The Nature of the Judicial Process p. 149. The judges have so many cases to decide that

they are induced to lessen their labor, by taking, wholesale, the fruits of the reflections of proceding judges. The extent to which this motive operates would be determined by the capacity for work, and willingness to undergo it of the imitating judges.

The state is a person which exists through decades and centuries. One of its tasks is to produce certain results, when certain events occur. The events may be human conduct. A. and B. make a contract, and B. does something in consequence. B. may claim that A should now do something, e. g. pay a sum of money. The state, through its judge, may think that A should pay it. When a similar contract occurs between C and D, and D. in consequence does an act like that of B, another judge may think that there should be application of the same principle, to the two cases, and, to secure this uniformity, he may purposely decide in the same way, not because he thinks this way the best, but because he thinks consistency of decision is more valuable to the public, than so much of an improvement of the decision as could be secured by a divagation from the earlier decision. The principle that the organs of the state, the courts, should make their judgments conform to earlier judgments in like cases, is born. It is the duty of the judges stare decisis, to make their judgments accord with earlier judgments in like cases.

But, a survey of the decisions, sometimes presents us with some that are illogical, inconvenient and unjust, so much so indeed, as to make a self-respecting judge of competent abilities unable to imitate them. Blackstone qualifies the duty of the judges to follow precedent by the remark; "The doctrine of the law then is that precedents and rules must be followed, unless flatly absurd or unjust." Comm p 70 and he concedes "that the law and the opinion of the judges are not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may mistake the law."

That the decision must be "flatly absurd and unjust"

before it may be rejected as a precedent, scarcely expresses the sentiment of some of the judges of Pennsylvania.

A man standing on the platform of a railroad, was struck and killed, by a passing train. The platform was too narrow for safety of the passengers. In an action by his widow, for his death, it was shown that the agent of the R. R. Company, immediately after the accident telegraphed to the General Superintendent, the situation of the platform, and stated that it ought to be removed. It was removed the next day. This evidence said the court was "clearly proper" Penn'a R. R. vs. Henderson, 51 Pa. 315. An effort to minimize the force of this decision is made by Fell J. in Baran v. Reading Iron Co. 202 Pa. 274 who disputes the principle that an alteration in the structure of the railroad made immediately after, and because of, the accident, may be treated by the jury as an admission that the arrangement superseded was not a proper one.

In Westchester R. R. Co. v. McElwee 67 Pa. 311, a son was killed by a collision between cars moving along the track, and a cart, which was on scales for the purpose of being weighed. The trial court, in an action by the parents of the deceased, allowed proof that since the accident the track had been moved. This was found to be correct by Williams J. who remarked: "If it tended to show, as suggested, that the tracks were originally too near the office and shanty to permit the cars to be run on it without danger, then it was evidence of a fact proper for the consideration of the jury, in determining whether due and reasonable care had been used by the Company to avoid the accident. If the proximity of the track to the buildings did not increase the danger, why was it moved? And if it did, then a higher degree of care was necessary in order to avoid accident, and in this aspect, the evidence was properly received." Fell J. in 202 Pa. 274, supra, disposes of this case by saying that "the negligence of the defendant was so manifest that proof of subsequent alterations could not make it more apparent;" and therefore no harm had been done by the admission of the evidence.

In McKee v. Bidwell, 74 Pa. 218, McKee sought damages for injury from falling into a hole in a passage way leading to an office where he had business, there being no light to reveal the hole. He offered to show that immediately after the accident, defendant put a gas light close to the opening. The offer was rejected. A judgment for the defendant was reversed, Mereur J. saying: "Upon the question of the defendant's negligence, we think the evidence covered by the first assignment of error (that concerning the placing of the gas light after accident) will be admissible," and he cites 51 Pa. 315, supra, and 67 Pa. 311 supra. Fell J. dismisses this case by the obesrvation that "the reversal was on the ground that the question of the plaintiff's negligence should have been submitted to the jury." So it was, but it was held that, in weighing this question, the putting of the light, immediately after the accident, was a proper fact to consider.

In Lederman v. Penn'a R. R. 165 Pa. 518 a child was killed in crossing a railroad track in the city of Lancaster. In the action by the parents for its death, it was shown that safety gates were erected shortly after the accident. Affirming the judgment for the plaintiff McCullom J. observes "That the Company very soon after the accident erected gates at the crossing where it (the killing of the child) occurred, was a fact for the consideration of the jury."

In Dark v. Railway, 164 Pa. 243, an action for the death of Plaintiff's wife, in crossing a track, a non-suit was entered because the evidence showed negligence on the part of the deceased. The judgment was affirmed. The court rejected evidence that the defendant had, after the accident, employed a night watchman at the crossing. The Supreme Court thought the evidence irrelevant, "because the deceased was not killed at night but in the day time." Besides, the trial court in entering a non-suit, had "necessarily assumed negligence on the part of the defendants."

In Pittsburgh Southern Railway Co. v. Taylor, 104 Pa. 306, Paxson J. mentions the fact that "It has been ruled in Railroad Co. v. Henderson and Railroad Co. vs. McElwee,

and in McKee v. Bidwell, that where, after an accident, the defendant removes the alleged cause, it is to some extent an admission that he was in default;" and no doubt is hinted of the correctness of this position.

In Sweeny v. Barrett, 151 Pa. 600, a visitor to a saloon having need to leave it by a rear door, which opened on a lot, and ignorant of a stairway, leading into a cellar stepped on the lot, in the dark and fell down the stairway. A little while after the accident it was shown that the defendant placed a gate across the entrance of the stairway, but whether it was a day or two, or a week after, the witness could not say. The trial court struck out this evidence, because it did not appear that the placing of the gate was done immediately, or within a short time after the accident. A compulsory non-suit was affirmed.

In Card v. Columbia Township, 191 Pa. 254, a vehicle in which the wife of the plaintiff was, went over a bank and she was killed. It was shown that soon after the occurrence, the township widened the road and erected a guard-rail, in order to reduce the risks of accident. But there is no intimation by the Supreme Court, that the evidence was inadmissible. A judgment for the plaintiff was reversed, because the omission to place a guard-rail, etc., whethter negligent or not, was not the proximate cause of the accident, but not because it was error to admit the proof of the subsequent placing of the guard-rail.

In Hager v. Phaston Township, 200 Pa. 281, a horse was thrown by one of its feet being caught in a hole at the edge of a narrow bridge on a country road. The rider, Hager, was seriously injured. Was the Township negligent? It was shown that a month after the accident the supervisor filled a hole at the side of the bridge with stones. Fell J. doubting whether testimony of alterations or improvements after an accident should ever be admitted, held that the filling of the hole was too late after the accident.

We have then had the recognition for fifty years, by a great variey of justices of the supreme court of the value of

evidence, after the accident of alterations in the arrangements which have led to it, for showing that the toleration of the arrangement which existed at the time of the accident was negligent. In 1901, we have, for the first time, a suggestion that the propriety of the evidence "is at least doubtful." This through a dictum, expresses the attitude of the writer of the opinion, Justice Fell. His objection to the evidence is that "it makes evidence against a defendant who guards against the occurrence of an accident, which before he had no reason to anticipate, or who for the safety of others exercises a precaution, when he is not legally bound to do." Hager v. Wharton Township, 200 Pa. 281.

In Baran V. Reading Iron Co. 202 Pa. 274, the same Justice Fell was the writer of the opinion. An explosion of a boiler in an iron mill had occurred, with the result that the infant daughter of the plaintiff, in bed in an adjacent house, was killed, by a piece of the boiler. The court tacitly recognizes the principle, that one man can carry on a business, --for his own enrichment of course--and subject his neighbors to all losses caused, in the prosecution of it, provided that they are not caused by his malice or negligence. The profits of the business are his; the losses, if they fall on others, are theirs. The father of the killed child could not recover for its death, unless there was negligence. After the explosion, the defendant (a) gave orders that "hereafter, in all cases where a furnace was drawn, the steam connections should be closed and the boiler disconnected from the steam main," and (b) in reconstructing the mill suspended the boilers from both ends and also the middle: whereas, previously they had been supported at the ends only.

The court had to decide whether such evidence should be admitted.

It repudiated the principle of stare decisis, saying "The time has come when we should distinctly say that we do not approve the rule and that the cases which may be considered (and properly we may interject) as announcing and sustaining it, are, to that extent, overruled." Two reasons seem to

be intimated. On principle, the evidence can not be defended. The act of repairing, or changing the structure or method of action" is not more likely to show that there was negligence before the accident, than that the occurrence of the accident first suggested the use of methods or appliances, not before thought of; it applies to conduct before an accident a standard of duty determined by after acquired knowledge, it punishes a prudent and well-meaning defendant who guards against the recurrence of an accident, he had no means to anticipate, or who, out of a considerate regard for the safety of others, exercises a higher degree of care than the law requires."

Is it not odd, to characterize the admission of evidence of a fact, as "punishment"? The evidence tends to show that the shock of an accident is needed to make the defendant see the need of alteration, and the jury are to say what significance is to be assigned to that hebetude.

The other reason for rejecting the principle that improvements or changes made in consequence of an accident are evidence of negligence in not having made them before the accident is that though judges, in other states, are not harmonious on the question, the "trend of decision" is against the admission of such testimony, and, in one state, Minnesota, the habit of permitting such evidence has been given up. An opinion adverse to the admission of the evidence, is cited from the English reports, from the Supreme Court of the United States, and from fifteen states. But what have the courts of the other states done? And must the Pennsylvania judges repudiate the doctrine recognized by them many times, because the judges of one, two or twenty, other states have not accepted it? Are we to count heads, and say that that opinion is right which has the larger number of sponsors beyond Pennsylvania?

And, are we to substitute for the doctrine of stare decisis of our own state, the doctrine of stare decisis of other states? In Pennsylvania stand with or by the decisions of New York

or Maryland, or Oklahoma, but not with or by those of Pennsylvania?

And is it clear that the Pennsylvania judges were in error, when they permitted proof of the defendant's having altered his methods, or the structure of his works, at the suggestion of an accident resulting from the former method, or structure? It is not necessary to regard the alteration by the defendant, as an admission by him that he had been negligent. It is enough to interpret it as an admission that the former method or structure was not the best. It is plainly such an admission. Then, if the defendant was using methods that were not the best, it would be for a jury to say whether his doing so was the result of incompetence, or negligence.

When the defendant, in Baran v. Reading Iron Co. 202 Pa. 274, after the explosion of the boiler, which had been supported only at the ends arranged for the additional support in the middle, he plainly manifested a belief that the risk of accident would be lessened by such support. He had been using a method less safe than the safest. Why is his admission that it was less than the safest, not receivable, to show that it was less than the safest? And, if it was, why is the jury not to be allowed to determine whether there was negligence in not having earlier made the substitution of the better method? When a dangerous force is being used, omission to use practicable contrivances to avert accidents might well be found by a jury to be negligence, and the adoption after an accident, of such contrivances, may well be deemed a concession that the old is less safe than the new. We dismiss this case by emphasizing that it is a stunning violation of the principle stare decisis; a rejection of what, by repeated decision, had been the law of Pennsylvania in deference to the law of some other states.

In Buck v. Commonwealth, 107 Pa. 486, it was proposed to ask a witness for the state, whether he had not been indicted and tried for embezzlement, for the purpose of lessening his credit with the jury. The trial court ruled out the

question. The Supreme Court, through Paxson, J., affirming, said "The proper mode of proving a conviction, of embezzlement, or any other crime, is the production of the record. It is the highest and best evidence." In Commonwealth v. Racco, 225 Pa. 133, Racco was indicted for murder. He became a witness for himself, and, on cross-examination was asked whether he had not been convicted and sentenced for larceny, assault and battery, wounding and obtaining money under false pretenses. To all these questions he answered no. He was allowed to be contradicted by proof of a confession to a detective that Racco had committed these crimes. Approving of the admission of this evidence, although proof of a crime was attempted otherwise than through the record of conviction, Brown J., referring to Buck v. Commonwealth, 107 Pa. 486, said "We do not now approve what was there said, and, if this is to be regarded as an expression of the law, it is overruled. **** When the matter about which a witness is asked, though one of record, is merely collateral to the main issue, and arises in it only as affecting the credibility of the witness, he may testify to it, especially when, of all others, he knows the exact truth, without regard to the record." Between these decisions, was an interval of twenty-five years. The "we" of 1909 did not think as had the "we" of 1884; and said so, untrammeled by the maxim of stare decisis.

But, perhaps the most striking display of irreverence of a court for the decision of its predecessorss, is given in the Sanderson v. Coal Company case. It was heard and decided in 86 Pa. 401, the court holding that for corrupting the water of a creek so as to make it of no further service to Mrs. Sanderson, and so as to reduce the value of her land, the Coal Company was liable. A later trial resulted in two appeals, one by Mrs. Sanderson because she thought the damages she was permitted to recover, were too restricted, and the other by the Coal Company to induce the court to retract its earlier decision, and to determine that Mrs. Sanderson was not en-

titled to damages. The court reaffirmed that she was entitled to damages; two judges, Paxon, J., and Sterrett J., dissenting. Meantime the personnel of the court was changed by the entrance into it of Justice Green and Justice Clark. The Coal Company, suspecting that a majority of the court might change its decision with regard to liability, sued out a writ of error; Pennsylvania Coal Co. vs. Sanderson and wife, 113 Pa. 126. Four of the Justices reversed the decision of the trial court, and three decisions of the Supreme Court. Mercur, C. J., Gordon, J., and Trunkey, J., dissenting. In 8 years, the court uttered three judgments in favor of the plaintiff, and then reversed them in a judgment in favor of the defendant. The parties were the same, the cause was the same. What differed was the two new judges, and the two whom they superseded. After this flagrant repudiation of the principle of stare decisis, it is difficult to believe that the writer of an opinion is serious, when, proposing to deliver a judgment the propriety of which he professes to doubt, he finds excuse in the doctrine of stare decisis and refers discontented critics to the legislature as the only instrument competent to give redress.

As to the distinction between stare decisis and res judicatoa, see Hospital for Criminal Insane v. Water Supply Company, 267 Pa. 29.

MOOT COURT

HAMMOND VS. GAS COMPANY

Declarations of a Party—Res Gestae—Workman's Compensation Act —Jurisdiction of Common Pleas—"Course of Employment"—279 Pa. 5 Criticised.

STATEMENT OF FACTS

Hammond, employee of the defendant, visited the home of a customer of the company for the purpose of inspecting the gas meter. On coming up from the cellar, he said to the resident of the house that he had slipped on the stairs and had seriously hurt himself. He was pale and gave evidence of suffering great pain. Six hours later he returned to his home and made the same statement. An illness followed resulting in his death. The physician attributes the death to the injury caused by the fall. The Workman's Compensation Board refused to be convinced by this evidence that he had suffered an accident in the course of his employment. This is an appeal to the Common Pleas.

Baratta, for Plaintiff.

Barris, for Defendant.

OPINION OF THE COURT

Barna, J. The first question that we must decide is whether the deceased was injured in the course of his employment. Section 301 of Article 3 of the Workman's Compensation Act of 1915 contains the following statement—"The term, injury by accident in the course of his employment, as used in this article—shall include all other injuries while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere." The case at bar falls within the very letter of the statute and Hammond was injured in the course of his employment. The criterion is not as the attorney for the defendant alleges, whether the defendant owned, managed, or controlled the premises, but whether the party was injured while engaged in the course of his employment. If it were otherwise a salesman or a plumber would never be entitled to compensation.

Messer vs. Manufacturers L. & H. Co. 263 Pa. 5.

The second question is whether the Common Pleas has jurisdiction in this case. Section 409 of the Act of 1915 provides that—"the compensation board's finding of fact shall in all cases be final—and from any decision of the board on a question of law an appeal may be taken to the courts." Since the appeal in this case is concerning the admission of evidence, it is a question of law and the Common Pleas Court has jurisdiction.

McCauley vs. Imperial W. Co. 261 Pa. 312.

There are two declarations which the plaintiff submitted in evidence and which the board refused to receive in the consideration of the case. The third question is whether these declarations should have been admitted. The declarations are—the statement made by the deceased to the resident of the house and the statement that he made when he came home.

The statement made to the resident of the house is part of the res gestae and, as such, it was admissable in evidence. It was a spontaneous declaration. In the case of Guyer vs. Equitable Gas Co. 179 Pa. 5, Guyer was a gas meter reader, and while reading a meter entered the home of Mrs. Sillman, looking very pale and saying that he had just slipped and hurt himself, pointing to his back. That night he said the same thing to his wife and on the next day to the doctor. It was held that the declaration was apparently spontaneous and so connected with the accident as to be part of the res gestae and, as such, competent evidence. The court in order to be more specific as to the length of time that might intervene between the accident and the declarations, said in part—"Statements made by a person on going downstairs as to that which just occurred upstairs, or on entering a house as to that which had just occurred outside, would be part of the res gestae. In either case the declaration would be an undesigned incident of the occurrence and not the recital of a past event." However we do not think that the time between the accident and the declaration need be of so short duration for it was held in Smith vs. Stoner, 243 Pa. that such a declaration was admissable even tho it was made a half hour after the accident.

File vs. City of Lancaster, 17 Dis. 144.

Tomczak vs. Susquehanna Coal Co. 250 Pa. 325.

Van Emon vs. Fidelity & Casualty Co., 201 Pa. 537.

In Riley vs. Carnegie Steel Co. 216 Pa. 82, it was held that to be admissable as part of the res gestae, a declaration must be a spontaneous utterance accompanying or immediately succeeding or preceding the act in question; so near in point of time and place as to be in reality a part of it, and not the designed statements of the actors nor the recital of a past event.

Eby vs. The Travelers Ins. Co. 258. Pa. 525.

Greenleaf on Evidence, Page 264.

It is not essential to the admissability of a statement or act as part of the res gestae that it should have been made or done at the place where the principle fact occurred.

22 C. J. 458.

The declaration which he made when he came home is inadmissable in evidence as it is too remote in length of time, for by that time he could have thought over the matter and coined a story to suit himself. In McCauley vs. Imperial W. Co. supra, the deceased told his son, after he left the factory at night, that he had been scratched by a sticker, and when he came home, he made the same statement to his wife. It was held that such evidence was hearsay and not admissable.

Riley vs. Carnegie Steel Co. Supra.

Guyer vs. Equitable Gas Co. Supra.

Carroll vs. Knickerbocker Ice Co. 218 N. Y. 435.

The testimony of the doctor concerning the cause of the death was admissable. The doctor could not testify to anything that the deceased had said concerning the cause of the injury. Medical testimony has been used to determine the cause of death after an injury in each of the following cases:

Watson vs. Lehigh Coal & N. Co., 275 Pa. 251.

Whittle vs Nat. Aniline & Chemical Co. 266 Pa. 356.

Clark vs. L. V. Co. 264 Pa. 529.

Guyer vs. Equitable Gas Co. Supra.

Eby vs. The Travelers Ins. Co. Supra.

The foregoing discussion brings us to the final question whether there was sufficient competent evidence to warrant the Board in deciding for the plaintiff.

Section 422 of Article 4, of the act of June 26, 1919 P. L. 663 provides, "Neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based only upon competent evidence."

We have arrived at the conclusion that the testimony of the woman and the doctor were sufficient to prove an accident and that death was due to this accident. Even technical rules would permit this evidence to be used. The probable nature of an accident followed by death could be established by circumstantial evidence alone.

Weinschenk vs. Phila. H. M. H. Co. 258 Pa. 98.

Judgment of the Workman's Compensation Board is reversed.

OPINION OF THE SUPREME COURT

The clear opinion of the learned court below makes protracted discussion by us unnecessary.

We do not appreciate the statement, so often made, that the declaration about an accident is so connected with it as to be part of it. The history of an occurence is different from it, whether the history follows a moment afterwards or a week or month or year afterwards. They are two totally different events—an act or state exterior to the mind, a reaction of the mind to that state, and an expression of that reaction in words or other signs. The statement is unsatisfactory that the declaration was spontaneous and so connected with the accident itself as to be part of the res gestae, and, as such, competent evidence; 279 Pa. 5. It is enough that the declaration was manifestly spontaneous, made under circumstances which forbad the suspicion of invention. That is enough to justify the reception of it as evidence of the fact declared without thinking that it was a part of that fact, as it palpably was not.

We affirm the judgment of the learned court below.

MORRISON VS. X COMPANY

Contracts—Corporations—Consideration—Set-off by Corporation vs. Director.

STATEMENTS OF FACTS

Morrison, a stockholder in the X Co. and a director agreed with the four other directors, a deficit of $5000 appearing by the report of the book-keeper, to contribute his share of that amount, the amount being apportioned among the five directors according to the amount of stock held by them. Morrison's share was $1200. Two of the other directors have paid their share of $750 and $1000. Morrison is sueing for his salary of $2500. The X Co. claims the right to set off $1200 against the $2500.

Cherchesky. for Plaintiff.

Einhorn. for Defendant.

Abrahams, J. There are two questions which must be considered in reaching a decision in this case. The first of these is: was the agreement which Morrison made with the other directors a valid, enforcable contract, and the second, if it was a good contract may the amount of the obligation of Morrison be set off by the defendant company against his claim for salary?

In our opinion the contract was a valid one. The consideration for this contract was the promise of each of the directors, and the payment of their shares as made by two of them.

In Russel vs. Patterson, 48 Sup. 571, the facts were very similar to those in the case at issue. Four directors of a corporation agreed at their meeting to make up an impairment of the capital of the company according to their respective holdings of stock. One of the directors paid his share. When one of the other directors sued the company for his salary it was held that the consideration was the payment of the obligation by one of the directors and the promises of the other two. In this case a set-off was allowed the defendant company for reasons which will be given below.

If, after the plaintiff had induced the other directors to pay in a large sum of money on the strength of the agreement that each would contribute his share, the defendant were allowed to ignore the agreement, it would be a fraud upon the other stockholders since he had received the benefit of the promises of the other directors. 96 Pa. 443, 226 Pa. 420.

Under the circumstances, therefore, we conclude that the contract was a valid one, and the defendant is bound in obligation to each of the directors.

As to the question, whether the company may set-off the claim of the directors against the claim of the defendant, we believe the answer to be in the affirmative.

The five directors present constituted the board of directors of the company. His promise made to the company's representatives was made to the company as well as to them as individuals. 43 Superior 571.

The promises were all made for the benefit of the company and therefore the company may sue on them. 37 Pa. 210; 33 Pa. 114; 18 Sup. 96.

In our opinion therefore, the company may set off the claim for $1200 against Morrison's suit for $2500.

OPINION OF THE SUPREME COURT

The agreement was made to repair the losses of the corporation. Each agreed to contribute. Some have carried out their agreement. In so doing, they have furnished a consideration for the contract of others, even if the contractual assumption by each were not a sufficient consideration for that of the rest.

The corporation is the mere agent of the stockholders. The learned court below has found an analogy between the contract among the stockholders, for the benefit of the corporation, and the contract among contemplating stockholders in a nascent but as yet

unborn corporation. The corporation, when it comes into existence, may sue on the subscription contract, made, not with it, but with the other subscribers. Jeannette Bottle Works v. Schall, 13 Super. 96. There are cases which hold that, when A contracts with B, for an act beneficial to C, C, though not a party to the contract may sue B to compel performance.

Here, the corporation has only an oral existence. What is called its property, its rights, are the property, the rights of those actual human beings, who, for the time, are ligated together. We think the corporation is so far identical with the stockholders, for the time being, that it may enforce a contract made by them, for its benefit. The learned court below has discovered a case much like the present, Russell v. Patterson, 43 Super. 871. We think it gives sufficient ground for the decision made by the court. The judgment is affirmed.

SIMPSON VS. HOLLANDER

Evidence—Proof of Foreign Laws—Presumption in Absence of Proof—Non-Reversible Error—81 Sup. 195 followed.

STATEMENT OF FACTS

Hollander allowed a truck to stand on a highway of Delaware at 10 o'clock at night without lights. The law of that state required lights under such conditions. Simpson's automobile, in consequence, collided with it and was injured to the extent of $1000. This is an action for damages brought in Pa. The court refused proof of the Delaware law, unless by an attorney from that State, declined to receive a printed copy of the laws, and certain decisions of the State of Delaware, and ruled that the law of Delaware will be presumed to be like that of Pennsylvania. The appellate court compared the Delaware statutes with the statutes of Pennsylvania, and found the requirements of the former more exacting as to lights and the period of night than that the Pennsylvania statutes. Verdict for the plaintiff. Appeal.

OPINION OF THE COURT

Bertman, J. The controversy in this case evolves about the questions—(1) how may the laws of a foreign state be proved and (2) whether it is reversible error on the part of the court below in refusing to admit copies of the law of Delaware?

The counsel for the plaintiff rightfully contends that since the cause of action arose in Delaware the rights of the parties concerned are to be controlled by the laws of that state, which in absence of proof to the contrary are presumed to be like those of this state and so held in Bollinger vs. Gallagher 170 Pa. 84, Musser vs. Stauffer 192 Pa. 398.

As proof of negligence on the part of the defendant, the plaintiff correctly cited the case of Jaras vs. Whight 263 Pa. 486, in which case the Court held that there is no legal excuse for the failure to obey an absolute statutory requirement.

In Bayuk Bros. vs. Wilson Martin Co. 81 Superior 195, the Court held that the burden is upon the defendant to show that the laws of the state in which the cause of action arose are different from those in the state where the action is brought.

The case of Bayuk Bros. vs. Wilson Martin Co., supra, is in all respects analogous to the case at bar. In that case the lower court refused to admit copies of the laws of New Jersey, which required cars to be lighted at an earlier hour than the Pa. law, and the defendant failed to introduce proof that the laws of Pa. and New Jersey were different. The upper court in reviewing the decision of the lower court held—"Judgments are not to be reversed because the court has made a mistake of law; the errors which are fatal to the judgment are such only as may reasonably be held to have worked injury to the cause of the other party."

We agree with the learned counsel for the defendant in much of his criticism of the lower court's holding. The offer to introduce the copies of the statutes of the state of Delaware was refused, the learned court being of the opinion that the only method of proving the laws of another state was by calling an attorney of that jurisdiction to testify as to what the law was. We agree with the learned counsel that the court committed error in refusing to admit the copies of the law of Delaware into evidence, but, did the court's refusal constitute such error as will warrant a reversal? We are of the opinion that it does not in the case at bar. In deciding this point we must consider whether or not the party seeking to have the evidence introduced was injured by the lower court's refusal to admit it.

The defendant in the present case had violated the law of Penna, and the laws of Delaware are more burdensome in this respect than those of this state. We, therefore, can conceive of no good reason why the defendant should complain because the lower court refused to admit the copies of the Delaware Laws into evidence. If the complaint of the defendant were to be upheld, he, the defendant, would be subjected to a greater difficulty in establishing his de-

fence. The mistake, instead of constituting an injury to his cause, has on the contrary inured to his benefit.

We, therefore, are of the opinion that altho the court below erred in not allowing the printed copies to be introduced, yet since the refusal inured to his, defendant's, benefit, and in consideration of the above mentioned authorities, no reversible error was committed, the appeal must be dismissed.

Judgment affirmed.

OPINION OF THE SUPREME COURT

The judgment of the learned court below is AFFIRMED.

TEMPLE VS. HOPEWELL AND SCHWARTZ

Partnership—Liability of Firm for Act of One Partner—Uniform Partnership Act; Sec. 13, 275 Pa. 246 and 277 Pa. 98 Approved.

STATEMENT OF FACTS

Defendants owned an automobile which was used in their business, but, occasionally, on errands not pertaining thereto. Hopewell was using it to reach his home in the evening but he hurried from his direct course to visit a friend, a member of the Rotary Club, to consult for a few minutes about an impending club affair. While doing so he ran against Temple and severely injured him. Temple sues the partnership, asking $500 damages.

OPINION OF THE COURT

Devers, J. It is essential to a recovery in this case that it appear that the accident from which the plaintiff's injury resulted occurred while the partner was using their automobile in the course of partnership business. To show this, the counsel for the plaintiff ingeniously offers evidence that when Hopewell went to see his friend at the Rotary Club it was concerning business in which his partner was likewise interested. If such could be reasonably inferred from the facts, the court would have no recourse but to decide for the plaintiff as the law is well settled "That the partnership is liable for the wrongful acts or omissions of a partner while he is acting in the ordinary course of the firm's business or with his co-partner's authority."

Zondler et al. v. Foster Mfg. and Supply Co., 277 Pa. 98.

Polis v. Heizmann et al. 276 Pa. 315

Curran v. Lorch, 243 Pa. 247.

30 Cyc. 523 Sec. 13, Uniform Partnership Act—1915 P. L. 18-21.

However, in the case at bar it appears that Hopewell, his day's business being finished, was on his way home. While so doing, he turned from his course and went to a certain Rotary Club to discuss with one of its members, a coming club affair. All of which tends to show that when Hopewell was on his way to the club he was acting in the capacity of an individual and not as an agent of the partnership.

It is an established fact that a partner is to be considered the agent of the partnership, and the liability of the partnership is that of a principal for the acts of his agent, but only within the scope of his authority. Recognizing these principles, the plaintiff's counsel suggests that since the car was occasionally used on errands not pertaining to the partnership business there was implied authority that on using the car on his way home, he was in the course of partnership business, and the fact that he turned from such course would in no way tend to lessen the partnership's liability. To substantiate this proposition numerous Pennsylvania cases are cited.

Upon review of these cases it develops that in all there was either expressed or implied authority from the other partner to do such acts and it was therefore in the course of their business. These cases differ from the one at bar in that here no authority seems to have been given either expressly or impliedly by the other partner.

In the case of Lotz vs. Hanlon, 217 Pa. 339, a case similar to the one at bar, it was held that one must not only show that the car was used as a partnership car, but that at the time of the accident it was being used in partnership business. Here it appears that the use of the machine by the partner on the trip to the club was merely incidental to his trip home and made merely for his own convenience and pleasure and unauthorized by his partner and not in the scope of their business. Under such circumstances the partnership would not be liable. Lindley on Partnership. 2nd. Am. Ed. P. 150 says "If a partner commits a tort, not as a partner, but as an individual in respect to a matter entirely foreign to the business, the other partner is not liable unless he either authorized or adopted the wrongful act.

Therefore, in view of the above facts and the well settled rules of law, we find for the defendants and a non-suit is allowed.

OPINION OF THE SUPREME COURT

The automobile belonged to the defendants jointly. It does not follow from this fact that the injury inflicted by it is to be attributed to them. They might have lent it to X, whose operation, for his own purpose, could not be imputed to them.

The automobile belonged to the two partners. However, it might be operated by one of them. If it was operated for the two the negligence of the one operating it will be attributed to the two. If it was operated by one, for his, not the firm's, business, the negligence could not be imputed to the other partner or to the firm.

Hopewell was using it to reach his home in the evening. We cannot say that in going home he was acting for the firm. As well might it be said that in eating, in sleeping, in awakening the following morning, in dressing with a view to the resumption of his labors, in eating breakfast. he was acting for the firm.

He was on his way to a friend's home when the accident happened. With the friend he wished to discuss, not a theme in which the partnership was interested, but one in which he, as an individual, and the friend alone were interested, viz an affair of the Rotary Club. How can it be said that he was operating the automobile in the business of, or for, the firm? It plainly cannot. The decision of the learned court below must then be affirmed. Cf. Treon vs. Shipman and Son, 275 Pa. 246, Zondler vs. Supply Co., 277 Pa. 98.

JOHN FRANKLIN VS. HENRY FRANKLIN

Wills—Valid Conditions Subsequent—Constitutional Provisions Concerning Religion—275 Pa 266 Differentiated—174 Pa. 642 Approved.

STATEMENTS OF FACTS

John Franklin devised by will a farm to his son Henry and his heirs, so long as he should remain a member of the X church. This church was one of the larger denominations. The will provided that, on Henry's ceasing to be a member, the land should pass over to a younger brother John and his heirs. Five years after Franklin's death, Henry left the X church, but did not give up the farm Action of ejectment by John.

OPINION OF THE COURT

Golden. J. The question for determination is whether the limitation imposed by the will upon the devisee is valid. The limitation prescribed by the will is, "as long as he should remain a mem-

ber of X church." In examining this limitation, we are confronted by the question: does the limitation constrain the devisee from his freedom of worship? We are of the opinion that it does.

It is enacted in Art. I. Sec. III of the Pennsylvania Constitution that, "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, and no man can of right be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent. No human authority can in any case whatever control or interfere with rights of conscience, and no preference shall be given by law to any religious establishment, or modes of worship."

The right of the citizens of the Commonwealth to worship God in accordance with the dictates of their own consciences is a landmark of the old colony. It was, in fact, one of the chief reasons for its establishment. Art. I, Sec III. of the Pennsylvania Constitution was re-enacted from the Duke of York's Laws Page 107.

The testator's will violates this State policy. He wished to force his son, the devisee, to adhere to a certain religious faith under penalty of the loss of what might be termed his inheritance. If we were to hold the limitation valid, we would not only contravene this announced policy but we would originate a method whereby, through successive encroachments, the worship of God according to a given religious persuasion could be controlled and compelled through the disposition of property at death. It would be a step backward to the days of religious persecution.

The same question arose in 275 Pa. 266. The Supreme Court, through Mr. Justice Kephart, held that the limitation was invalid. This decision is consonant with the Constitution of Pennsylvania and the policy of the State.

We therefore are of the opinion that the limitation is invalid and that the devisee took an absolute estate in fee. We dismiss the action of ejectment and order judgment to be entered for the defendant.

OPINION OF THE SUPREME COURT

The testator intended that, at his death, Henry should have a fee in his farm if he was a member of the X church, and that, on the cessation at any time of this membership, the farm should cease to be Henry's and become his brother John's.

There is not, here, a failure to name a person to take the farm on Henry's abdication, as in Droce v. Klinedinst, 275 Pa. 266.

The only question is whether making one estate to end, by a condition subsequent, and another estate to begin, by a condition

precedent, (the same event), is unenforcable because of the nature of the event which constitutes the condition.

Some conditions subsequent are void e. g. if the continuance of Henry's estate was made dependent on his murdering M. he would continue to own the estate tho he did not murder M. A condition, so formed, as to be an inducement to a crime would be ignored.

Is there any adequate reason for the refusal to respect the condition in this case?

It is not reprehensible for a man to love a particular church and to be anxious that his son shall be members of it; nor to offer an inducement by gift, if he is a member, which gift is to cease if he ceases to be such. There are many pious but possibly foolish men who are deeply devoted to a particular cult. The agents of the law do not exist to rebuke this foolishness nor to prevent the foolish man from using his estate as a means of promoting the particular church, or, as he conceives it, the spiritual welfare of his beneficiary, particularly if his own son.

A man has a right to belong to any church or to no church, to worship or not to worship God, as against the State. The constitution puts a limit on the power of the state to penalize irreligion or desertion of one church for another. It is singular that it should be supposed to prohibit a man's giving his land to another, if that other should be, at the time of the gift a member of a particular church and to make the continuance of the gift depend on the continuance of the membership.

It is a commonplace in constitutional law of this state, that when the constitution says that men may worship God according to the dictates of their own consciences; that no man can be compelled to attend or support any place of worship, or to maintain any ministry, against his consent; it means that the state cannot compel him. How foolish to cite it as preventing a testator from conditioning a gift on membership of a particular church. The testator could bequeath or devise his estate away from his children without condition. Why can he not specify a condition? The legatee is not bound to comply. He may do so or not as he will. To denounce such a condition as unenforceable is to say that A cannot, by gift or bribe, induce B to do a particular act and that B can retain the gift without doing that act. We have moved far in the direction of disparaging religious sentiment, but hardly so far as that.

It is hardly necessary to say that the Constitution of the United States prevents Congress from passing any law establishing a religion or prohibiting the free exercise of it. It does not affect state or individual action.

The attempt to deduce from the inability of state or nation to establish or favor a particular church the inability of the individual to do so, is puzzling.

We have intimated that Droce vs. Klinedinst differs from this case in its facts. We do not refuse submission to it. We cannot derive from it the doctrine that making membership in a church a condition subsequent or precedent to an estate is not permissible.

In White's estate vs. Appeal of Free Library, 174 Pa. 642, a testator made bequests to certain charitable corporations but provided that, if at any time, any such corporation should give any support, aid, sympathy, or countenance to the pernicious doctrine of prohibition, the legacy should become void and the money, (which had been held in trust for such legacy,) should be used in the establishment of a free library in Philadelphia.

The corporation legatees renounced the legacy so it was unnecessary to decide whether the condition subsequent was valid. Justice Dean however, remarks, (and his good sense may be commended) "whatever criticism may be passed upon the peculiar views of the testator, we can only say that his money was his own, to do with it as he pleased; if he chose not to give it to those who would promulgate a doctrine which he hated, that is his business. It is our business however, to give effect to the wills of dead men, whenever they are not contrary to law, irrespective of our views as to the wisdom of their benefactions."

This is a wholesome view of the functions of a court. The court should be chary of assuming legislative functions; as in saying that a man who believes in a particular church shall not in his will, give a motive to his son to continue in the church by conditioning his devise upon such continuance.

The judgment of the learned court below must be reversed.

TROLLOPE VS. RAILWAY COMPANY

Evidence—Negligence—Reputation for Negligence—Evidence of Previous Negligent Acts—"Elevator Case."

STATEMENT OF FACTS

Trollope was a motorman of defendant company. A collision between his car and another caused by the negligence of X, motorman of that car, killed Trollope. X had been originally careful but in the course of his ten years of employment, had grown reckless. The plaintiff offers to prove this by showing five cases during the

last year in which X had caused his car to collide with others and by his reputation among defendant's employees for negligence. No evidence has been given of defendant's knowledge of the previous collisions or of the reputation. Lower court found for the plaintiff.

OPINION OF THE COURT

Mutzabaugh, J. In the case at bar, in order that the plaintiff might recover against this defendant, he was bound to show by affirmative testimony, first, that X was an incompetent servant for the duty he had to perform; and, second, that the fact of his incompetency was known to the defendant.

In the case of Rosenstiel vs. Pittsburgh Rys Co. 230 Pa. 273, it was held that incompetency of a fellow employee must be established by evidence of general reputation and cannot be proved by specific acts. The plaintiff in this case offers to prove the incompetence of X by showing, first, five cases within the past year in which the car of X had collided with other cars and, second, the reputation of X among defendant's employees. According to the case above cited, evidence of previous collisions would not be admissible to establish the incompetence of X, so the first offer must be rejected. However, in support of his contention, we have further his offer of evidence as to the reputation of X among defendant's employees. This evidence is admissible, although the alleged incompetency arose after the lawful employment of X, and although the evidence does not tend to establish a bad reputation for the precise kind of negligence which caused the injury in question., It is not necessary to prove that the person whose incompetency is at issue had a bad general reputation for the precise character of negligence which caused the injury. Proof of habitual recklessness and carelessness in the work he is employed to do is sufficient.

Although there was no evidence given in this case of defendant's knowledge of the previous collisions, or of the reputation of X, this fact does not screen the defendant company from liability. We are of the opinion that the reputation for incompetency of X was sufficient notice to the defendant. In the case of Driscoll vs. Fall River 39 Northwestern 1003, it was held that "a general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that if the master had exercised due care, he might have learned or heard of the incompetency.

In view of the authorities above cited, we are of the opinion that the plaintiff is entitled to recover. The judgment of the lower court is affirmed.

OPINION OF THE SUPREME COURT

Was the motorman unskillful or negligent? Skill and care are shown only in acts or the effects of acts. In the year preceding the occurrence, in which Trollope lost his life, the motorman had caused five collisions. Could more cogent evidence that he was destitute of skill or care be imagined? On such acts this reputation of the motorman is based. People who know of the acts, summarize the impression made by them, by saying he is reckless, he is unskilled. Why could a juror not draw the same inference? He could. It is unscientific to hold that the opinion of X, Y, Z, etc. can be put in evidence, but not the facts which have engendered that opinion.

It is objected that to allow such proof would expose the defendant to unfair surprise. That could be averted, by requiring the plaintiff to specify in advance of the trial, the facts on which he could relv.

As to the multiplication of issues, that objection rests on a distrust of the mental power of the juror. Many are the cases in which he has to decide as many issues as he would have to decide, were the five collisions held provable. If the jurors are mentally too feeble to be able to sift a number of facts from the evidence, the state should adopt a better standard of capacity for jury service.

The courts of this state however, insist on the exclusion of the primary evidence of negligence and incompetence, viz., the acts or omissions that express it, and permit the secondary evidence of it, viz., the impressions made on people who have knowledge of these acts or omissions; that is, the reputation.

To charge the defendant, not only must the motorman have been often negligent or incapable, but it must, through its appropriate officer, have had knowledge of such character of the motorman. This knowledge is provable by circumstances, and the inference is legitimate from five collisions, that the defendant had knowledge of them. Such serious mishaps are not hidden under a bushel. 1 Wigmore, Evid. Sec. 250, p. 320.

The Pennsylvania authorities however, exclude particular acts to establish the employee's general negligence or want of skill, and also to establish the employer's knowledge of such acts.

Was the reputation of the motorman properly received? It was not a general reputation, but a reputation among the defendants' employees. They are interested in each other; in the affairs of the employer. Among whom would an employee's characteristics be so apt to be observed and discussed? If the reputation is admissible as evidence of the general unfitness of the motorman, that

which pervades the community of fellow-servants should be. Again, if the existence of a reputation is to be deemed evidence that the company had knowledge of it, Rosenstiel v. Pittsburg Rys. Co., 230 Pa. 273, 284, a reputation among no other class would be as apt to reach the authorities of the corporation.

With regret that the very cogent evidence of unfitness, that of the five collisions is under the decisions of this state, not receivable, we must affirm the judgment of the learned court below.

Affirmed.

COMMONWEALTH VS. HARRISON

Murder—Plea of Self-defense—Admissability of Reputation of Deceased—277 Pa. 122 Followed

STATEMENT OF FACTS

Murder. The affair was between Harrison and the person killed, Bates, no other being present. Harrison testified to a violent and brutal attack from Bates, which made resort to the fatal shooting necessary in self defense. The Commonwealth offered evidence that Bates had the reputation of being a quiet, indolent, good natured man, peaceable always. Harrison objects to this evidence.

Verdict—guilty of murder in the first degree.

OPINION OF THE COURT

Trembath, J. The law on these facts is that as a rule evidence as to the reputed character of a person is not admissible, quite regardless of the fact that it may be relevant, and may have a probative value. It is inadmissible according to Greenleaf for two reasons: first, it tends to confuse the issue, and second, it is likely to excite undue predjudice in the minds of the jurors which would lead them to a verdict regardless of the other evidence.

However in homicide cases there is another reason why the Commonwealth may not introduce evidence as to the reputed good character of the deceased. The reason is because until the deceased's reputation is put in issue by the defendant it is presumed to be good. In these same cases the defendant may introduce evidence as to the bad character of the deceased to rebut the presumption aforementioned, where such a rebuttal would tend to establish likelihood of an aggression on the part of the deceased, and also if it first be shown that the defendant knew of such bad reputation, to show a reasonable belief that an attack was being made by the deceased.

Where the defendant has made self defense his plea courts will allow evidence of the reputed character of the deceased to be admitted as evidence of the fact whether the deceased was or was not, as alleged, the aggressor. "Most of the courts admitting it for this purpose prescribe as a condition that there shall be some independent evidence of the deceased's aggression, or, in the phrases of some, an overt act of aggression by the deceased." 1 Wigmore 40 and cases there cited. That such evidence is admissible for such purpose in Pa. see Commonwealth vs. Castellano 277 Pa. 122. That case does not, however, seem to decide that such evidence of self defense will alone and in and of itself pave the way for the admission of such evidence.

In that case the facts of the case were similar to this one but the evidence was not, for in addition to the plea of self defense and the evidence supporting that plea there was also evidence introduced by the defendant as to the bad reputation of the deceased for peaceful and quiet disposition. And even this case was never before presented in this state according to Chief Justice Von Moschizsker, but he does not commit himself on the question before this court although he does discuss it to some extent.

Taking it as established in Pennsylvania then that evidence of the reputation of the deceased as to a disposition to peace and quiet is admissible on the question of whether the deceased was or was not the aggressor, we have only to discuss the question of when that evidence becomes admissible.

It is also a rule of evidence that the defendant may in a criminal proceeding set up his own good reputation in respect to the crime charged, as reflecting his true character, and that as consequence it would be unreasonable to suppose that he would commit an act diametrically opposed to the character so reflected. The mere charge of a crime against him will permit the admission of such evidence. When the defendant sets up the plea of self defense he becomes the accuser and the deceased the acccused and the Commonwealth should then be allowed to answer the attack on the character of the deceased because they are the only ones who may protect it. We fail to see how it can be argued logically that although the deceased and the accused start out in the trial with their character's presumed to be good, that in the case of one a criminal charge will pave the way for evidence as to the good reputation of the one in rebuttal of the crime charged, while the other who is likewise charged with a crime is not allowed to rebut that charge with like evidence. If there is a difference in the cases, what or where is it? As stated above both are accused of a crime. Is the difference then in the fact that the truth of the accusation of one is now being tried?

That is true for both, for the jury if it convicts must necessarily find that the deceased was not the aggressor, and if it acquits says at the very best that they are in doubt whether he was or not. Is it the fact that a penalty is awaiting the first attack and not the second? The deceased has paid his penalty and deserved at least that any attack on his character be vindicated. Nor would such an inquiry confuse the issue. The jury must in any event pass on the question as to the likelihood of his having been the aggressor and the evidence as to the reputed good character of the deceased for peace and quiet could do no harm and would help them to reach their decision.

Counsel for the defendant have given two views under which the evidence might very well be excluded; first, that the admission of such evidence would surprise the defendant and make him contend an issue that he could not be expected to meet; and second, that because one specific act does not or cannot prove reputed character, that one specific act cannot be given as proof of an attack on character.

I cannot see the hardship of the first argument. A counsel for the defendant could not help but see in an action of this kind where, by the very nature of the facts the Commonwealth is restricted to circumstantial evidence in proving the guilt of the defendant, that the character of the parties to the fight would play an important part. Furthermore what hardship there might be would be restricted to this case because it would establish the rule that where the defendant pleads self defense and the evidence is purely circumstantial evidence as to the reputed character of the deceased for peace and quiet would be admissible. It is far better that one defendant be subjected to the questionable hardship of attacking the character of the deceased than to place a premium upon chosing an unfrequented place and using stealth in the perpetration of a crime.

It is true as contended that one specific act will not prove the reputed character of the deceased or anyone else, and that the reputed character is what people generally believe to be the character of the person. We would much prefer to know the real character of anyone but since that is in its nature impossible of determination we must chose the next best proof of what it really is, that is what people generally think it is, as being more reliable than what any particular person thinks it is.

It cannot be seriously argued that what people think to be the character of a person is the best method of disproving a certain alleged reputed character. That would be one method, for if people generally do not believe that a certain person has such and such a character it is certainly some proof that such is the case.

There is another and a better way, I think, of disapproving reputation. That is by showing that it is not deserved. One specific act or two specific acts will do this if they be sufficiently well established. is it to be denied that that is the reason why so many people take care that their actions be seemly if they have any respect at all for for their reputation? In our opinion then the evidence was properly admitted and the conviction below is affirmed.

We have at least three sister states to confirm our stand on this question. Thrawley vs. State 153 Ind. 375, 55 N. E. 95; State vs. Holbrook 98 Ore. 43, 192 Pac. 640, 647 State vs. Tackett 8 N. C. 210.

In State vs. Holbrook supra the Court said: "In at least two jurisdictions including Oregon the plea of self defense accompanied by evidence to support it, has been treated as a sufficient attack on the character of the decedent for peace and quiet to entitle the State to submit rebuttal evidence of his good reputation for peacefulness."

OPINION OF THE SUPREME COURT

Harrison has killed Bates, and is on trial for murder. He admits the killing, but seeks to justify it as an act of self-defence. He alleges that Bates brutally attacked him, and made his fatal act necessary, in order to save his own life.

Harrison is a deeply interested witness. Bates is no longer here to contradict him. Whether Bates made the alleged attack, and whether it was visibly dangerous to Harrison, is a matter to be inferred from circumstances. Harrison's testimony is a circumstance, but its truth is infirmed by his personal interest. Can it be still further infirmed?

That a man has not done acts of a certain class may create some likelihood that he did not do an act of that class, on a given occasion. If a man of 40 years, has never sought a quarrel, has never threatened or assaulted anybody, has been uniformly quiet, good-natured, and peaceable, and, withal is indolent, it is unlikely that on the alleged occasion, he exhibited contradictory qualities. was fierce, aggressive, murderous.

Ordinarily, the habit of a man, to be quiet, law abiding, is not provable by exhibiting situations in which he has displayed these tendencies, not because such proof would not be convincing, but because it would cost too much time and probably weary the patience of the jury, or confuse it by the number of contested instances.

So, to escape this inconvenience from the proof of particular behaviors, it is the habit to receive proof of reputation, and to infer the behavior, the character, from this reputation.

The question then is, whether the reputation of being a quiet, good natured, always peaceable man, is some evidence that the deceased was quiet, good natured, etc.

Reputation for truth or untruth, is some evidence that a witness is truthful or otherwise. Reputation of being a law-abiding peaceable man, is some evidence that the person having this reputation, is law abiding, peaceable. Why should it not be such evidence, when the subject of it is not the defendant but the deceased? To the accusation against a defendant, may be opposed his reputation of being one who did not commit the kind of act of which he is accused. Why should not the deceased when charged with a violent and homicidal act, be shown to have a reputation which men who do such acts are not likely to have?

Further discussion is needless. The case cited by the learned court below, 277 Pa. 122, will suffice for an authority.

The well conceived opinion of the learned court below well sustains its decision.

Affirmed.