# REPUTATION OF THE VICTIM ON THE ISSUE OF SELF-DEFENSE IN MISSOURI

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When the issue of self-defense is raised in a trial for homicide or assault with intent to kill, two major questions arise: first, Under what circumstances and subject to what limitations may the defendant offer evidence of the bad reputation of the victim for violence? and second, Under what circumstances may the state offer evidence of the good reputation of the victim?

The defendant is on trial for the wrongful taking of the life of another, his own life being at stake. He admits the killing, but by pleading self-defense alleges that it was not wrongful, but was necessary as a protection to his own life and therefore excusable. In so doing the defendant changes the issues of the case by adding his own charge that the victim attempted to commit a crime upon him. There is then a combined case of the state against the accused and the accused against the victim.

## I. ADMISSIBILITY OF REPUTATION EVIDENCE REGARDING THE VICTIM, OFFERED BY THE ACCUSED

It is a general rule that on a trial for homicide, evidence of the character of the victim is not admissible.[1] The state is not permitted to prove his good character, nor is the accused permitted to prove his reputation for violence. "The rule is based upon the ground that character is not involved in the issue, and, consequently, evidence in regard to it is immaterial."[2] Another reason given is that "the law protects everyone from unlawful violence regardless of character, and the service done the community in ridding it of a violent and dangerous man is, in the eyes of the law, no justification of the slayer."[3]

"But the rule is otherwise where the plea of self-defense is interposed and the evidence before the jury leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal

[1] 124 Am. St. Rep. 1019; 13 R. C. L. 916; L. R. A. 1916A 1266; 2 L. R. A. (N. S.) 102; 4 Ann. Cas. 338; 4 Elliott, EVIDENCE, Sec. 3038; 30 C. J. Secs. 394-397; State v. Jackson (1853), 17 Mo. 544.

[2] 4 Ann. Cas. 338.

[3] 2 L. R. A. (N. S.) 102.

whether the defendant was justified in believing himself in imminent danger at the hands of the deceased."[4] It should be borne in mind that the plea of self-defense raises two distinct issues, namely, who was the aggressor, and did the accused act reasonably in defending himself?[5] In considering these issues there arises in each a question as to the relevancy of evidence of the victim's reputation for violence, together with the subsidiary question as to the bearing of the accused's knowledge of the victim's reputation upon its relevancy.

*A. The Issue of the Reasonableness of the Accused's Act*

Assuming for the present that there is an issue of aggression, the reputation of the victim for violence, if known to the accused, has an obvious bearing upon the issue of the reasonableness of his act, and the great weight of authority concedes its admissibility.[6] Here knowledge by the accused is essential; for the purpose of the evidence being to show the accused's state of mind and to explain his conduct at the time of the encounter, it is clear that the victim's reputation, as affecting the accused's apprehensions, must have been known to him.

The Missouri decisions are in accord in holding evidence of the character of the victim admissible in support of this issue, subject to certain limitations. There must be doubt as to whether the defendant acted maliciously or from a well-grounded apprehension of danger or as to who was the assailant. The reputation must relate to violence, turbulence or quarrelsomeness;[7] it must be general, evidence of specific acts of violence having been repeatedly rejected;[8] and it must relate to the victim's reputation at the time of the tragedy[9] in the community in which he

[4] 13 R. C. L. 916.

[5] Logically the question of aggression would seem to precede the question of the reasonableness of the accused's act, but for the purposes of our discussion the issues will be treated in the inverse order.

[6] 124 Am. St. Rep. 1029, and cases cited therein; 11 Ann. Cas. 229; 13 R. C. L. 918; L. R. A. 1916A 1266; 2 L. R. A. (N. S.) 102; 30 C. J. Sec. 466; 2 Jones, COMMENTARIES ON EVIDENCE (2d ed.), 1231; 1 Wigmore, EVIDENCE (2d ed.), Sec. 63; 4 Elliott, EVIDENCE, Sec. 3038; 4 Ann. Cas. 338.

[7] State v. Colvin (1910), 226 Mo. 446, 126 S. W. 448; State v. Roach (1896), 64 Mo. A. 413.

[8] State v. Roberts (1922), 294 Mo. 284, 242 S. W. 669; State v. Woods (1918), 274 Mo. 610, 204 S. W. 21; State v. Jones (1896), 134 Mo. 254, 35 S. W. 607; State v. Elkins (1876), 63 Mo. 159; State v. Green (1910), 229 Mo. 642, 129 S. W. 700.

[9] State v. Pettit (1894), 119 Mo. 410, 24 S. W. 1014.

resides.[10] The limitation or requisite of admissibility with which we are herein primarily concerned is knowledge.

There is a seeming confusion in the Missouri cases as to the necessity of knowledge by the accused of the victim's reputation on the issue of reasonableness of the accused's act, but it is more apparent than real. It is believed that the confusion will be largely removed if it is borne in mind that the plea of self-defense raises two distinct issues; namely, aggression and the reasonableness of the accused's act. So far as the issue of reasonableness is concerned it is hardly possible that any court would attempt to dispense with the element of knowledge, but, as will be shown later, knowledge is a factor of no importance on the issue of aggression.

The first case[11] which raises the question of knowledge by the accused of the victim's reputation for violence as a requisite of admissibility is *State v. Hicks*.[12] The court, in approving an instruction asked for by the accused himself, expressly makes knowledge of the reputation of the victim by the accused a requisite of its consideration by the jury in determining whether the accused had reason to apprehend danger. The court says the law permits a man to act on reasonable fear, ". . . and therefore, when the killing has been under circumstances that create a doubt as to whether the act was committed in malice or from a sense of real danger, the jury have the right to consider any testimony that will explain the motive that prompted the accused."

The next group of cases,[13] relying upon the *Hicks* case, admit character evidence for the purpose of showing the motive which prompted the act of the accused. While they are silent upon the element of knowledge, the entire argument implies knowledge on the defendant's part as a requisite of admissibility on the issue of the reasonableness of the defendant's fear.

These cases are definitely reinforced by *State v. Brown*[14] and

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[10] State v. Roberts (1922), 294 Mo. 284, 242 S. W. 669.

[11] All cases discussed are homicide cases unless otherwise indicated.

[12] (1859), 27 Mo. 588.

[13] State v. Keene (1872), 50 Mo. 357; State v. Bryant (1874), 55 Mo. 75; State v. Elkins (1876), 63 Mo. 159; State v. Downs (1886), 91 Mo. 19, 3 S. W. 219.

[14] (1876), 63 Mo. 439.

*State v. Kennade.*[15] In the latter case the court says: "Even if deceased had a reputation for being quarrelsome and dangerous, evidence of it could not have been received unless it had been previously shown that defendant knew it, and therefore might more reasonably apprehend danger in certain circumstances, than if that reputation had been different." The *Hicks* case is relied upon as authority for the rule.

Up to this time the rule is clear, but *State v. Feeley,*[16] decided by the Supreme Court, starts trouble. The question directly involved in this case was whether the state could offer evidence of the victim's good reputation when not drinking, to rebut the evidence offered by the accused of the victim's bad reputation when drinking. The court ruled that the state's offer was good since the victim's reputation when drinking was but one trait of his general character which had been attacked. It appeared that the accused did not have knowledge of the victim's reputation, but the admission of the evidence was not objected to by the state. However, the court goes into a long discussion of the question of knowledge as a requisite of admissibility of character evidence and, after reviewing the law on the subject, which it says has been conflicting, overrules the *Kennade* case and, relying upon the cases which are silent upon the question of knowledge, sets up the rule that the accused need have no knowledge of the reputation of the victim as a prerequisite of admissibility.[17]

Two subsequent cases[18] ignore the *Feeley* decision and hold that it is a well-settled rule that where there is an issue as to whether the accused acted maliciously if from a well-grounded apprehension of danger the reputation of the victim is admissible. It does not appear whether the accused had knowledge of that reputation.

But *State v. Stubblefield,*[19] a prosecution for assault with intent to kill, cites the *Feeley* case with approval and rules that the instruction of the trial court covering the victim's reputation for violence should be made to conform to the principle announced in *State v. Feeley.*

[15] (1894), 121 Mo. 405, 26 S. W. 437.
[16] (1905), 194 Mo. 300, 92 S. W. 663, 3 L. R. A. (N. S.) 351.
[17] It is felt that the court may have had in mind the issue of aggression.
[18] State v. Zorn (1907), 202 Mo. 12, 100 S. W. 591; State v. Green (1910), 229 Mo. 642, 129 S. W. 700.
[19] (1911), 239 Mo. 526.

The rule in Missouri, although slightly ambiguous up to this time, is greatly clarified by *State v. Barrett,*[20] on the issue of the reasonableness of the accused's act.[21] In the *Barrett* case *State v. Feeley* is reversed and the rule of the *Kennade* case is reestablished. The defendant pleaded self-defense to the charge of murder and asked for an instruction regarding the evidence of the bad reputation of the victim, to the effect that the jury be permitted to consider the evidence "for the purpose of throwing light upon the conduct and demeanor of the deceased during the difficulty between him and the defendant, and also for the purpose of throwing light upon the defendant's apprehensions, if any, at the time of the shooting." This instruction was refused and an instruction was given that the jury might consider the evidence if the defendant had knowledge of it, as a circumstance in determining the reasonable cause of the defendant's apprehension of great personal injury. Thus the use of the evidence was limited to the issue of whether the defendant acted maliciously or in self-defense. The court says, "It is clear that the evidence tending to show the reputation of the deceased as a dangerous man could not have affected defendant's apprehensions if unknown to him, and to that extent the court did not err in thus refusing the defendant's instruction."

However, a subsequent civil case for assault and battery, in holding that the issue of self-defense puts the character of the plaintiff in issue, and that the defendant may attack his reputation before he himself puts it in issue, cites the *Feeley* case as "the rule of the court at this time."[22]

Hence starting with the *Hicks* case, which makes knowledge a requisite of admissibility, we find a subsequent line of cases up to the *Kennade* case which discuss the question from the standpoint of the reasonableness of the accused's act and follow the *Hicks* case, apparently presupposing knowledge by the accused. The *Kennade* case expressly makes knowledge a requisite. *State v. Feeley* may be set aside in a discussion of this issue for the reasons that, first, the opinion does not show a thorough ex-

[20] (1912), 240 Mo. 161, 144 S. W. 485.

[21] But the rule laid down on the issue of aggression is one which cannot in reason be supported. See *infra.*

[22] Davenport v. Silvey (1915), 265 Mo. 543, 178 S. W. 168, L. R. A. 1916A 1266.

amination or a fair construction of the cases upon which it bases its rule, and, second, because the element of knowledge was not an issue either at the trial or on appeal and any discussion of it is dictum. *State v. Zorn* and *State v. Green* are of little consequence since they do not discuss the element of knowledge. *State v. Stubblefield,* in its approval of the *Feeley* case, fails to disclose the issues with which it is concerned, saying merely that the instruction concerning the reputation of the victim should be made to conform to the views expressed in *State v. Feeley.* It cannot be regarded as authority of any kind.[23] Nor can *Davenport v. Silvey* be regarded as authority on this issue. The controversy there was whether the defendant had the right to attack the reputation of the plaintiff in the first instance. Knowledge was not in issue. In endorsing the rule of the *Feeley* case the court completely overlooked *State v. Barrett,* as well as all previous decisions.

We cannot help but conclude that the *Barrett* case, which contains a thorough review of all previous decisions, definitely established the rule that when the only issue to be determined is whether the accused acted maliciously or from a well-grounded apprehension of danger, it having been shown that the victim was the aggressor, the reputation of the victim for violence is admissible only if known to the accused.[24]

### *B. The issue of aggression*

There has been an almost universal failure to distinguish between the purposes for which evidence of the violent character of the victim is offered.[25] But generally[26] where the attention of

[23] Even if it is regarded as authority it is overruled by the subsequent decision of the Barrett case.

[24] In State v. Turnbo (Mo. 1924), 267 S. W. 847, it was held error to refuse to permit the defendant to show that the victim bore a general reputation for being dangerous, turbulent and quarrelsome. State v. Freeman (1877), 3 Mo. A. 591; State v. Hayden (1884), 83 Mo. 198.

[25] "The reason for the hesitation, once observable in many courts, in recognizing this sort of evidence, and the source of much confusion upon the subject, was the frequent failure to distinguish this use of the deceased's character from another use, perfectly well-settled, but subject to a peculiar limitation not here necessary,—the use of communicated character for violence to show the reasonableness of the defendant's apprehension of violence . . . and hence, an early ruling excluding the present use of the evidence cannot always be taken as a repudiation of the

the courts has been clearly called to this distinction it has been held that character evidence of the victim is admissible as tending to corroborate evidence of the accused as to who was the aggressor, whether the accused knew of such character or not.[27]

Here the element of knowledge is immaterial since the question is what the victim probably did, and not what the accused thought he was going to do. "The inquiry is one of objective occurrence, not of subjective belief."[28]

The Missouri courts, except for the *Barrett* case, have been silent on this issue. An early case[29] excluded character evidence because it appeared that the accused was the aggressor. The court opens the door for admission of character evidence to explain the act of the partes by saying, "There may be cases where the general character would be proper evidence before the jury; it would explain the situation of the parties, and their acts and deeds at the time." Again in *State v. Rider*[30] the court approves the use of character evidence on the issue of aggression, saying: "The jury had a right to consider the threats made by the deceased and his character as a turbulent, dangerous man in determining the question as to who was the assailant, he or the defendant, and whether defendant had reasonable ground to apprehend, and did apprehend, that he was in imminent danger of sustaining great bodily harm at the hands of the deceased." Neither case discusses knowledge, nor is either case cited or discussed in subsequent decisions.

The *Barrett* case addressed itself to two issues, the first relating to the reasonableness of the accused's conduct, and the

present principle, but is often merely a ruling that the offer does not satisfy the doctrine of communicated character; and such a court may in future recognize the present doctrine if the distinction is pressed upon it. Apart from a few such precedents, the principle is now generally accepted." 1 Wigmore, EVIDENCE (2d ed.), Sec. 63; L. R. A. 1916A 1266; 2 L. R. A. (N. S.) 102.

[26] The Barrett case excepted.

[27] People v. Lamar (1906), 148 Cal. 564, 83 P. 993; State v. Beird (1902), 118 Ia. 474, 92 N. W. 694; State v. Jones (1914), 48 Mont. 505, 139 P. 441; State v. Byrd (1897), 121 N. C. 684, 28 S. E. 363; State v. Thompson (1907), 49 Or. 46, 88 P. 583; State v. Barber (1907), 13 Ida. 65, 88 P. 418; State v. Adamo (1922), 120 Wash. 268, 207 P. 7.

[28] 1 Wigmore, EVIDENCE (2d ed.), Sec. 63.

[29] State v. Jackson (1853), 17 Mo. 544, a prosecution for assault with intent to kill.

[30] (1886), 90 Mo. 54, 1 S. W. 825.

second relating to the question of aggression. As heretofore pointed out it established the law of Missouri on the first issue on a sound basis by calling attention to the weaknesses and fallacies of the *Feeley* case, but when it took up the second issue, namely that of aggression, it introduced into the Missouri law a new element of confusion. It framed the question of aggression[31] and answered it with authority for the issue of reasonableness,[32] failing to recognize the logical relevancy of character evidence on the issue of aggression on grounds quite distinct from those which obtain on the issue of reasonableness. Wigmore[33] criticizes the opinion for its failure to note the necessary distinctions between the two issues.

It is felt that the problem did not receive the consideration to which it is entitled and that the solution reached by the *Barrett* case should not be accepted without further discussion of the merits of the question. The *Barrett* case is not entitled to stand as the final word in Missouri on this issue.

The general rule that uncommunicated threats are inadmissible because the defendant could not have been influenced by them unless he knew of them,[34] is subject to an exception that in cases of homicide, where there is an issue of self-defense, they are admissible to throw light upon the occurrence and to show who was the aggressor.[35] This exception has been recognized by

[31] 240 Mo. l. c. 171: "Was the defendant entitled to the instruction directing the jury that they might consider such testimony (the reputation of the victim for violence) for the purpose of explaining the conduct of the deceased during the difficulty?"

[32] 240 Mo. l. c. 172, "The wilful killing of a human being is presumptively murder and therefore in such case malice may be presumed, and there may be evidence tending to prove malice. To negative malice the character of the assailant as a dangerous man, if known, is held admissible because it tends to prove that the killing was from a sense of danger, but as a sense of danger by reason of deceased's character could not exist unless the defendant had knowledge thereof it necessarily follows that in the absence of such knowledge such evidence can have no bearing upon the issue whether the killing was from malice or from a sense of danger." The court discusses the previous cases which deal only with the issue of reasonableness and holds that the Feeley case is out of line.

[33] 1 Wigmore, EVIDENCE, (2d ed.), Sec. 63: "It is strange that the court is unable to see the point."

[34] 13 R. C. L. 920; 3 L. R. A. (N. S.) 523.

[35] "It is the fact of his design, irrespective of its communication to the defendant that is evidential." 1 Wigmore, EVIDENCE (2d ed.), Sec. 110; 13 R. C. L. 920; 3 L. R. A. (N. S.) 523; 1 McClain, CRIMINAL LAW, Sec. 307; 4 Elliott, EVIDENCE, Sec. 3035.

the Missouri courts.[36] In *State v. Spencer*,[37] the court says: "A great array of authorities is marshalled to sustain the proposition that uncommunicated threats made by the deceased are admissible when there is doubt as to who is the aggressor, in an affray, as tending to prove who was in fact the aggressor, but there is no doubt this is the law. It has been iterated and reiterated by this court."

The admission of character evidence unknown to the accused has been likened to the admission of uncommunicated threats as evidencing the aggression of the victim.[38] It is said in *People v. Lamar*:[39]

> "The philosophy which supports this rule as to the admissibility of evidence of such threats, where it is otherwise in doubt from the evidence who was the assailant, is that it is more probable that one who has made threats of hostile intention towards another would, when opportunity permits, attempt to carry such threats into execution and become the assailant, than would one who has made no such threats or declared no such intention. So, too, with reference to the admissibility of evidence of the reputation of deceased as being a violent, turbulent, dangerous man, such proof, when the evidence as to who was the assailant is in doubt, for a similar philosophic reason should be permitted; it being more probable that one bearing such reputation would pre-

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[36] State v. Nelson (1901), 166 Mo. 191; State v. Smith (1901), 164 Mo. 567; State v. Kelleher (1907), 201 Mo. 614, 100 S. W. 470; State v. Sloan (1871), 47 Mo. 604; State v. Bailey (1887), 94 Mo. 311; State v. Harrod (1890), 102 Mo. 590; State v. Alexander (1877), 66 Mo. 148—"Where there is evidence tending to show an assault first made by deceased, evidence of threats, made by deceased, whether communicated to defendant or not, are admissible as bearing directly upon that important question which the jury must determine before making their verdict."

[37] (1901), 160 Mo. 118.

[38] People v. Lamar (1906), 148 Cal. 564, 83 P. 993; State v. Beird (1902), 118 Ia. 474, 92 N. W. 694; State v. Jones (1914), 48 Mont. 505, 139 P. 441; ("Such evidence serves the same purpose as uncommunicated threats, which are always admissible when the question is in doubt, in order to enable the jury to determine who probably brought on the conflict."); State v. Byrd (1897), 121 N. C. 684, 28 S. E. 663; State v. Thompson (1907), 49 Or. 46, 88 P. 583 ("Evidence of the turbulent character of the victim of an assault or homicide, unknown to the defendant, has been regarded as admissible for the same reason and purpose as evidence of uncommunicated threats."); L. R. A. 1916A 1266; 1 McClain, CRIMINAL LAW, Sec. 307; 1 Wigmore, EVIDENCE (2d ed.), Sec. 63.

[39] (1906), 148 Cal. 564, 83 P. 993.

cipitate a deadly contest than would one having no such reputation."

The *Barrett* case denies the similarity between the two kinds of evidence but little reasoning is advanced by the court, and it disposes of the question with the following remarks:[40]

> "It is urged that as uncommunicated threats were admissible to explain the conduct and demeanor of the deceased at the time of the homicide, and to show who was the aggressor, by analogy testimony showing that deceased was a dangerous man should be admitted for the same purpose; but there is plainly such close connection between a threat to kill and an attempt to do the act threatened, and such a lack of it between evidence of the bad character of the deceased unknown to the defendant, and the homicide, that the competency of the former cannot be considered as affording a reason for the competency of the latter. If the defendant knew he was dealing with a dangerous man his apprehension and right to act should be gauged according to such knowledge and the surrounding facts and circumstances. But if he did not know whether the deceased was a dangerous or peaceable man his right to act from apprehension of danger and in self-defense could not have been affected by the reputation of his assailant."

It is difficult to understand the view that the fact of the defendant's knowledge of the victim's reputation could have any effect upon the use of such evidence to show a probability that the victim was the aggressor. Would it be more probable that the victim acted in a certain manner if the accused knew he had a bad reputation? Would the jury be more apt to misuse character evidence if the defendant had no knowledge of it than if he had? Logically there can be no basis for such a theory.

Nor can it be said that in all instances uncommunicated threats are more logically relevant to the probability of the victim's having done the act alleged than is evidence of his character. A knowledge of human nature will show that the man who goes around making threats—conceded to be admissible—is no more dangerous or apt to do a particular criminal act than is the tight-mouthed criminal whose thoughts are seldom imparted to others.

It is not necessary to argue that evidence of the bad character

[40] 24 Mo. l. c. 175.

of the victim would have just as much weight with the jury as would evidence of uncommunicated threats. Our concern is with the logical relevancy of the evidence, which is a fundamental requisite of admissibility.

We recognize character as a reasonable index to conduct. It has been said that conduct conforms to character.[41] It would seem natural that a man's character would throw light upon the probability of his having done a particular act, it being more probable that a man of violent and dangerous character would make an unprovoked assault.

This principle is recognized in permitting the defendant to put his good character into issue to show the probability that he did not do the particular act with which he is charged;[42] or in a case where self-defense is pleaded to show the improbability of his having started the affray.[43] The same logic would seem to apply in admitting evidence of the victim's character to show the probability of his having been the aggressor in the encounter, whether known to the accused or not.[44]

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[41] ". . . good conduct is evidence of good character. General good reputation, the fruit of good conduct, is usually requisite in proof of good character, but the rule excluding the good conduct itself and requiring evidence of reputation is not based upon such conduct's lack of tendency to prove good character. In fact the admission of evidence of general good reputation necessarily is predicated upon and a recognition of such a tendency, and formerly specific acts of good conduct were permitted to be shown in proof of good character. These are now, generally, excluded because a contrary rule would result in 'surprise and a confusion of issues' . . . and not because they lack probative force." State v. Turner (1912), 246 Mo. 598, 152 S. W. 313, Ann. Cas. 1914B 451. ". . . the law presumes that a man whose chacter is good is less likely to commit a crime than one whose character is not good. . ." State v. Maupin (1906), 196 Mo. 164, 93 S. W. 379.

[42] "Nothing is better settled than that evidence of general character is competent for the accused in all criminal trials. The reasonable operation of such evidence is to create a presumption that a person of good character was not likely to have committed the act imputed to him; that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly admissible evidence in the case." State v. O'Conner (1861), 31 Mo. 389; State v. Alexander (1877), 66 Mo. 148; State v. Howell (1890), 100 Mo. 628; State v. Maupin (1906), 196 Mo. 164, 93 S. W. 379.

[43] State v. Shoultz (1857), 25 Mo. 128; State v. Turner (1912), 246 Mo. 598, 152 S. W. 313, Ann. Cas. 1914B 451.

[44] Although desperate character does not prove the commission of a crime, "It does increase the probability of the other evidence tending to show that he (the victim) commenced the affray, and that his attack was felonious

Writers on the subject have agreed that there is an evidential value in evidence of the victim's character of which the accused should not be deprived.[45] The general rule is stated to be "that wherever it becomes necessary to determine the intent of the deceased, or whether or not he was the aggressor, evidence of his violent and dangerous character or reputation is admissible on behalf of the defendant, whether known to him or not."[46]

In the field of evidence everything which is logically relevant to the issue is admissible unless there are considerations of policy to exclude it[47] or limitations which qualify it. Having pointed out the logical relevancy of character evidence of the victim, even though unknown to the accused, on the issue of ag-

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and intended to do the defendant great bodily harm. The claim that the defendant acted in self-defense, if indicated by the other evidence, would be more readily believed concerning a violent and dangerous man than a peaceable and quiet one, and any mind searching for the truth and in doubt would naturally be affected by such evidence. The defendant's knowledge or want of knowledge of the deceased's character can have nothing to do with its value as evidence for the purpose stated. Its object was to render more probable the other evidence in the case which tended to show that the deceased was the aggressor, and that the nature of his attack was such as to justify the defendant in resorting to violence to repel it or to save his own life, and is not affected in the slightest by the defendant's previous knowledge. Its value comes from the fact that the deceased was one who was apt or likely to do what is imputed to him, and not from the defendant's knowledge of such fact." State v. Thompson (1907), 49 Or. 46, 88 P. 583. ". . . for it is entirely in accord with everyday experience that a turbulent, violent man is more aggressive and will more readily bring on an encounter than one who is of the contrary disposition." State v. Jones (1914), 48 Mont. 505.

[45] "It has been held that when there is evidence tending to show that the defendant acted in self-defense, proof that the deceased was a violent and dangerous man is competent, whether such fact was known to the defendant or not, for the purpose of aiding the jury in determining who was in fact the aggressor, and the nature and character of the assault if one was made by the deceased." 11 Ann. Cas. 229. "When the evidence is introduced for the purpose of showing that the deceased was the aggressor or to explain his acts, the belief of the prisoner is not involved in the inquiry, and the evidence of character is properly admitted although it may not have been shown that the prisoner had any knowledge or information thereof." 13 R. C. L. 918; L. R. A. 1916A 1266; 2 L. R. A. (N. S.) 102; 1 McClain, CRIMINAL LAW, Sec. 307; 4 Elliott, EVIDENCE, Sec. 3038; 30 C. J. Sec. 466; 1 Wigmore, EVIDENCE, (2d ed.), Sec. 63.

[46] 124 Am. St. Rep. 1019.

[47] It is the policy of the law and not the lack of evidential value and relevancy which precludes the state from showing the bad character of the accused as tending to prove that he was the aggressor, or a man likely to do the particular act charged, in the first instance.

gression, it remains to be determined whether there are considerations to exclude it or qualifications and limitations to be attached to it.

Admitting that the reputation of a party is the type of evidence to which a jury is inclined to give more weight than is merited, it is felt that this alone should not exclude evidence of the bad reputation of the victim, unknown to the accused, as bearing upon the issue of aggression. It has been said that the jury may fail to give careful consideration to character evidence in its relation to the legal problems and requirements of proving self-defense and that it might decide for the defendant merely because he was confronted by a man of bad character and that society should not condemn the accused for killing a man of whom it is well rid.

These are the same perils which led to the well-established rule precluding the state from showing the bad character of the accused in the first instance, and so it may be argued that the defendant should be precluded from showing the victim's bad character in the first instance. But we may answer this argument in many ways. First, this objection goes to the time of admission of character evidence of the victim rather than to a policy of exclusion on grounds of irrelevancy or historical precedent. Second, it is the policy of the law to be extremely favorable to one accused of crime in helping him to justify or minimize the results of his act, and he is entitled to put before the jury all the extenuating circumstances surrounding the encounter.[48] Third, if a jury is apt to misuse character evidence it is no more apt to do so when the accused offers the victim's bad character to prove that he was the kind of man who might have done the act charged by the accused, than when the accused offers his own good character to prove that he is not the type of man who would have done the act charged by the state.[49]

[48] Garner v. State (1891), 28 Fla. 113, 9 So. 835.

[49] Let us suppose a case. The state has accused the defendant of homicide. It is the duty of the jury to consider all the facts and circumstances presented in evidence and to find the prisoner guilty beyond a reasonable doubt or to acquit him. The evidence before the jury, excluding evidence of the defendant's good character, offered to show the probability that he did not do the act charged, is such that the jury is about to render a verdict of guilt—beyond a reasonable doubt. But upon considering the defendant's good character a reasonable doubt of guilt is created. Then suppose self-

In both instances the evidence is offered toward the same end—i. e., to prove the innocence of the accused. Fourth, as a practical matter—assuming for the moment that the jury will misuse character evidence—is there any reason to believe that the unknown reputation of the victim, as tending to show aggression, carefully guarded by an appropriate instruction, will be used more prejudicially than the known reputation of the victim, as tending to show the defendant's reason to believe himself in danger of great bodily harm also carefully guarded by an appropriate instruction? When character evidence is before the jury it will have its prejudicial effect, if any, regardless of the purpose for which it is admitted or the instruction under which it is given to the jury.

It is submitted that there is no policy of the law to exclude character evidence of the victim as tending to show aggression, the policy of the law being rather one of favoritism toward the defendant. The logical and legal relevancy of reputation evidence having been shown, we have only to consider the advisibility of placing limitations upon its use.

The defendant may offer evidence of his good character at any time during the trial[50] the only check upon the prejudicial effect of this evidence being one of instruction that the jury may not base its verdict entirely upon the defendant's good character.[51]

defense is added to the case. The defendant has admitted the killing but says it was essential to the preservation of his own life. The duty of the jury is altered from finding that the defendant actually killed the victim, to finding that the defendant did not act in self-defense, beyond a reasonable doubt, or to acquit him. The evidence presented, aside from the reputation of the victim, does not create a reasonable doubt of defendant's guilt and logically a verdict of guilty would result. But upon consideration of the fact that the victim was a man of bad character and likely to start a quarrel the jury is then able to say that there is a doubt as to the fact that defendant's act was malicious. In both cases it is the defendant's privilege to put character into issue, but this fact is easily explained by the above-mentioned policy of affording the defendant every possible circumstance which may tend to show his innocence. In both cases, too, it is the privilege of the state to offer rebuttal evidence which is a sufficient check upon manufactured evidence. This problem does not concern us as it is a matter of credibility rather than admissibility and is for the jury.

[50] State v. O'Connor (1861), 31 Mo. 389; State v. Maupin (1906), 196 Mo. 164, 93 S. W. 379.

[51] "It is not a shield from the consequences of a criminal act, proved to the satisfaction of the jury." 13 R. C. L. 914; 11 Ann. Cas. 1192. In State v. McNamara (1889), 100 Mo. 100, it was held proper to refuse an instruc-

However, it would be wise to attach an additional safeguard to the admission of evidence of the unknown reputation of the victim. This safeguard is one which is adopted in the admission of threats[52] and known reputation of the victim[53]—namely, that there be some other evidence of the victim's aggression, thus removing all the theoretical argument that the jury could base its verdict upon evidence of character alone.

Wigmore approves this limitation. He says:

> "There ought, of course, to be some other appreciable evidence of the deceased's aggression, for the character-evidence can hardly be of value unless there is otherwise a fair possibility of doubt on the point; moreover, otherwise the deceased's bad character is likely to be put forward to serve improperly as a mere excuse for the killing, under the pretext of evidencing his aggression, and it is often feasible to obtain untrustworthy character-testimony for that purpose. In short, the same reasons for caution apply as in the case of uncommunicated threats when offered as involving a design of aggression, and thus evidencing a probable aggression, on the part of the deceased."[54]

In *People v. Lamar*,[55] the court comes to a similar conclusion in the following words:

> "Hence we think the rule should be that whenever the circumstances of a case permit of the admission of evidence of threats made by the deceased against the defendant, either communicated or uncommunicated, evidence of the reputation of the deceased as being a violent, quarrelsome, dangerous man, either known or unknown to the defendant, is equally admissible, the consideration of the jury to be limited by proper instructions of the court, where the reputation is unknown to the defendant, to the same extent that the law limits the consideration by them of uncommunicated threats—to the question solely as to who was the assailant in the fatal encounter."

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tion that if defendant's good character added to the legal presumption of innocence raised any doubt in the minds of the jurors they should render a verdict of acquittal.

[52] "When there is no evidence that deceased made an assault, evidence of threats made by him is not admissible for any purpose." State v. Alexander (1877), 66 Mo. 148; 3 L. R. A. (N. S.) 523; State v. Taylor (1877) 64 Mo. 358.

[53] *Supra.*

[54] 1 Wigmore, EVIDENCE, (2d ed.) Sec. 63.

[55] (1906), 148 Cal. 564, 83 P. 993.

There may be some who will quarrel with the policy of admitting evidence that is logically relevant solely as corroborative evidence. But this policy is not new to the law. It has been pointed out above that in the admission of character evidence to show the reasonableness of the accused's conduct, and in the admission of threats, it is held that there must be doubt as to whether the accused acted maliciously or from a well-grounded apprehension of immediate bodily harm, or as to who was the aggressor. It is also noted that the good reputation of the accused is not a sufficient basis for a verdict of acquittal.

This same policy arises in other branches of the law. In proving the contents of a lost will it is generally held that neither ante-testamentary nor post-testamentary declarations standing alone are sufficient to prove the will. And in criminal cases it is held that a confession of guilt or the testimony of an accomplice is not sufficient to support a verdict of guilt. Here the question is not one of admissibility but of sufficiency of evidence, and it is the duty of the court to instruct the return of a verdict of acquittal if there is no other evidence. But the court cannot instruct that a verdict of guilt be brought in. Therefore, to safeguard against a prejudicial verdict of acquittal (assuming that the unknown bad reputation of the victim is the only evidence offered to show aggression) and to keep the jury within the bounds of reason, it is deemed advisable to attach to the admissibility of evidence of unknown character a requisite that there be some other evidence upon the point.

## II. ADMISSIBILITY OF REPUTATION EVIDENCE REGARDING THE VICTIM, OFFERED BY THE STATE

Missouri decisions are unanimous in holding that the defendant must attack the reputation of the victim before the state may offer evidence of his reputation for peace and good citizenship.[56]

There is some question as to what constitutes an attack upon the reputation of the victim; namely, Is the raising of an issue of self-defense sufficient,[57] or must there be actual evidence of

[56] State v. Ross (Mo. 1915), 178 S. W. 475; State v. Woodward (1905), 191 Mo. 617, 90 S. W. 90; State v. Reed (1913), 250 Mo. 379, 157 S. W. 316; State v. Dixon (Mo., 1916), 190 S. W. 290.

[57] Thrawley v. State (1899), 153 Ind. 375, 55 N. E. 95 and State v. Wilkins (1914), 72 Or. 77, 142 P. 589, support this theory.

bad reputation offered by the accused? The Missouri courts, in accord with the weight of authority, hold that the accused must offer actual evidence of the bad reputation of the victim before the state may offer evidence of his good reputation.[58]

In *State v. Reed*,[59] a judgment of conviction was reversed on the ground that the state was permitted to introduce evidence of the good reputation of the victim after the defendant had testified that the deceased was trying to rob him. The court says that this precise issue had not been raised in the appellate courts before. The *Feeley* case[60] is distinguished on the ground that there the evidence was offered by the defendant to show the bad reputation of the deceased under certain conditions, while in the instant case the evidence only tends to show a specific criminal act on the part of deceased and was also offered to mitigate or excuse the act of the defendant. The court perceives the relevancy of the evidence but fears that it "would be making a precedent which would open up a Pandora's box of collateral issues to be let into every case, and thereby confuse juries even more extensively than under our present system." The opinion continues: "There are always many collateral issues that resourceful attorneys could inject into all kinds of suits might throw some indirect light upon the real issue tendered by the parties." It concludes that the defendant must introduce evidence which directly attacks the general reputation of the victim for peace and quietude before the state can introduce contrary evidence. The rule enunciated in the *Reed* case has been rigidly followed in Missouri. In *State v. Dixon*[61] the court held that evidence offered by the defendant that the victim was drunk in the afternoon of the tragedy and had been running his horse along the highway and yelling was not such an attack upon the reputation of the deceased as would permit the state to offer evidence of his good reputation.

Mr. Wigmore criticizes the *Reed* case[62] and agrees with the

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[58] *Supra*, note 52.

[59] *Supra*, note 56.

[60] 194 Mo. 300, where the state was permitted to introduce evidence of the good reputation of the victim when not drinking to rebut the evidence offered by defendant of the victim's bad reputation when drinking.

[61] *Supra*, note 56.

[62] 1 Wigmore, EVIDENCE (2d ed.), Sec. 63: "Is it not a pity that these

minority view. He says, "The state also can of course offer the deceased's peaceable character, when the issue of self-defense has been raised, even though the defendant has not first introduced the deceased's violent character; though most courts thus far are singularly loath to accept this dictate of logic and fairness."

resourceful attorneys are not matched by resourceful judges? And is it the law's fault that the resourceful judge is not permitted to checkmate the chicanery of the resourceful attorney?"