NEW YORK LAW SCHOOL

NYLS Law Review

Volume 1
Issue 1 *NEW YORK LAW FORUM, vol 1, 1955*

Article 8

January 1955

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THIS article is limited to a consideration of the problems which may arise when the character of the accused is offered on a criminal trial in New York as evidence of his guilt or innocence. Related problems, such as the right of the prosecution to use on trial evidence of previous crimes to prove that the accused committed the crime charged, or to enhance punishment, lie outside the scope of this analysis.

I. THE DEFENDANT'S CHARACTER EVIDENCE

CHARACTER reflects disposition, and a person's disposition to do or not to do the act in issue is logically relevant on the question whether he has done the act. For this reason, the defendant in a criminal prosecution may introduce evidence of his own good character. As was said in *Cancemi* v. *People*,[1] it is improbable "that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions; the rule is otherwise." At one time character evidence was admitted in capital cases only,[2] but it is now well settled that the defendant may prove his good character in any criminal prosecution, whether the crime charged is a felony or is a misdemeanor,[3] for the purpose of demonstrating that it is unlikely that he committed the crime for which he stands accused.[4]

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[1] 16 N. Y. 501, 506 (1858).

[2] Cancemi v. People, *ibid*; 20 AM. JUR. § 324.

[3] 1 WIGMORE, EVIDENCE § 56 (3d ed. Boston, 1940, hereafter referred to as WIGMORE).

A "traffic infraction" is not a crime. N. Y. Veh. & Tr. Law § 2 (29). May the accused show his good character when he is on trial charged with a traffic infraction? Possibly pertinent is fact that the procedural rules for misdemeanors apply to a trial for a traffic infraction. N. Y. Veh. & Tr. Law § 2 (29); People v. Propp, 172 Misc. 314, 15 N. Y. S. 2d 83 (1939). It may be of interest, in this connection, to note that there is some authority in New York for the admission of evidence of the defendant's good character in a filiation proceeding, which, although not a criminal prosecution, may be regarded as quasi-criminal in nature. See Webb v. Hill, 115 N. Y. Supp. 267 (Co. Ct., 1909); SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 111 (3d ed. Albany, 1953).

[4] As indicated, the usual purpose for which the defendant proves his good charac-

But the prosecution may not prove the defendant's bad character unless and until the defendant has introduced evidence of his good character. This is a rule based on policy, not on logic, for obviously if the defendant's character is relevant to prove his innocence, it is equally relevant to prove his guilt. The very real danger of undue prejudice, that the jury might give disproportionate weight to evidence of the defendant's bad character, justifies the rule prohibiting the prosecution from initially attacking the defendant's character.[5]

There is but one instance in New York where the prosecution may initially show the defendant's bad character. The New York Code of Criminal Procedure, section 513, provides:

"A person who, having been adjudged an habitual criminal, is charged with a crime committed thereafter, may be described in the complaint, warrant or indictment therefor, as an habitual criminal; and, upon proof that he has been adjudged to be such, the prosecution may introduce, upon the trial or examination, evidence as to his previous character, in the same manner and to the same extent as if he himself had first given evidence of his character and put the same in issue."

Except in the rare instance where this statutory provision is applicable, the defendant alone decides whether his character should be considered in determining his innocence. If the defendant chooses "to put his character in issue", he must produce evidence of his good character. There is no presumption as to a defendant's character.[6]

ter is to show that it is improbable that he did the act charged. But character evidence may also be relevant and admissible where defendant concedes that he did the act but denies that he did it with the required criminal intent. 1 WIGMORE § 56 (3). If, however, and this case is unlikely to arise, the act is conceded and no criminal intent is required by the definition of the crime, character evidence is irrelevant and inadmissible. *Cf.* Comm. v. Kolb, 13 Pa. Super. 347 (1900).

[5] ". . . [c]haracter is never an issue in a criminal prosecution unless the defendant chooses to make it one. . . . In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar. . . . The principle back of the exclusion is one, not of logic, but of policy. . . ." People v. Zackowitz, 254 N. Y 192, 197, 172 N. E. 466, 468 (1930).

[6] In People v. Lingley, 207 N. Y. 396, 405, 101 N. E. 170, 173 (1913), it was argued that the presumption of innocence necessarily includes within it a presumption of good character. In rejecting this contention, the court pointed out: (1) The presumption of innocence is always open to initial attack by the prosecution; indeed, the whole effort of the prosecution is to destroy that presumption. Therefore, if there was, as part of the presumption of innocence, a presumption of good character, the prosecution should be able initially to attack character similarly. Yet, it is a firm rule of policy and tradition that the prosecution may not initially do so. (2) Giving the defendant the right either to put character in issue, or to keep it out of the case, is an adequate protection against undue prejudice. The defendant would obtain an

The defendant proves his character by calling a qualified[7] witness or qualified witnesses to testify to his good reputation in the community for the particular trait or traits involved in the crime charged.[8] Thus, in a prosecution for larceny, he has the right to show his good reputation for honesty, but, quite obviously, not his good reputation for sobriety, for the latter trait has no relevancy to the crime charged. Nevertheless, in practice it is not uncommon for defense attorneys, usually without objection from the prosecutor, to elicit from character witnesses the defendant's reputation for traits broader than those involved in the crime. There is a danger to the defendant in this procedure, for, as will be pointed out later, the cross-examination of the character witness may be as broad as the traits testified to by the witness.

The character witness may not testify to specific acts of the defendant, for each such act would create a collateral issue; nor may he give his own opinion of the defendant's character based on his own knowledge of the defendant. The witness is strictly limited to testimony concerning the defendant's reputation.[9] The rule has often

unwarranted advantage if he could prevent an attack on his character by not putting it in issue, and yet obtain an instruction to the jury that the law presumes his character to be good. The true rule is, therefore, that the law presumes nothing about it.

[7] In practice, the character witness is usually qualified by his testimony showing that he resided in the same community as the defendant; that he has known the defendant for a period of time; and that he has also known people who know the defendant.

The following is one form of the ritual usually employed after the witness has testified to residence:

"Q. Do you know the defendant?
"Q. How long have you known the defendant?
"Q. Do you know people who know the defendant?
"Q. Have you ever discussed with people the defendant's reputation for————?
"Q. Do you know the defendant's reputation for————?
"Q. What is it?

Is it not true that this quick run-through of minima makes the least effective use of reputation testimony? Within permissible limits, would it not be better to have the witness amplify his qualifications?

[8] People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (1907). Occasionally a court will admit evidence of good general reputation. *Cf.* People v. Slaughter, 253 App. Div. 802, 1 N. Y. S. 2d 673 (1st Dept. 1938).

[9] People v. Van Gaasbeck, note 8, *supra.*

The rule that character can be proved only by reputation has been severely criticised. 7 Wigmore, Evidence, § 1986. In discussing the analogous problem of the admissibility of evidence of the plaintiff's character in a prosecution for rape, the late Judge Cardozo has said that the defendant "may show that her *reputation* for chastity is bad. He may not show specific, even though repeated, acts of unchastity with another man or other men. The one thing that any sensible trier of the facts would wish to know above all others in estimating the truth of his defense, is held by an inflexible rule,

been stated to be that the witness must know, and his testimony must be confined to, the reputation of the defendant in the community in which he resided. This is the general rule, but circumstances may justify departing from it. In *People* v. *Colantone,*[10] an appeal from a conviction in New York City of the defendant for murder, it was held that the trial court erred in excluding evidence of the defendant's reputation in the army, in his vocational school, and in his veterans' post. As the Court of Appeals observed, in a large city where the inhabitants usually dwell in apartments, a person may be unknown to the community in which he lives, and his only opportunity to create a reputation, "good or bad, is among his associates in his particular activities or in the personal contacts of his life where he actually lives it."[11] But even in such a case, the reputation offered must not be one in too restricted a class of persons,[12] for in such event the alleged reputation is likely to be no more than opinion based on personal observation of the accused.

A good reputation may also be shown by negative evidence. Thus, a witness may testify that he has lived for a considerable period of time in the same neighborhood as the defendant and has never heard anything said against the defendant in respect to his peaceableness, or honesty, or whatever other trait might be relevant.[13]

to be something that must be excluded from the consideration of the jury. . . . Here, as in many other branches of the law of evidence, we see an exaggerated reliance upon general reputation as a test for the ascertainment of the character of litigants or witnesses. Such a faith is a survival of more simple times. It was justified in days when men lived in small communities. Perhaps it has some justification even now in rural districts. In the life of great cities, it has made evidence of character a farce." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 156, 157 (New Haven, 1921). Despite the well settled rule, occasionally a trial court will permit the character witness to testify to specific acts of the defendant, and cases may be found where the character witness, without objection from the prosecutor, has given testimony which is a composite of personal opinion and community reputation. For example, in People v. Slaughter, note 8, *supra,* the defendant's character witness testified: "His general reputation is very good, 100%. I still thought enough of him to put down $500 bail and still employ him." These deviations from the rule may make good sense, but they are technically improper.

[10] 243 N. Y. 134, 152 N. E. 700 (1926).

[11] In Thomas v. People, 67 N. Y. 218, 224 (1876), a prisoner's reputation in prison and among the inmates was held properly admitted. Said the court: "It matters not that the witnesses had only known the deceased in the prison; there was a large community there, and a man can have a general character there as well as elsewhere; and it is just as competent for witnesses to speak of that character there where they have become acquainted with it, as at any other place." Might not this ruling be justified on the ground that the prison was the residence of the prisoner?

[12] Williams v. United States, 168 U. S. 382, 18 S. Ct. 92, 42 L. Ed. 509 (1897).

[13] People v. Van Gaasbeck, note 8, *supra.*

What is sought to be shown by means of the reputation is the defendant's character at the time in issue. The defendant's reputation at an earlier time, and even at a different place, is, if not too remote, admissible on trial, for the character trait evidenced by the earlier reputation may be presumed to continue and hence to exist at the time in issue.[14] The New York cases do not seem to have passed on the question of the admissibility of the defendant's reputation at a time after the commission of the crime. The rule generally in the country is that evidence of the defendant's character after the event is not admissible.[15]

II. HOW PROSECUTION MAY MEET DEFENDANT'S CHARACTER EVIDENCE

IF THE defendant elects to put his character in issue by evidence of his good reputation, the prosecution may in rebuttal call contradictory witnesses to testify, if such is the case, that his reputation is otherwise. The prosecution's witnesses who testify to the defendant's bad reputation must be qualified in the same way as the defendant's character witnesses are required to be, and are subject to the same rules in testifying. Thus, the prosecution's witness is also limited to testimony of reputation and may not testify to specific acts.[16] The New York cases do not seem to have considered, and the cases generally in the country rarely discuss, the interesting question whether the evidence of the defendant's bad reputation is received only for the limited purpose of refuting the defendant's claim that he has a good reputation, or whether the prosecution's evidence of

[14] *Ibid.*

[15] 20 Am. Jur. § 331; 1 WHARTON, CRIMINAL EVIDENCE, §§ 331, 338 (11th ed. Rochester, N. Y., 1935). Wigmore observes that reputation after the controversy has begun is clearly not admissible against the defendant because the public discussion of the charge against him is likely to create a hostile reputation. Wigmore suggests, however, that the defendant might properly be allowed to show in his own behalf a good reputation "post litem motam." 5 WIGMORE § 1618 (a). The cases generally, however, exclude reputation after the event without regard to which party offers it. See, for instance, White v. State, 111 Ala. 92, 21 So. 330 (1896).

It is interesting to observe that in practice the defendant's character witness testifies to what appears to be present reputation. The usual final question to such a witness is: "What is defendant's reputation?" See note 7, *supra*. The writer knows of no reported cases in New York where an objection was raised to the question because of the time element. For the possible effect of this customary procedure on the right of the prosecution's rebuttal witness to testify to defendant's reputation after the event, see State v. Gile, 93 Vt. 142, 106 A. 2d 829 (1919).

[16] WHARTON, *op. cit. supra* note 14, § 331.

bad reputation may also be considered by the jury as affirmative evidence tending to establish guilt. Since the defendant has deliberately chosen to have his character evidence weighed for the purpose of establishing his innocence, he is hardly in a position to complain if the rebuttal character evidence is also used to help determine his guilt. The rule, however, is unclear.[17]

Much more serious for the defendant is the rebuttal permitted to the prosecution by the New York Code of Criminal Procedure, section 393-c. This section provides that, "When the defendant offers evidence of his character, the prosecution may offer in rebuttal thereof proof of his previous conviction of a crime." The language of this section is broad enough to authorize proof of any previous conviction, irrespective of the character trait involved. This was evidently the intent of the New York State Crime Commission, on whose recommendation section 393-c was enacted in 1927. In the Commission's report made earlier that year, it was said:[18]

"One of the disabilities under which the people suffer at the present time is found in the ability of counsel for a criminal to convey the impression to the jury that his client is a person of reputable character and disposition, when in reality he has a long criminal record, which under some circumstances, especially where the defendant fails to take the stand himself, the people are unable to get before the court.

"Obviously the people should be free to disabuse the mind of the

[17] Wigmore adopts the position that the prosecution's rebuttal evidence is admitted solely to refute the defendant's claim that he has a good reputation. 1 WIGMORE, EVIDENCE, § 58. Statements may be found in some of the cases in support of this position. Thus, in Commonwealth v. Maddocks, 207 Mass. 152, 157, 93 N. E. 253 (1910), it was said: "We cannot say that after the defendant had put his general reputation in issue, the Commonwealth might not show in reply that his reputation as to being a law-abiding person in relation to the liquor law was bad, although we intimate no opinion as to the particular question which was excepted to. The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it merely as meeting and nullifying (so far as it might have any effect) the evidence of the defendant's good reputation." Contrary statements can also be found. See Lea v. State, 94 Tenn. 495, 29 S. W. 900 (1895). On this point, also, see State v. Nance, 195 N. C. 47, 141 S. E. 468 (1928); State v. Bridgers, 233 N. C. 577, 64 S. E. 2d 867 (1951). So far as this writer has been able to ascertain, the precise question has not arisen in New York.

In New York the prosecution is entitled, as heretofore discussed, initially to attack the defendant's character where the indictment alleges that the defendant had been previously adjudicated a habitual criminal. N. Y. Code of Crim. Proc. § 513. Obviously evidence of the defendant's bad character offered in this instance is not rebuttal evidence. See People v. Gibson, 114 App. Div. 600, 99 N. Y. Supp. 1052 (4th Dept. 1906).

[18] N. Y. Leg. Doc. (1927), No. 94, p. 72.

jury of any such impression where it is contrary to the facts, and where a defendant has a previous record of convictions of crime, to get that fact before the jury without unnecessary limitations.

"We recommend therefore an amendment to the code which will permit the people to offer in rebuttal of evidence of the defendant's good character the fact that he has previously been convicted of crime."

Section 393-c has not yet been interpreted by the courts. A judgment of conviction of a crime involving the same trait as the crime charged is clearly admissible under this section to rebut defendant's evidence of his good character. This seems both desirable and logical. But an interpretation of the section to authorize proof of conviction of a crime involving a trait wholly dissimilar to the trait involved in the crime charged can hardly be justified on the theory that the prosecution is rebutting defendant's character evidence. In a prosecution for larceny, for example, where the defendant has shown his good reputation for honesty, evidence of his previous conviction for assault would not logically refute his character evidence. A person of violent disposition is no more likely to steal than a person of peaceful disposition. Without intending to belabor the point, it might be observed that the defendant's bad reputation for peacefulness is not admissible to rebut his good reputation for honesty. It would therefore be at least odd to admit a conviction of assault for that purpose.

There is still a third hazard to which the defendant is subjected when he elects to prove his character. His own character witnesses may be cross-examined for the purpose of ascertaining the basis for the witnesses' testimony that the defendant enjoyed a good reputation. The character witness may be asked whether he had heard rumors or reports derogatory to the defendant's reputation as testified to by the witness. This is proper as bearing on the credibility of the witness, for if he had heard of these rumors or reports, the value of his testimony that the defendant had a good reputation may be seriously impaired. Thus, in *People* v. *Laudiero*,[19] in affirming a conviction of murder, the court said:

[19] 192 N. Y. 304, 309, 85 N. E. 132, 134 (1908). See, also, People v. Elliott, 163 N. Y. 11, 57 N. E. 103 (1900); People v. Fay, 270 App. Div. 261, 59 N. Y. S. 2d 127 (1st Dept. 1945), *aff'd* 296 N. Y. 510, 68 N. E. 2d 453 (1946), *aff'd* 332 U. S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1946). In the case last cited the defendant called thirteen character witnesses, at least eight of whom were subjected to extended cross-examination concerning rumors or reports which they may have heard concerning the defendant.

"During the trial Assunto Tucillo was sworn as a witness for the defendant, and testified that she had known the defendant for a long time; that they grew up together and she knew his reputation for peace and quiet, and that it was good, he was always a good man and always told the truth. On the cross-examination by the district attorney she was asked if she had heard that the defendant had shot anybody since he had been in America, and also to tell the jury how many persons she had heard that he had shot. The witness answered about three or four. She then gave the names of two, but did not recollect the names of the others. She also testified that the defendant was in prison once for fighting while living in Italy. She then concluded her testimony by stating that she still considered him a good man. We think that no error occurred in the rulings of the court with reference to the testimony of this witness. She was called by the defendant for the purpose of establishing his previous good character. This depended upon the reputation in the community in which he lived. (2 Wigmore on Evidence, § 988.) It, therefore, became entirely proper on cross-examination to show by the witness what she had heard with reference to his character, upon which she based her judgment that he was a good and peaceable man."

The trial court will instruct the jury that the rumors or reports inquired into are to be considered solely on the question of the weight to be given to the testimony of the character witness, and that these rumors or reports are not to be regarded as evidence that the events recited in them actually took place. This is an instruction easier for the court to give than for the jury to follow. Indeed, the danger of undue prejudice inherent in this type of cross-examination is so great that complete good faith is required of the cross-examiner. Thus, in one New York case it was held that error was committed when under the pretence of cross-examining defendant's character witness, the district attorney was allowed to read aloud a detailed affidavit concerning the defendant's misconduct.[20]

No New York case has been found in which the trial court demanded evidence of good faith on the part of the cross-examiner.[21] In the federal case of *Michelson* v. *United States*,[22] the prosecutor asked the defendant's character witnesses whether they had heard that the defendant had been arrested for receiving stolen goods. The trial

[20] People v. Marendi, 213 N. Y. 600, 107 N. E. 1058 (1915).

[21] There is no reported case which this writer was able to discover. There have been, however, a number of unreported instances in New York in which the trial judge, at the defendant's request, has demanded that the prosecutor establish good faith.

[22] 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

court, out of the presence of the jury, asked the prosecutor whether it was a fact that the defendant had been so arrested, and the prosecutor, to establish his good faith, exhibited to the court a paper record which the defendant did not challenge. The Supreme Court of the United States noted with approval the pains taken by the trial judge to satisfy himself that the prosecutor was not misusing his right of cross-examination, that the prosecutor "was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box."

What would be deemed sufficient to satisfy the requirement of good faith on the part of the cross-examiner? Is it enough that the cross-examiner believes, and has reasonable grounds to believe, that the reports he is inquiring about on cross-examination did in fact circulate in the community?[23] Logically this should be sufficient, for the cross-examiner is testing the accuracy of the character witness' conclusion that the defendant's reputation in the community is good. Or do policy considerations require more than that? An able scholar in this field has suggested that the cross-examiner be required to demonstrate privately to the court the fact of defendant's misconduct before the cross-examiner may question the witness as to rumors or reports concerning the misconduct.[24] The suggested procedure cannot be defended on purely logical grounds, for the fact of misconduct is not relevant to reputation; it is only what the community says about the defendant which is relevant to reputation, and a defendant may be reputed to have been guilty of misconduct without in fact having been so. Justification for this procedure can be found only in the theory that, despite instructions from the court, the jury will regard reports of defendant's misconduct as actual evidence of defendant's misconduct, and consequently unfounded reports, although they affect reputation, are too dangerous to be brought to the jury's attention. The Supreme Court neatly summarized this view in the *Michelson* case when it said that this procedure "thus limits legally relevant inquiries to those based on legally irrelevant facts in order that the legally irrelevant conclusion which the jury probably will draw from

[23] One way in which a cross-examiner may show reasonable ground for his belief that there were rumors concerning the defendant's misconduct is by showing that the misconduct actually occurred. Thus, if the cross-examiner shows that there was an actual arrest or actual conviction, the inference is permissible that the actual event caused a ripple of comment in the neighborhood.

[24] MCCORMICK, EVIDENCE, § 158, p. 337 (St. Paul, 1954).

the relevant questions will not be based on unsupported or untrue innuendo."[25]

In some instances it may be impossible to prove, or even to furnish credible evidence tending to show, that the defendant's misconduct actually occurred, although there may be no doubt that rumors or reports of the misconduct circulated among his neighbors. To deny to the cross-examiner in such a case the right to use the rumors on cross-examination of the defendant's character witnesses would be in effect to assist the defendant to misrepresent his reputation and to mislead the jury. For this reason, this writer is inclined to the belief that the requirement of good faith should be deemed satisfied when the prosecutor has reasonable grounds for his belief that the rumors inquired into actually circulated in the neighborhood. What the rule is in New York on this point, however, remains yet to be determined.

Of course, even assuming good faith, the cross-examiner's inquiry must be directed to what the witness heard about the defendant; what the witness personally knows of the defendant is not relevant.[26] And the rumors or reports inquired into must be of such a nature as to tend logically to weaken the character witness' testimony that the defendant enjoyed a good reputation. Consequently, if the character witness testifies to defendant's reputation for traits broader than the traits involved in the crime charged, the cross-examination may be equally broad.[27]

III. THE DEFENDANT AS A WITNESS

THE fact that a defendant testifies in his own behalf does not put his character in issue. *People* v. *Hinksman*[28] is a somewhat extreme case in point. In this case, a prosecution for murder, the defendant had been called as a witness in his own behalf. At the close of his direct examination, and in response to his counsel's question whether he had ever been in trouble, the defendant testified: "I had a little trouble once; I was convicted of grand larceny, second degree. That was for stealing something. That was the only trouble I ever

[25] 335 U. S. at 481, 69 S. Ct. at 221, 93 L. Ed. at 176. The trial court in this case followed this procedure and the Supreme Court approved it. It was not necessary, however, for the Supreme Court to decide whether proof of actual misconduct is always essential before the cross-examiner may inquire into the rumors of misconduct. See note 23, *supra*.

[26] Stewart v. United States, 104 F. 2d 234 (App. D. C. 1939).

[27] Michelson v. United States, note 22, *supra*.

[28] 192 N. Y. 421, 85 N. E. 676 (1908).

had in my life, and it was three years ago. Sentence was suspended on me. I have been a good boy ever since." After the defendant had rested his case, the prosecution was allowed, over objection, to show that the defendant had a general bad reputation. The Court of Appeals held that this evidence should have been excluded, for the reason that the defendant had not put his character in issue.

But a defendant who becomes a witness may be impeached like any other witness. Thus, like any other witness, the defendant may be "interrogated upon cross-examination in regard to any vicious or criminal act of his life" for the purpose of affecting his credibility.[29] For the same purpose, the fact that the defendant had been previously convicted of a crime may be brought out on cross-examination or established by the record.[30] And a properly qualified witness may be called by the prosecution to testify, if such is the case, that the defendant has a bad reputation for truth and veracity.[31]

The jury will be instructed to consider this evidence as affecting only the credibility of the defendant as a witness. There can be little doubt, however, that ordinarily evidence of defendant's misconduct elicited on cross-examination and evidence of his previous conviction of crime, whether established by the record or admitted on cross-examination, will be misused by the jury and considered by it as evidence of the defendant's criminal disposition.

It may be noted in passing that it is improper to ask the defendant on cross-examination whether he had been previously arrested or indicted, for an arrest or indictment is a mere accusation and not evidence of misconduct bearing on credibility.[32] Arrest or indictment, however, may be the subject of community comment and may thus affect reputation; and consequently, as mentioned earlier, the defendant's character witness may be asked on cross-examination, as bearing on the credibility of the character witness, whether he had heard other people say that the defendant previously had been arrested or indicted. Of course, these rumors must be of such a nature

[29] People v. Webster, 139 N. Y. 73, 34 N. E. 730 (1893). This article does not undertake to discuss the extent to which a defendant waives his privilege against self-incrimination by taking the stand.

[30] N. Y. Pen. Law § 2444; N. Y. Civ. Prac. Act § 350. See, also, People v. Sorge, 301 N. Y. 198, 93 N. E. 2d 637 (1950).

[31] For a consideration of the principles applicable to this method of impeachment, see RICHARDSON, EVIDENCE, §§ 572-575 (7th ed. PRINCE, Brooklyn, 1948).

[32] People v. Morrison, 195 N. Y. 116, 88 N. E. 21 (1909).

as would logically tend to weaken or destroy the witness' testimony that the defendant's reputation was good.[33]

IV. THE VALUE OF CHARACTER EVIDENCE

THE law regards evidence of good character as a matter of substance, and the defendant is entitled to have the jury consider it even when the other evidence in the case against him "may be very convincing."[34] Indeed, it is the rule in New York that "evidence of good character, if believed, may when considered with all the other evidence in the case create a reasonable doubt when without it none would exist."[35]

The wisdom of using character evidence is quite a different matter. A defendant who has a record of previous convictions, and who for this reason is not called to testify on the trial, may do himself serious harm by introducing evidence of his good character, for the prosecution may then be enabled to prove his previous convictions directly under section 393-c of the Code, or, assuming relevancy to the trait testified to by the character witness, to reveal them indirectly by cross-examining the character witness as to what he had heard people say concerning these convictions. Even a defendant with no previous convictions, but with a record of previous arrests for offenses bearing on the reputation testified to by his character witnesses, may find the cross-examination of his character witnesses highly prejudicial to his cause. In brief, as a practical matter, the defendant's choice "to put his character in issue" or keep it out of the case must be determined by what rebuttal evidence is available to the prosecution.

[33] It would seem clear on principle that rumors concerning the defendant's lack of sobriety could not be inquired into for the purpose of weakening the character witness' testimony that the defendant had a good reputation for honesty.

[34] People v. Colantone, 243 N. Y. at 136, 152 N. E. at 701 (1926).

[35] People v. Collins, 265 App. Div. 756, 40 N. Y. S. 2d 675, 676 (1st Dept. 1943).

In People v. Trimarchi, 231 N. Y. 263, 266, 131 N. E. 910, 911 (1921) the court said: "Evidence of good character is not, of itself, sufficient to raise a reasonable doubt. Such evidence . . . must be believed by the jury. It then may, when considered with all the other evidence in the case, be sufficient to raise a reasonable doubt as to his guilt." Cases prior to the Trimarchi case used language even more favorable to the accused. Thus, in People v. Bonier, 179 N. Y. 315, 322, 72 N. E. 226, 228 (1904), it was said "that upon the request of the accused the jury should be told that such evidence, in the exercise of their sound judgment, may be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear conclusive."

The task of formulating the proper charge on this point sometimes proves troublesome. See People v. D'Anna, 243 App. Div. 259, 277 N. Y. Supp. 279 (4th Dept. 1935); People v. Helmbrecht, 297 N. Y. 789, 77 N. E. 2d 798 (1948).

While there is no danger of effective counterattack, evidence of the defendant's character may be helpful to him. The extent to which a jury in any given case may be influenced by evidence of this nature is, of course, uncertain and unknown. Judge Barshay[36] has told this writer that in his opinion:

"The true value of character testimony is unascertainable. There have been cases in which witnesses, who were held in the highest public esteem, testified to the good reputation of the defendant, who nevertheless was convicted. The conclusion is obvious that good reputation testimony cannot overcome the weight of the evidence. On the other hand, if there had been an acquittal in these cases, who can say with certainty that it was due to the good character testimony. At most it might have been a contributing factor.

"I personally used good character testimony whenever it was available, because I felt then, as I do now, that a good character witness, properly prepared, can do a defendant no harm and might do him some good."

Judge Inch[37] has contributed the view that character testimony to be effective must be given "by reputable witnesses whose conclusions have a firm foundation." Judge Inch is also of the opinion that of "the two types of reputation testimony available, i.e., that the defendant has a good reputation for the trait involved or that the witnesses never heard anything derogatory uttered against him, the latter or negative type of testimony is more effective."[38]

To all of which this writer would add the comment that for reasons already considered, the decision to use evidence of defendant's

[36] Judge Hyman Barshay is a judge of the County Court, Kings County, New York.

[37] Judge Robert A. Inch is the Chief Judge of the United States District Court, for the Eastern District of New York.

[38] Several veteran practitioners in the field of criminal law have also contributed their views to this writer. Colonel William W. Kleinman expressed this opinion: "Where the evidence is overwhelming, it is useless to try to stave off conviction by calling character witnesses. Where the testimony indicates a brutal or heinous crime, the jurors will not be diverted by character testimony alone. But where the crime charged does not, upon first impression, shock the sensibilities of the jurors, good reputation testimony is extremely valuable, provided the defendant has no 'Achilles heel' and the witnesses called for this purpose are truly representative of the community and within the social sphere and stratum of the accused. If these latter conditions exist, such testimony can be utilized as a powerful argument in summation."

Professor Mario Pittoni, my colleague, and who incidentally was the prosecutor in the Michelson case, suggests that character testimony is most effective when the character witnesses represent different religions and different activities. My colleague also, Professor Samuel Bader, one time Special Assistant Attorney General, is of the opinion that character evidence is of little or no value when the case is tried before a judge without a jury and the defendant does not take the stand.

character should not be made lightly; and if it is determined that character evidence may be used safely and profitably, counsel should give the same degree of care to the preparation of character evidence as he would give to any other item of material evidence he plans to introduce on trial.[39]

[39] Sometimes a character witness destroys the value of his own testimony because he does not understand the meaning of the words used in the questions addressed to him. Thus, in one unreported case in New York a few years ago, a prosecution for an unnatural sex offense, the defendant's character witness testified that the defendant had a good reputation for morality. On cross-examination, the District Attorney asked the witness what he meant by the word "morality". The witness was unable to give a satisfactory definition, finally stating feebly that he thought it meant that the defendant was "a nice man." Sometimes, too, a witness who has testified in response to the usual ritual that he had discussed the defendant's reputation (see note 7, *supra*) is surprised and bewildered on cross-examination by the prosecutor's question: "When, and with whom, did you last discuss the defendant's reputation?" If defense counsel properly and legitimately before trial discusses with his character witness the extent of the latter's knowledge of the defendant's reputation and the nature of the questions which will be asked on trial, the witness will be in a position to testify effectively. When the witness informs the attorney before the trial that he had never discussed the reputation of the defendant with anyone because no one doubted the good character of the defendant, the attorney should, of course, use negative character testimony.