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Admissibility of Evidence of Reputation of the Place in "Jointist" Cases

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To fill the vacancy created by the resignation of Crawford M. Bishop, the Law School is pleased to announce the appointment of Rudolph H. Nottelman, A. B. Monmouth College, 1912, M. A., Illinois, 1913, LL.B., Yale, 1922, as Professor of Law. Mr. Nottelman practised law with George Keenan in Minneapolis, 1922-25, and was Professor of Political Science at Monmouth College, 1925-27. He will teach the subjects of *Equity, Trusts, Public Utilities, Suretyship, and Mortgages.*

NOTES AND COMMENT

ADMISSIBILITY OF EVIDENCE OF REPUTATION OF THE PLACE IN

"JOINTIST" CASES*—Reputation is the reputed character of the person or thing in the community as evidenced by the conversation of those acquainted with him or it.¹ Reputation, when offered as

*The scope of this note is limited to evidence of reputation of the place operated in criminal actions, for the maintenance of a "joint" or liquor nuisance and in actions in abatement, against the owner of the premises or the person operating the alleged nuisance excluding all questions involving the reputation of the place or of the defendant in other types of liquor violation cases.

evidence of the truth of the matter stated, is hearsay²—termed “composite hearsay” by some authorities³—and is, in keeping with the general rules excluding hearsay evidence, primarily inadmissible unless the facts of the case bring it within certain recognized exceptions to the general rule.⁴

Dean Wigmore has stated⁵ that any evidence of reputation must fall into one of three classes, *i.e.*, where it is offered⁶ (1) as evidentiary of defendant's character, to show the doing or not-doing of an act by him,⁷ or (2) to show character of person or thing as evidentiary for any other purpose,⁸ or (3) where reputation of the person or thing is, under the legal principles and pleadings of the case, one of the issues.⁹

Reputation evidence of the first class is eliminated from consideration as this concerns only reputation of defendant himself and the question here involves solely reputation of place.

Cases falling within the third class are those wherein the ultimate fact to be proved is the *repute* rather than the actual character.¹⁰ The statutes¹¹ regulating the operation of liquor nuisances in all states prohibit the maintenance of a place where intoxicating liquors are sold or kept or consumed but are not framed to prohibit the operation of a place where it is *reputed* that such liquors are sold or kept. Consequently, the character and not the reputation of such places is the direct issue and these cases do not fall under this classification.

¹ For a clear understanding, the reader must be cognizant of the technical distinction between “character” and “reputation” The words are here used in their more technical sense rather than in their more loose popular sense, which is also often used in the cases. See 1 WIGMORE, EVIDENCE 265, § 52, for discussion of the distinction; also 3 WIGMORE, EVIDENCE, § 1608. In *State v. Pickett*, 202 Ia. 1321, 210 N. W 782 (1926) it was said, “Character and reputation, briefly stated, are distinguishable in that character refers to what a person actually is while reputation is what is said of him by his neighbors.”

² WIGMORE, EVIDENCE, 357, § 1609; WHARTON, CRIM EVIDENCE, § 255.

³ 22 C. J. 211 § 170; CHAMBERLAYNE, HANDBOOK EVID. 777, § 1037.

⁴ 3 WIGMORE, EVIDENCE 3, § 1362.

⁵ 1 WIGMORE, EVIDENCE, § 54.

⁶ It is to be noted that there is a distinction between the first two of these classes and the third class in the purpose for which the evidence is offered. In the first two classes the evidence is offered as circumstantially evidentiary of a fact to be established, in the third class the reputation itself is the thing in issue, and which must be proved.

⁷ 1 WIGMORE, EVIDENCE, 268 *et seq.*

⁸ *Ibid.*, 300, § 69.

⁹ *Ibid.*, 301, § 70 *et seq.*

¹⁰ 1 WIGMORE, EVIDENCE, 315 § 78; 18 C. J. 1267, and cases note 67
1 WHARTON, CRIM. EVIDENCE 486, §§ 260, 261, 1 WHARTON, CRIM. EVIDENCE 481, § 255.

¹¹ See note 22, *infra.*

Thus it will be seen that if evidence of the reputation of a place which it is alleged the defendant maintains for the purpose of illegal sale of intoxicating liquors is to be admissible it must be for some purpose falling under Wigmore's second class of evidence of reputation—to show character of person or thing as circumstantially evidentiary of a fact in issue.

While disorderly house cases are apparently analogous to "joint" cases their authority cannot be blindly relied upon.¹² Some of these cases lay down the true rule,¹³ but others are absolutely wrong on principle;¹⁴ some are governed by the wording of the statute under which action is brought,¹⁵ and in still others, such evidence is admitted solely because it is made competent by statute.¹⁶ Any such case¹⁷ must be carefully scrutinized as to facts and reasons before it can be safely cited as authority for the admissibility of evidence of reputation of a place in a case involving a liquor nuisance or "joint" The same basic principles are

¹² The great majority of cases involving disorderly houses in the U. S. have held that evidence of reputation of the house is admissible to prove the character of the house. These can be divided into three classes: (1) where the ultimate fact to be proved is the "ill fame" of the house rather than its character (2) where such evidence is made competent by statute; and (3) where courts permitted such evidence in proof of character of disorderly house, failing or refusing to recognize the distinction between a disorderly house and a house of "ill fame" Cases of the first and second class are undoubtedly correct upon principle but those of the third class cannot be accorded such support. But see Wigmore's statement commented upon in note 28, *infra*.

As distinguished from the cases of the third class there are a number of cases of the same type in which such evidence has been held incompetent upon the ground that it is hearsay and inadmissible to prove the fact itself in the absence of statute permitting it. It is submitted that these cases are correct on principle.

¹³ 18 C. J. 1266 and cases there cited, note 47. 36 YALE L. JOUR. 144.

¹⁴ *Batesville v. Smyth*, 138 Ark. 276, 211 S. W 140 (1919) *State v. Fleeman*, 102 Kans. 670, 171 Pac. 618 (1918) *King v. Comm.*, 154 Ky. 829, 159 S. W 593 (1913) *Egan v. Gordon*, 65 Minn. 505, 68 N. W 103 (1896) *State v. Hendricks*, 15 Mont. 194, 39 Pac. 94 (1895) *Putnam v. State*, 9 Okla. Cr. 535, 132 Pac. 693 (1913) and many others. See note, 50 Am. Rep. 209.

¹⁵ See note 10, *supra*. Also, 1 WIGMORE, EVIDENCE, 316, § 78 (a) and cases there cited, note 1. However it has been held that even in such a case the evidence is inadmissible. *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 321 (1895).

¹⁶ MCKELVEY, EVIDENCE, 317, cases noted, note 7, 3 WIGMORE, EVIDENCE, 373, § 1620 (2), wherein statutes are mentioned.

¹⁷ In the three classes mentioned in note 12, *supra*, where such evidence is held admissible, the question also arises as to whether reputation evidence alone is sufficient to sustain the burden of proof. See note, 46 L. R. A. (N. S.) 593. Usually, in these cases, the reason it is first admitted is not mentioned—and the decision is consequently misleading unless closely analyzed.

found in each type of case and it is a similar erroneous application of principles that must be watched for in both types.

Before any evidence which is contrary to the hearsay rule may be admitted there must be two essential requirements fulfilled,¹⁸ i. e., (1) the principle of circumstantial guarantee of trustworthiness,¹⁹ and (2) the principle of necessity²⁰

Evidence of general reputation in the community satisfies the principle of trustworthiness.²¹ The real question, then, narrows itself down to the determination of whether or not there is any necessity for the admission of such evidence as evidentiary of a material issue in the case.

An examination of the statutes²² which prohibit liquor joints and liquor nuisances reveals that, generally stated, the material issues to be proved are (1) that defendant operates or as owner or agent has knowledge of the operation of (2) a place wherein intoxicating liquors are sold, kept, or consumed on the premises.

First, as to the character of the place. Evidence of reputation offered for the purpose of proving its character is offered for the truth of the matter therein stated and falls within the hearsay rule. Then, the question is, is there such a necessity for this type of proof as to permit its use in contravention to this rule.

The decisions on this point may be divided into three classes (1) where such evidence has, on common law principles, been held inadmissible;²³ (2) where such evidence has, without a statute making it competent, been declared admissible;²⁴ and (3) where such evidence has been admitted because of a statute declaring it competent for that purpose.²⁵

¹⁸ 3 WIGMORE, EVIDENCE 153; *Id.*, 329.

¹⁹ *Ibid.*, 155, § 1422.

²⁰ *Ibid.*, § 1421.

²¹ *Ibid.*, 359, § 1610 (2).

²² U. S. (Volstead Act) Oct. 28, 1918, c. 85, Title 2, § 21, 41 Stat. 314, U. S. C., Title 27, § 33.

CAL. General Laws, 1923, Act 3784, General Laws, 1923, Act 3778.

ILL. 3 Callaghan's Ill. Stat. (1926) § 2740.

IOWA CODE 1924, §§ 1924, 2017.

KANS. Rev. Stat. 1923, §§ 2130-31, 2136-37.

OKLA. Comp. Stat. 1921, § 7022.

TEXAS. Pen. Code 1911, §§ 496, 500.

WASH. Rem. Comp. Stat. 1922, § 7328.

WYO. Laws 1921, c. 117, § 20.

(Above are statutes cited in cases here mentioned. Other statutes may be obtained by reference to various codes. Many states have reenacted the Volstead Act, as may be seen by reference to above.)

²³ See note 26, *infra*.

²⁴ See note 29, *infra*.

²⁵ See note 34, *infra*.

It is submitted that cases of the first class are, on principle and reasons, correct.²⁶ The legislature has declared that the act prohibited is the keeping of a place of the character named, not the keeping of a place reputed to be of such character. There is no necessity for the admission of such evidence for this use is capable of being proved by direct evidence²⁷ by proof of sales of liquor at the place, and by other physical acts of the defendants or his agents.

For the same reason, it must follow that cases of the second class are, on principle, wrong.²⁸ The departure from common law principle can be traced in practically all instances to an original

²⁶ *People v. Johnson*, 63 Cal. App. 178, 218 Pac. 449 (1923) *Shacklett v. State*, 195 Ind. 436, 145 N. E. (1924) *Wrench v. State*, 198 Ind. 61, 152 N. E. 274 (1926) *State v. Fleming*, 86 Iowa 294, 53 N. W. 234 (1892) *Cook v. Comm.*, 159 Ky. 339, 169 S. W. 553 (1914) *Comm. v. Eagan*, 151 Mass. 45, 23 N. E. 494 (1890) *Comm. v. Nagle*, 157 Mass. 554, 32 N. E. 861 (1893) *Crown v. State*, 30 Tex. App. 278, 171 S.W. 410 (1891) (gambling) *Trayhan v. State* (Tex. Civ. App.) 180 S. W. 656 (1915) *Anderson v. State*, (Tex. Civ. App.) 180 S. W. 648 (1915) *State v. Radoff*, 140 Wash. 202, 248 Pac. 405 (1926) *State v. Fairfield*, 143 Wash. 355, 255 Pac. 661 (1927) affirming 140 Wash. 349, 248 Pac. 810 (1926) (*dictum*) *State v. Longpre and Cameron*, 35 Wyo. 482, 251 Pac. 468 (1927) (very good analysis and review of authorities; 37 HARV. L. REV. 385, 2 McLAIN, CRIM. LAW §§ 1249, 1279; dissenting opinion of Davidson, J., in *Joliff v. State*, 53 Tex. Cr. R. 61, 109 S. W. 181 (1908).

²⁷ 3 WIGMORE, EVIDENCE 375, § 1620 (3) 1 WHARTON, CRIM. EVID. 486, § 260.

²⁸ But see statements of text-writers: 4 CHAMBERLAYNE, MOD. LAW OF EVID. 3774 § 2745, BLAKEMORE, PROHIBITION 341, 3 WIGMORE, EVIDENCE 373, § 1620 (2) 33 C. J. 698 and note 73. An examination of the cases cited in support of the statements will reveal that these conclusions are not well founded. Wigmore's belief that there is a necessity because of inability to obtain direct evidence does not seem to have the support of the courts, and in the cases he cites, note 7, with but few exceptions, the evidence is admitted because of statutory provision.

²⁹ *State v. Mercier*, 70 Mont. 333, 225 Pac. 802 (1924) (citing Tenn. and Ia. cases where admitted under statute and 33 C. J. 698, mentioned *supra*, note 28) *Ostendorfer v. State*, 8 Okla. Cr. 360, 128 Pac. 143 (1912) *Titsworth v. State*, 2 Okla. 232, 101 Pac. 283, 293 (1909) *Carrol v. State*, 4 Okla. Cr. 242, 111 Pac. 1021 (1910) *Ward v. State*, 15 Okla. Cr. 150, 175 Pac. 557 (1918) *Sibelaner v. State*, 16 Okla. Cr. 576, 185 Pac. 448 (1919) *Tindell v. State*, 18 Okla. Cr. 721, 196 Pac. 555 (1921) *Williams v. State*, (Okla. Cr. App.) 220 Pac. 667 (1923) (semble) *Barngrover v. State*, (Okla. Cr. App.) 229 Pac. 301 (1924) (compare with disorderly house cases, note 12, *supra*) *Sullivan v. State*, ____ Okla. Cr. ____, 252 Pac. 442 (1927) *Taylor v. State*, ____ Okla. Cr. ____, 255 Pac. 714, *Ryan v. U. S.*, 285 Fed. 734 (1923) *Merrill v. U. S.*, 6 F. (2d) 120 (1925) *Chapman v. U. S.*, 9 F. (2d) 790 (1926) *Maki v. U. S.*, 12 F. (2d) 668 (1926) (all of above Federal cases without giving reasons therefor and with little citation of authority, all of which could be distinguished from their holdings). Washington cases cited in note 36, *infra*, wherein evidence was admitted without comment as to basis therefor have been so cited, and the language used is so ambiguous as to well merit such interpretation.

unwarranted reliance upon decisions in disorderly house cases²⁹ or to pure judicial legislation.³⁰

Likewise, for the reasons above stated, the cases of the third class are correct on principle.³¹ Here the legislature has declared that the necessity exists.

Second, as to whether or not the defendant maintains or operates or as owner or agent has knowledge of the maintenance or operation.

Clearly, the reputation of the place is of no probative value as evidence of the fact, if it be one, that the particular defendant charged actually operates or maintains the place,³² and is thus generally excluded.

But when the question is, not whether this defendant actually operates the place but, whether he knew that it was being so operated by another with whom he is in privity, there is need to prove a state of mind existing at a particular time. For this purpose it has been admitted in intoxicating liquor cases, both equitable and criminal.³³

²⁹ An examination of the first three Oklahoma cases cited in note 29, *supra*, reveals an interesting story of how one judge impressed the court with his own opinions on the subject, and established the rule by citing his own obiter statements.

³¹ *Shadeler v. Naughton*, 163 Ia. 616, 145 N. W. 280 (1914) (Code, §§ 2406, 2431) *State v. Anderson*, 188 Ia. 626, 176 N. W. 637 (1920) *McMillan v. Sumner* 190 Ia. 1108, 181 N. W. 464 (1921) *State v. Pickett*, 202 Ia. 1321, 210 N. W. 782 (1926) (Code 1924, § 2053) *State v. James*, 202 Ia. 1137, 211 N. W. 372 (1927) (Code 1924, § 2022) Burns Ann. Ind. Stat. (1926) § 2744, *State v. Kingston*, 5 R. I. 297 (1858) (Rev. St. c. 73, § 3) *State v. Wilson*, 15 R. I. 180, 1 Atl. 415 (1885) (Pub. St. c. 80, § 3) *Joliff v. State*, 53 Tex. Cr. R. 61, 109 S. W. 176 (1908) *Webber v. State*, (Tex. Cr. App.) 109 S. W. 182 (1908) *O'Brien v. State*, 55 Tex. Cr. R. 431, 117 S. W. 133 (1909) *Bumbaugh v. State*, 56 Tex. Cr. R. 55, 126 S. W. 1139 (1910) *Pace v. State*, 70 Tex. Cr. R. 454, 156 S. W. 1192 (1913) *Johnson v. State*, 69 Tex. Cr. R. 107, 153 S. W. 875 (1913) *Claunch v. State*, 83 Tex. Cr. R. 378, 204 S. W. 436 (1918) (Pen. Code 1911, § 500)

³² 3 WIGMORE, EVIDENCE, 339 and cases there cited, note 8; 3 JONES, COM. ON EVID., 1995.

³³ *Brown v. State*, 196 Ind. 77, 197 N. E. 136 (1925) *State v. Brooks*, 74 Kans. 175, 85 Pac. 1013 (1906) *State v. Young*, 72 Mont. 408, 234 Pac. 248 (1925) *State v. Perrin*, 127 Wash. 193, 220 Pac. 772 (1923) (Court says "It was essential that the state in order to convict, should prove that they had knowledge that such sales were being made. This proof might have been made by showing actual knowledge of the appellants, or presumptive knowledge flowing from the fact, if it be one, that the place with which they were connected had the reputation of being one where people resorted for the purpose of obtaining and drinking intoxicating liquors.") *State v. Anderson*, note 36, *infra*, *State v. Kallas*, note 36, *infra* (see also note 37, *infra*) *State v. Radoff*, note 40, *infra*, *State v. Espeland*, note 41, *infra*, *State v. Fairfield*, note 41, *infra*, *State v. Stuttard*, note 43, *infra*, *State v. Mavros*, note 41, *infra*, *State v. Costello*, note 41, *infra*, *State v. Longpre and Cameron*, 35 Wyo. 482, 251 Pac. 468 (1927). Also, in a number of late Oklahoma cases, cited note 29, *supra*, the evidence has

There is some controversy among legal writers as to the nature of reputation evidence, when offered solely for the purpose of proving knowledge. Some contend that when offered for that purpose it is not hearsay at all, others, that it is hearsay and admissible as an exception to the hearsay rule.³⁴ Important and differing consequences follow, depending upon whether it is regarded as the one or the other. If it is not hearsay at all under such circumstances, it should be admissible if relevant regardless of the factor of necessity which underlies the exceptions to the hearsay rule. If, on the other hand, it is hearsay and admissible as an exception, then the admissibility of it must be worked out consistently with the principles governing hearsay exceptions, including the principle of necessity

In Washington, the court has apparently taken the view that reputation evidence for the purpose of proving knowledge is admissible as an exception to the hearsay rule, and has rendered a number of decisions on this question which show rather unusual developments and applications of the rule in this state.

The court, in *State v. Perrin*,³⁵ the first case presented on this question, held that the evidence was inadmissible to prove the actual character of the place but was admissible in proof of know-

been held admissible upon the ground that the crime is keeping a place with intent to sell liquor and that such evidence is competent to prove the intent with which the place is kept. However, the authorities do not recognize any such exception to the hearsay rule as one for the purpose of proving intent. The reasoning of these cases seems no more satisfactory than that pointed out in note 30, *supra*.

³⁴Upholding view that it is original evidence: 3 WIGMORE, EVIDENCE, 819, § 1788; *Id.*, 770, §1766, *Id.*, 820, § 1789. Criticizing this view: Eustace Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 151 (1912) Wm. G. Hale, *The Hearsay Rule and Its Exceptions*, 2 ILL. L. BULL. 65, 94 (1919).

In favor of the view that reputation evidence, when offered to show knowledge, is admissible as an exception to the hearsay rule it may be suggested that the issue to be proved is defendant's knowledge of the actual character of the place. Evidence of the reputation of the place can directly do no more than create an inference charging defendant with the same knowledge of its *reputed* character that is had by the community at large. But this will not convict him; he must have knowledge of the actual character. To use the reputation evidence, therefore, as proving knowledge of the *actual* character of the place, requires the further inference that its reputed character is its actual character. If this is correct, then the statements concerning the reputation appear to be used not as mere statements, the truth or falsity of which is immaterial, but as *true* statements, with the knowledge of whose contents defendant is charged.

³⁵Note 33, *supra*.

ledge. Then followed five cases³⁶ in which the evidence was declared admissible but in no one of these cases is it reported why such evidence is admissible. In four of the cases³⁷ the Perrin case is cited, so it must be assumed that it was admitted for the purpose of proving knowledge. In the fifth case³⁸ the evidence is merely assumed to be admissible without reference to facts or authority.

Following these cases the question was again considered in *State v Radoff*³⁹ and the rule of the Perrin case reiterated and a limitation placed upon the admissibility of reputation evidence even to prove knowledge.⁴⁰ This same rule of inadmissibility except to prove knowledge is recognized in all cases⁴¹ which have been decided since the Radoff case, and in several of these⁴² the doctrine that there are limitations upon its admissibility even for this purpose has been put forth.

In *State v Stuttard*,⁴³ the last case in which the principle has been discussed, the court, per Askren, J., in holding reputation evidence inadmissible to prove knowledge where an actual sale by defendant was shown, said:⁴⁴

"We conceive a just rule to be that whenever the state has shown a sale by a defendant or his presence at a sale

³⁶ *State v. Anderson*, 132 Wash. 551, 232 Pac. 275 (1925) *State v. Kallas*, 133 Wash. 23, 233 Pac. 315 (1925) *State v. Maloney*, 135 Wash. 309, 237 Pac. 726 (1925) *State v. Panovich*, 136 Wash. 20, 238 Pac. 903 (1925) *State v. Davis*, 137 Wash. 238, 242 Pac. 31 (1926)

³⁷ *Anderson*, *Kallas*, *Maloney*, and *Panovich* cases, *supra*. The briefs are of little assistance in determining the purpose for which the evidence was offered in all except the *Kallas* case, where it does appear that it was offered to prove knowledge on part of defendant.

³⁸ *Davis* case, note 36, *supra*, at p. 291.

³⁹ 140 Wash. 202, 248 Pac. 405 (1926).

⁴⁰ At page 203, the court says: "The purpose of the admission in cases of this character is to establish the knowledge of the person being prosecuted of the character of the business being conducted. Evidence of reputation is, therefore, unnecessary in a case where an owner is on trial, who is conducting the business unassisted by any agent or servant or employee. In such case, the general rule should apply that reputation, which is hearsay evidence, is not proof upon which a conviction can be had." The only cases cited are *State v. Brooks*, 74 Kans. 175, 85 Pac. 1013 and the *Perrin* case, note 34, *supra*, both of which hold that evidence is admissible to prove knowledge but neither of which expresses any intimation that a limitation exists.

⁴¹ *State v. Fairfield*, 140 Wash. 349, 248 Pac. 810 (1926) affirmed on rehearing, 143 Wash. 355, 255 Pac. 661 (1927) *State v. Espeland*, 141 Wash. 364, 251 Pac. 562 (1926) *State v. Stuttard*, note 43, *infra*, *State v. Mavros*, 144 Wash. 340, 258 Pac. 21 (1927) *State v. Costello*, 45 Wash. Dec. 477, 260 Pac. 1073 (1927).

⁴² *Espeland* case, note 41, *supra*, follows *Radoff* case, *supra*, notes 39 and 40; *Stuttard*, *Mavros* and *Costello* cases, note 41, *supra*, exclude the evidence where sales proved by defendant.

⁴³ 143 Wash. 426, 255 Pac. 663 (1927).

⁴⁴ at p. 429.

with knowledge thereof, it has then established actual knowledge of the character of the place, and that presumptive knowledge may not then be shown by reputation evidence. But if the state's evidence shows only facts from which knowledge may be inferred or presumed, or if the state fails to show any such facts, it may, in either case, offer evidence of reputation to show presumptive knowledge."⁴⁵

The Washington court considers the evidence hearsay and says it is excluded because of lack of necessity for its use⁴⁶ and because of the extremely prejudicial effect, which the court mentions⁴⁷ such evidence no doubt has on the issue of the actual character of the place.

In the Washington cases, defendant's knowledge of the character of the place as being a place for the unlawful sale of intoxicating liquor is, perhaps unjustifiably,⁴⁸ assumed by the court always to

⁴⁵ Attention is called to the fact that this statement is in part *dictum*. The *Stuttard* case only decided that the evidence will be excluded, if offered to prove knowledge, when actual sales have been made by the defendant.

The statement is also here made that a sale is direct proof of the act prohibited by the statute; but the statement is not accurate. The statute, Rem. Comp. Stat. § 7328 reads: "Any person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquors, be and hereby is defined to be a 'jointist'." There are cases which have held that proof of a sale is not essential (*State v. Kichinko*, 122 Wash. 251, 210 Pac. 364 (1922) and cases therein cited) and, moreover, where a sale has been proved it does not necessarily result that the one who makes the sale is a "jointist" (*State v. Buss*, 121 Wash. 314, 209 Pac. 523 (1922)). For a discussion of what constitutes the crime, see *State v. Pistona*, 127 Wash. 171, 219 Pac. 859 (1923) and cases there cited.

⁴⁶ See statement from *Radoff* case in note 40, *supra*. This same statement is quoted in both the *Fairfield* and *Stuttard* cases.

⁴⁷ "Its effect is usually more prejudicial than any direct evidence could possibly be, and impels the conclusion that it should be resorted to only in these cases that come clearly under the rule" and then follows the statement above quoted.

⁴⁸ Upon analysis the argument appears very strong that knowledge is not an issue in all "jointist" cases. As was pointed out in the text above, the issue involved in these cases, and in particular under the Washington statute, are two in number. The defendant (1) opens up, conducts or maintains a place, and (2) that that place is one for the unlawful sale of intoxicating liquors.

As to the first issue: The statute provides that it may be either as principal or agent, which, in other terms, is as owner or employee. As to the methods of proof: If the evidence is to the effect that the defendant is owner, he may be shown to be either (a) active or (b) inactive in the operation of the place. As active owner, he may be either (a') sole operator or (a'') aided in its operation by another. Under a'' he may be shown to be either (a''a) participant by his own act in the illegality or (a''b) a non-participant by direct acts in the illegality although present at the place. Proof under a''a would be either (a''aa) evidence of sales by him or (a''ab) of other acts by him connected with the operation of

be a relevant issue. Proceeding, however, on the theory that the court's assumption is correct, one faces the court's position that in some cases, as for example, where the defendant has sole control of

the place as a joint. It is submitted that in situations a' and a''a no issue of knowledge of the character of the place ever arises in proving that defendant has opened up, conducted or maintained the place. The thing to be proved is that the defendant acted and that his acts amount to the opening up, conducting or maintaining of a place. A person being legally responsible for his own act, regardless of whether or not he knows that the acts he does are illegal, there can be no question of knowledge. As to the decisions of the Washington court—it has held that evidence of reputation of the place is inadmissible under situations a' and a''aa but have held the evidence admissible in situation a'ab. The reason given in the first two types of cases (a' and a''aa) where the evidence has been held inadmissible is that actual knowledge has been proved. It is submitted that here the result is correct but the reason wrong because knowledge in those situations is irrelevant. As to the third type of cases, a''ab, it is submitted that the court is wrong in admitting the evidence; no issue of knowledge arises to be proved under this situation of fact and consequently reputation evidence has no place in proof of this issue. Cf. *Everett v. Simmons*, 86 Wash. 276, 280, 150 Pac. 414 (1915).

There are two more types of cases involving an owner, however, described above as a'b and b. In both these situations the owner is not being charged as for his own illegal act but the illegal act of another for which he is legally responsible if it be shown that he assented to the illegal acts—that is, that he had knowledge thereof.

As to a defendant charged as agent or employee the same situations might arise as above except that as agent he could not be held if his employment was such that it has no connection whatsoever with the illegal purposes for which the place is operated.

The result is that knowledge comes into issue only in those cases where no illegal act or acts directly connected with the illegal purpose are proved against the defendant charged, whether as principal or agent.

Then to proceed to the other issue of the case, i. e., the character of the place. One glance at this issue shows that the defendant's knowledge has absolutely nothing to do with this phase of the case; it matters not one whit whether the defendant knows or does not know its actual character when it comes to legal proof of that fact. There does, however, arise, in proving this issue, a question of intent on the part of the owner or operator—but intent is not knowledge; the two are entirely separate and distinct facts.

Under the Washington decisions, that a place is a "joint" may be shown by proving actual sales (note plural) at the place or by showing in some manner the purpose for which the place is operated. If sales are proved they may be either by defendant or by his agent or tenant. Either one equally well establishes the actual character of the place. If sales are not shown, it must, or if shown, in addition thereto, it may be shown what the purpose of the place was by showing circumstances such as a single sale, possession of liquor, equipment consisting of glasses, bottles and the like, drunkenness on the premises or any other relevant physical fact and for the intent of those who operate the place. The intent may be inferred from written statements, declarations, etc., from circumstances as above, or from the defendant's knowledge of the purpose for which the place is operated. However, that the intent may be inferred from knowledge, does not seem to lead to the conclusion that knowledge is always an element in these cases. It would seem more logical to say that in those cases where knowledge becomes a factor in the first issue, the intent can be inferred from the fact of knowledge, if proved, and in those cases

the place,⁴⁹ or where he makes sales in the place,⁵⁰ his knowledge of the character of the place is regarded as so directly proved that additional circumstantial proof in the form of reputation evidence is unnecessary. The court entertains the view that where he has sole control of the place, he must know what is going on there, i. e., he must know of the unlawful purpose for which the place is being conducted or maintained, that where he sells liquor in the place, he must know of the unlawful purpose in a similar way.

The question is whether the Washington court has not placed an unnecessary limitation on the rule. This question of limitation has two aspects. first, the general one, whether there should be a limitation at all, and second, whether, if a limitation is justified, the one laid down by the court is a proper one.

As to the first aspect, it would seem that any limitation which would exclude relevant circumstantial evidence tending to prove the issue merely because there is direct evidence to prove the issue is unwarranted. An examination of the cases,⁵¹ both American and English, wherein reputation evidence has been held as competent in proof of knowledge of a fact in issue, reveals no cases wherein

wherein knowledge is not a factor in proving the first issue above, then the necessary intent can be inferred from the facts which are proved to establish the first issue, for such acts are those of the defendant which, having himself done, the law presumes that he intended.

However, as far as reputation evidence of the place is concerned it has no place in proof of any element of the second issue, from whatever angle it is approached, as far as authority of cases and the text-writers is concerned (the Oklahoma cases cited in note 33, *supra*, to the contrary) for it is not admissible to prove the fact itself nor is it admissible to prove intent. That, indirectly, intent *may* be inferred from knowledge proved by reputation evidence in certain types of cases should not lead to its admissibility in any other cases than where it is admissible for the direct purpose of proving knowledge. Consequently the use of reputation evidence should be limited strictly to those cases wherein it is relevant to prove knowledge as a factor, which in jointist cases is, as pointed out above, not in every case, but only in a limited class of cases.

The result of this analysis would lead to the conclusion that the Washington court has correctly limited the use of evidence of reputation of the place to those cases wherein knowledge is a factor but that it has not correctly defined and limited the cases wherein knowledge does become a factor, with the result that the evidence has been held admissible in some cases, i. e., those wherein defendant, either as principal or agent, has been shown to have directly participated in the illegality without having made sales, when it should have been excluded.

⁴⁹ *Radoff* and *Espeland* cases, notes 39 and 41, *supra*.

⁵⁰ *Stuttard*, *Mavros* and *Costello* cases, note 41, *supra*, *Contra Maloney* case, note 36, *supra*.

⁵¹ Cases cited WHARTON CRIM. EVID. 378, 3 WIGMORE, EVIDENCE, 821 *et seq.*, note 33, *supra*.

it has been held⁵² that such evidence would be excluded when other independent proof, either direct or circumstantial, of the same fact was offered. There seems to be no rule that circumstantial evidence in the form of hearsay which is admissible under an exception to the rule, should be excluded because there is direct evidence on the same issue.⁵³

As to the second aspect, to-wit, whether, if limitation is justified, a desirable one has been laid down, it would seem that if the rule of necessity is to be invoked at all as requiring a limitation, then necessity ought to be carried to its natural limits, namely, that reputation evidence should be excluded whenever there is other direct or circumstantial evidence tending to show knowledge. To permit circumstantial evidence in the form of reputation to be used in aid of other circumstantial evidence on the same issue, but not in aid of other direct evidence on the same issue, seems to be without support in the authorities. Circumstantial evidence is frequently more cogent than direct testimony because it is less likely to be fabricated.⁵⁴ On the theory of necessity as applied by the supreme court, reputation evidence ought perhaps only to be admitted where there is no other proof, either direct or circumstantial, tending to show knowledge. That it may be admitted under such conditions the court suggests,⁵⁵ although in *State v. Perrin* the court found it "not necessary to decide whether proof of reputation such as that suggested would alone be sufficient to sustain the conviction."

The present rule would seem, in one view, to put the admissibility of evidence to a considerable extent to the election of the prosecutor, in another view, to make him choose at his peril.

However that may be, all of the cases cannot be reconciled, even on the theory adopted by the court in the *Stuttard* case, which to some extent appears to be an attempt to restate the results of the earlier cases. At least one case is directly overruled,⁵⁶ although without mention, by the *Stuttard* case. The rule as stated seems

⁵² The only case found wherein it was even intimated that such might be the rule is *Ward v. Herndon*, 5 Port. (Ala.) 382, 385 (1837) where it was said, "where positive proof cannot be had of such knowledge, it is competent to prove a circumstance, from which it is inferable." But statement was dictum in this regard as evidence was admitted.

⁵³ See *Comm. v. Roddy*, 184 Pa. 274, 39 Atl. 211 (1898), and *State v. Moody*, 18 Wash. 165, 51 Pac. 356 (1897).

⁵⁴ *Comm. v. Webster* 5 Cush. (Mass.) 295, 52 Am. Dec. 711 (1850).

⁵⁵ *Stuttard* case: "or if the state fails to show and such facts."

⁵⁶ *State v. Maloney*, note 36, *supra*, in this case the report reads, "the evidence shows intoxicating liquors were sold in the place by him."

to lead to an overruling of at least one other earlier case on its facts, namely, the Anderson case,⁵⁷ where the defendant was engaged in handling the liquor but not in making actual sales, which evidence, under the facts of the case, seems just as direct proof of the knowledge of the conduct of the place for the purpose of the sale as an actual sale, it being borne in mind at all times that proof of an actual sale is not necessary to prove the defendant a jointist,⁵⁸ a fact which the court at times appears to have overlooked.⁵⁹ Moreover, the facts set forth in *State v. Perrin*⁶⁰ would almost appear to be such direct proof of knowledge as to exclude, under the present theory of the court, any additional circumstantial evidence to the same end.†

ALFRED E. HARSCH.

PROVISIONS IN A WILL FORFEITING THE SHARE OF A CONTESTING BENEFICIARY¹—PROVISIONS in will forfeiting the share of a contesting beneficiary are not contrary to public policy² It is suggested by the English courts that no question of public policy is involved, that the court has no interest whatever apart from the interests of the parties themselves, and that it matters not to the state whether

⁵⁷ Note 36, *supra*.

⁵⁸ See note 45, *supra*, second paragraph.

⁵⁹ See note 33, *supra*, and especially *State v. Stuttard*, cited therein.

⁶⁰ 127 Wash., at pp. 194-195.

† After this note had gone to press, the court, in a decision handed down on March 19th, 1928, *State v. Wilson et al.*, 47 Wash. Dec. 120, held reputation evidence inadmissible as against the appellant, proprietor and operator of a hotel wherein sales were proved by employees; no sales were proved by the appellant although court below found that he participated in and had knowledge of the handling of liquor in the hotel. The opinion is short and relies upon a citation of the *Radoff* and *Espeland* cases and states: "Again we announce the rule that reputation evidence is not admissible in cases of this character, where there is direct and positive testimony showing knowledge on the part of the owner or proprietor." No attempt is made by the court to explain this holding, which without doubt, throws greater doubt upon the earlier cases, criticized above; the conclusion reached in the foregoing discussion seems to now have support in this decision, although, unfortunately, the court does not make more than a general statement supporting the opinion which it hands down.

¹ For form of clauses see: 1 CUTLER'S TIFFANY FORM BOOK 2139 (no provision for gift over) 1 NICHOLS' ANNO. FORMS 2267, sec. 157 *In re Chappel's Estate*, 127 Wash. 638, 221 Pac. 336 (1923) *In re Bergland's Estate*, 180 Cal. 629, 182 Pac. 277, 5 A.L.R. 1363 (1919) *In re Kitchen's Estate*, 192 Cal. 384, 220 Pac. 301, 30 A.L.R. 1008 (1923) *In re Keenan's Will*, 188 Wis. 163, 205 N. W. 1001, 42 A.L.R. 836 (1925) *Cook v. Turner*, 15 M. & W. 727, 71 Rev. Rep. 808 (1846).

² *Rogers v. Law*, 66 U. S. 253, 1 Black 253, 17 L. Ed. 58 (1862) *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793 (1898) *In re Hite's Estate*, 155 Cal. 436, 101 Pac. 443, 21 L.R.A. (N.S.) 953 (1909) *In re Miller's Estate*, 156 Cal. 119, 103 Pac. 842, 23 L.R.A. (N.S.) 868 (1909) *In re Shirley's Estate*, 180 Cal. 400, 181 Pac. 777 (1919) *In re Bergland's Estate*, note 1, *supra*, *In re Kitchen's Estate*, note 1, *supra*, *Moran v. Moran*, 144 Ia. 451, 123 N. W. 202, 30 L.R.A.