

Merrimack, }
 March 4, 1919. }

STATE v. FRED A. CURRIER.

The exclusion of collateral evidence of a general habit presents no question of law, when there is evidence to sustain the finding that such evidence would not aid the jury.

The personal knowledge and belief of a witness as to the respondent's character is not evidence; only his reputation in the community is admissible.

If counsel *arguendo* ask the jury to draw an unwarranted inference from the evidence and the opposite party make no request for an instruction that such inference cannot be drawn, an exception to such argument is unavailing.

BILL OF EXCEPTIONS. The respondent was indicted for manslaughter in the first degree (P. S., c. 278, s. 7) for causing, while operating a motor vehicle in violation of s. 19, c. 133, Laws 1911, the death of Mrs. Lund. Trial by jury and verdict of guilty. A witness called by the respondent who testified she had ridden with him was asked by his counsel, "What sort of a driver is he?" Upon objection by the state the question was excluded, subject to exception, upon the ground that evidence of habit was not admissible when the circumstances as to the matter in controversy were clearly described by witnesses. Exception was also taken to the suggestion in argument of the state's counsel that the transaction might be characterized as an American atrocity, and to his contention that it was matter of common knowledge that the shock of a serious accident of this character would be likely to have a sobering effect upon the person responsible therefor. A bill of exceptions was allowed by *Branch, J.*, at the April term, 1918.

Herbert W. Rainie, solicitor (by brief and orally), for the state.

John M. Stark and *Martin & Howe* (*Mr. Howe* orally), for the defendant.

PARSONS, C. J. If evidence of the respondent's general habit of driving would not have aided the jury upon the question before them the evidence was properly excluded. *Shea v. Hillsborough Mills*, 78 N. H. 57, 58. That the transaction in question was clearly described by witnesses is evidence from which it could be found that the trial of the collateral issue of the respondent's general habit of driving would be of no service and was therefore unnecessary. As the bill

of exceptions does not controvert the fact upon which the ruling was based, no error of law is presented. *Amoskeag Co. v. Head*, 59 N. H. 332, 337, 338; *Emerson v. Lebanon*, 67 N. H. 579. The ruling of the court is supported by the decisions. *Bourassa v. Railway*, 75 N. H. 359, 360, 361; *Minot v. Railroad*, 73 N. H. 317, 320; *Tucker v. Railroad*, 73 N. H. 132, 133.

In oral argument the position was taken that the inquiry "What sort of a driver is he?" was competent as an offer to prove respondent's good character in that respect, an issue always open to the defence in criminal cases. The contention loses sight of the different meanings attached to the word character. It may mean what a man is, which was what the excluded question called for. It also means what a man is thought to be, his reputation. It is in this latter sense that a defendant may put his character in issue. "By a rule which is almost universal (in American courts, at least), the personal knowledge and belief of the witness to character is rigorously excluded, and the community-reputation is all that will be listened to." *Wig. Ev.*, s. 1980; *State v. Lapage*, 57 N. H. 245, 290; *People v. Van Gaasbeck*, 189 N. Y. 408; s. c. 22 L. R. A. (N. S.) 661; *Commonwealth v. O'Brien*, 119 Mass. 342. Whether in a proper case evidence of habit as tending to show the commission or non-commission of crime is admissible, or what evidence may be admitted of capacity to do an act (*State v. Knapp*, 45 N. H. 148) or to prove that a certain belief is entertained (*Curtice v. Dixon*, 74 N. H. 386, 396) is not now in question. Evidence of habit was properly excluded without reference to possible non-admissibility in a criminal case and evidence of reputation as proof of character was not offered.

The state's counsel called the killing of Mrs. Lund an atrocity. The respondent's view may have been and probably was that it was an unavoidable accident merely. But the bill of exceptions contains nothing tending to show that the characterization of the state's counsel was not justified upon the evidence as looked at by the state. *State v. Small*, 78 N. H. 525, 530.

Whether without evidence the jury from their general knowledge could determine the effect of mental shock upon the senses of one stupefied by intoxication is a question of law because determinable by the court and not by the jury. Counsel did not misstate the evidence or testify as of his personal knowledge. At the most he asked the jury to draw an unwarranted inference. The respondent's rights would have been fully protected by an instruction to the jury that such inference could not be drawn if it could not be as matter of law.

In the absence of such request and exception to its denial no question of law is raised by the record.

Exceptions overruled.

PLUMMER, J., was absent: the others concurred.

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WILLIAM E. CALLAHAN v. BOSTON & MAINE RAILROAD.

If the act a servant was performing at the time of his injury was incident to interstate work, he is within the provisions of the federal employers' liability act, 35 U. S. Stat. 65.

The operator of a helper engine, who has orders to assist an interstate train up a grade and to then return with his engine, may be found to have been engaged in interstate commerce on the return trip, although he might thereafter be assigned to an intrastate train.

CASE, under the federal employers' liability act, to recover for injuries received by the plaintiff on January 21, 1914. Trial by jury and verdict for the plaintiff. At the time of the accident, the defendant was a common carrier by railroad and engaged in commerce between Vermont, New Hampshire and Massachusetts, also in commerce within New Hampshire, and the plaintiff was in its employ as a locomotive engineer. On defendant's road, near Ashland, New Hampshire, there is a point called the Summit, which is the apex of the grades. At the time of the accident, it was necessary to assist heavy trains over the Summit from north to south and from south to north by attaching to them an extra engine called the helper.

The plaintiff was employed by the defendant to operate the helper. On the day of the accident there was occasion to help interstate train No. 604 from Plymouth to the Summit, and the plaintiff was assigned to the task. He was given a copy of the orders for operating No. 604, and in addition thereto, on a separate sheet, an order to return to Plymouth with his locomotive as soon as he left No. 604 at the Summit. He had no further orders. The accident occurred on his return trip.

At the close of the evidence the defendant's motion for a directed verdict upon the ground that the plaintiff was not shown to have