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EDITORS:
EMILIO MARIANELLI
ROBERT J. PUDERBAUGH
JOHN EYSTER MYERS

BUSINESS MANAGERS:
GEORGE B. STEVENSON
JOHN H. MCKINNEY
THOMAS B. MILLER

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HOW TO LOCATE A SALE.

A SALE is the name given the transfer of ownership of goods for a price. It occurs as soon as the parties intend that it should. The parties may be a thousand miles apart and the goods may be a thousand miles from either. Possession need not be surrendered to the buyer nor need the price have been paid. If the subject matter is specific and the terms are agreed upon, "the effect of the contract is to vest the property in the bargainee."[1]

If the seller is in New York and the buyer in Philadelphia and there is a certain barrel of whiskey in Baltimore for which they deal by telephone, where is the sale? The buyer goes home to Pittsburgh and the whiskey is shipped by his direction to his agent in Washington. The buyer sends his check from Pittsburgh for the price. The seller receives it and cashes it while on a trip to Boston. Was the sale in New York, Philadelphia, Baltimore, Pittsburgh, Washington or Boston?

There are some things that one cannot sell unless licensed to do so and a license granted in one place gives no right to sell in another. This makes it vital to a man who wishes to sell such things to know how far his license extends. If he has a license to sell in Carlisle, can he take an order while in New York and fill it when he gets home? Can he take the money when he takes the order? Can he send the whiskey to New York? If he has whiskey in New York in storage and he gets the order when in Carlisle, can he direct his bailee in New York to let the buyer have so much whiskey? Can he send a messenger to New York with a trunk full of whiskey previous-

[1]Henderson v. Jennings, 228 Pa. 188.

ly ordered and have him distribute it among his customers? Can the messenger let one have what he finds another ordered but does not want, or must he bring home whatever he can't deliver to the original orderer? Must the bottles be labelled with the names of the buyers? Can this be done by the messenger on the way or upon arrival? If two labels come off, must he be sure to get them on the same bottles or else bring them back home? Can the distributor stay in New York and send the trunk back and forward by express? Is the man who solicits orders in New York for a Pennsylvania dealer safe? Is the man who collects the price safe? Is the express company safe, when whiskey is sent C. O. D.? Is the express agent a liquor dealer? Is the messenger who goes back and forth and makes distributions safe?

If my goods becomes another's, is the place of the phenomenon wherever I happen to be, wherever the new owner happens then to be or where the goods happen to be? If he does not get possession till a later date, may the sale be where he gets possession? If a common carrier intervenes, is the place of sale at the starting point, the point of destination or on the route? Does it matter if the goods are sent C. O. D.? Is the place of sale the same whether or not the buyer reserves the right to accept or reject upon sampling the goods on arrival?[2] Is the place of sale the same whether the transfer is made by private messenger or common carrier, or by the use of both?

If A and B meet and A hands B whiskey and B hands A money in exchange for the whiskey, one witnessing the transaction might suppose he had seen a sale but he might be mistaken. Further he might hear B inquire the price and see him pay the sum asked for by A. He might see A write a receipt and deliver it to B. But still he is mistaken if he thinks he saw a sale or if he thinks that the place of sale was the place where he saw these incidents occur. A sale is invisible, inaudible and intangible. The goods and the money and the parties are substantial and at any instant their location can be determined but to locate the metaphysical notion expressed in the words "the transfer of ownership" is as difficult a matter as to arrive at the foot of the rainbow or state the distance to the mirage of the desert. Nevertheless the legislature has made the sale of liquor by a licensee lawful in one place and illegal in others and the courts have been compelled to start in pursuit of this will-o-

[2] 51 N. H. 496.

the-whisp. They *must* capture it for men must be able to tell when their acts are criminal. If the reader will follow the chase he should find the agility of the judges very entertaining and withal he may learn some law. He will see the man who thought he was guilty quite innocent, and the man who intended no wrong sent to jail as a criminal. One day he will see surprising indulgence and the next he will hear the defendant scolded for inventing devices to evade the law.

First, why is the licensee limited in his sales to a restricted territory? Justice Williams says it is because the sale of liquor requires intelligent supervision by the licensee.[3] He is personally entrusted with the distribution of the dangerous substance and he cannot scrutinize each transaction unless they all occur where he is. The applicant must prove his fitness for the trust, he must be of good moral character, so certified to by at least twelve of his neighbors and he must give bond to obey the law. He must not sell to a minor or to one whose condition indicates that he has already had enough. To determine the age and condition of the buyer, the seller must see him ordinarily. Again, licenses are an important source of revenue and the more limited the locality within which one licensee is permitted to do business, the more licenses will be required and the greater the revenue derived. Some localities decide to exclude liquor. To make effective their decision, those licensed to sell elsewhere must not make sales in the prohibition territory. Finally, there is the right of the licensee. If others who have paid no license fees in his territory may make sales there notwithstanding, the number of his customers is reduced, and he sees others making the profit that should have been his. If his customers go to other points and buy liquor while away from home, he would have only himself to blame. But he would naturally resent deliveries to his customers at their homes or the attempt to secure his business by house to house solicitation of orders.

Before examining the cases let us learn from both the Supreme and Superior Court the attitude of mind which we should bring to this subject. In Com. v. Holstein, 132 Pa. 357, Justice Paxson said: "The devices to evade it (the law) are so numerous and adroit, and the consequences of its violation are so serious to the welfare and good order of the community generally, that we think it *the duty of the courts to enforce the law*

[3]See dissenting opinion in Com. v. Fleming, 130 Pa. 138.

rigidly. It is needful that *all* those who engage in the traffic in violation of the law *should know that the way of the transgressor is hard.*" Now hear from the Superior Court. Said Judge Orlady, in Com. v. Munk, 1 Super. 479: "This question has been before the Supreme Court in as various forms as the *ingenuity of the trade can devise* but its solution is to be had in the application of principles governing the sale of any other article of trade . . . but it must be borne in mind that every part of such *transactions will be severely scrutinized*, as *there seems to have been an almost studied effort to avoid a penal statute.*"

Let us "severely scrutinize" the decisions in point.

In the first case[4] a man named Garbracht, an employe of a man licensed to sell in Erie, went to Mercer County and made a canvass in search of business. He got a number of orders and mailed them to his employer in Erie. The latter shipped the whiskey to the buyers by freight or express. Garbracht was indicted for selling in Mercer County. He was convicted notwithstanding his contention that as he had nothing to do with the delivery of the liquor, he should not be held responsible for the wrong, if any, that was committed by his employer in so doing. His contention, however, was approved by the Supreme Court. Justice Sterrett held that to take an order even accompanied by the price is not to make a sale. "To constitute a sale of personal property, especially under a penal statute, there must be a transfer of the title for a certain consideration. Orders for goods may be received but until they are transferred or set apart to the purchaser the *sale is incomplete. Delivery, either actual or constructive, is an essential ingredient of a sale of personal property. An agreement to sell is only executory until the contract is completed by delivery. . . . . The place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who for the purposes of delivery represents him.*" Until the purchaser or his agent receives the goods, the sale is incomplete, and the place of sale is apparently decided to be where it is made complete. The common carrier was not the representative of the buyer in the sense that the buyer had requested the carrier to receive and carry the goods on his behalf. The dealer selected the carrier and paid him but the court was controlled by an old fiction by virtue of which a seller may treat any common carrier as the agent of the buyer, unless the buyer expressly stipulates that

[4]Garbracht v. Com., 96 Pa. 449.

the goods shall be delivered to him in person. In this latter event, the seller may use the carrier as his own agent but he has not performed his contract until the carrier delivers to the buyer. All the whiskey having been shipped by carrier and there being no evidence that the buyers stipulated for delivery to themselves, the sales were completed in Erie when the whiskey was delivered to the carrier, the agent of the buyers, and no crime was committed either by the dealer or his agent.[5]

Garbracht was later tried again and this time it was shown that he had agreed with some buyers to made delivery direct to them if they would pay the freight. Though the carrier was paid by the buyer, it was held that the carrier represented the seller in these transactions, for the seller assumed responsibility for safe delivery. Garbracht was convicted and his conviction was this time approved by the Supreme Court. It mattered not that he did not have or pretend to have any whiskey of his own. It is as unlawful to sell on behalf of another as for oneself. It mattered not that no crime was committed till his employer sent the whiskey. To have made a contract that could not be performed without the commission of a crime was held to be sufficient to render Garbracht liable for the subsequent commission of the crime. To participate in the negotiation of a forbidden sale is as criminal as to participate in the performance of the bargain.

Suppose Garbracht had made no bargains but had merely taken orders subject to the acceptance or rejection of them by his employer, would such participation have rendered him liable for the acceptance of an order and a delivery by his employer in Mercer County? If he is guilty of making the sale when he places upon his employer a contractual obligation to make it, is he guilty of those sales made by his employer, which might not have been made had he not placed temptation in his employer's way by sending him the offer of the buyer? This was the question presented in Com. v. Munk, 1 Super. 479, and it was decided that the employee could not be convicted. The employer completed the bargain by accepting the offer and completed the sale by making delivery in his own wagons. He only was responsible for the crime. May the employee assure the buyer that there is no doubt his order will be accepted, that the "subject to approval" provision is just to satisfy the judges, and

[5]This case was followed by the Supreme Court in Clohessy v. Roedelheirm Bing & Co., 99 Pa. 66, but Chief Justice Sharswood dissented.

still escape the liability? Perhaps not. The judges are astute to discover subterfuges in these cases and they would be apt to regard as criminal the man who thus made light of their distinctions.

Suppose the contract made by the drummer makes no provision as to the manner or place of delivery, is he a criminal or not according as his employer ships by common carrier or delivers in his own wagon? Hardly. If the employer is free under the contract to perform without a violation of law by delivering to a carrier as the buyer's agent but he prefers to make delivery in the unlicensed territory, thereby violating the law, the employee is not the proximate cause of the crime. The employer should be punished for cheating the express companies. However, if the employee who took the order should drive the wagon that makes the deliveries, he then is what the supreme court calls a peddler.[6] He is said to be just as guilty as if he sold beer to all comers with the rear of his wagon as a bar. In Com. v. Holstine, 132 Pa. 357, Holstine thought it should be as lawful for him to deliver beer as it was for the express agent. He had make no stipulations for a direct delivery. Whether he would have been convicted had he made deliveries only to men from whom other agents had obtained the orders, is not decided. We could hardly call him a peddler and he would likely be held no more to have made a sale than the express agent who made the delivery in the Garbracht case.

In this Holstine case and in an earlier case, Stewart v. Com. 117 Pa. 378, counsel had urged upon the court the idea that the sale should be located at the point where the liquor is selected from the general stock and set aside for delivery, and the criminality should not depend on whether delivery was made by express or by the seller's own wagon. Chief Justice Paxson wrote the opinion in the Holstine case and it is notable that at that time (1890) he was not impressed by this argument. He held the place of sale to be where the order was taken, the goods received by the buyer from the seller's wagon and the price paid. It was urged on the wagon driver's behalf that he might be decided by some fiction to be the purchaser's agent as he was acting for his convenience but the realities of his employment prevented the adoption of the fiction.

The Garbracht cases decided that the place of the sale is the place of delivery to the buyer or his agent, and that the sale

[6]He is equally guilty if the drummer pays the wagon driver. Com. v. Rossi, 42 Super. 561.

is at the end of the transit unless the contract permits the fiction that the carrier is the buyer's agent. Great pains were accordingly taken to explain that the carrier is still the buyer's agent though the liquor is sent C. O. D. (Com. v. Fleming, 130 Pa. 138). None of the cases suggested that the place at which the order is taken would affect the result. With the law in this condition the Hess case arose. (Com. v. Hess, 148 Pa. 98.) The year following the Holstine decision six men (one of whom was Hess) were convicted in Montgomery County for making sales there under licenses granted in Philadelphia. Three of them were the drivers of the wagons that made the deliveries. Hess' sales were to hotel keepers but some of the defendants had sold to private individuals at their homes and some of the defendants received the cash on delivery of the liquor. The only difference in the facts of the cases as compared with the Holstine case, was that in all these cases the orders for the beer were sent by mail to the dealers, whereas in Holstine's case the orders were solicited by Holstine. The lower court charged the jury that the sale took place where it was completed by delivery to the buyers. All the prior cases had so decided except where delivery had been made to a carrier as the buyer's agent.

A case[7] on all fours with the Hess case had been decided by Judge Rowe, of Franklin County. One Coon had ordered beer by mail and Speck, licensed in Cumberland County, delivered it to him by wagon. Judge Rowe said: "The sale was made in Franklin County. True the sale is complete when the property passes, and delivery is not essential to the completion of the contract of sale. *But Coon's order was simply an offer to buy.*[8] The acceptance of it was not manifested by any word or act *that would be binding on Speck* until his wagon came to Coon's tavern. Before that Coon could not have brought an action for breach of contract; nor would the loss have been his, if the property had been destroyed. A delivery to Coon or *his* driver, or the common carrier, at Carlisle, would have made the sale complete then, delivery to the carrier in such case being regarded as delivery to the purchaser himself. But the beer was placed in the defendant's own wagon and carried to Roxbury," etc. Judge Rowe had the idea that an offer to purchase goods may be accepted by communicating a promise to sell in accordance with

[7]Com. v. Speck, i. c. c. 634.

[8]This is also asserted in Com. v. Munk, 28 Super. 68.

the terms of the offer or by shipping the goods ordered. He did not suppose that the buyer would become the owner of a barrel of whiskey as soon as the seller instructed his employee to deliver it to the buyer, for the reason that the buyer is not in a position to know when this occurs or whether or not it has occurred. It is highly unreasonable that a buyer of goods should pay for goods destroyed in the seller's store or wagon simply because the seller declares he had resolved to accept the order and had set apart the goods ordered. Had he delivered them to a carrier, he could stop them in transit only if the buyer became insolvent. But he can recall his own employe at will. He could resell the whiskey he had designated as intended for Coon and Coon would never be the wiser. He who makes an offer is entitled to information of the acceptance of it or at least that the aeceptor do some act that commits him irrevocably to the contract and that will come to the offerer's knowledge in due course. Could there possibly be a criminal sale without delivery?

But the Hess case teaches that this is not the law.

The contention of counsel rejected in the Stewart and Holstine cases, to wit, that the seller's wagon driver might as well be deemed the agent of the buyer as might the common carrier employed by the seller to made delivery was not adopted in that form but the same result was arrived at. He is declared to be the buyer's bailee.

"If we sustain the court below in this case," says Chief Justice Paxson, "we are brought face to face with this proposition: that if a wholesale dealer in liquor receives an order from a customer in an adjoining county, and in pursuance of such order delivers the liquor to a common carrier for transportation, he is a law-abiding citizen; whereas, if he delivers the liquor in his own wagon, in the usual course of business, he is a criminal, and liable to both fine and imprisonment. If this be the law, it is certainly not the 'perfection of reason.' On the contrary, it is the climax of absurdity, and cannot fail to shock the common sense of every business man in the community." He then sets out to convince the reader that the property becomes the buyer's as soon as the seller decides to accept the order, separates the beer from his stock and charges the price to the account of the buyer on his books. Extension of credit has the same effect in passing title as payment, says he. So it does if the buyer asks credit and knows it has been extended. But as to what liquor

does the title pass? To that set apart, he says. When is it set apart? All the beer is alike. The dealer has a dozen customers in the next county. He puts enough beer on the wagon to fill all their orders. The driver delivers to each the quantity ordered. Which bottles belonged to each customer while they were on the wagon? Their orders were separate. They were hardly owners in common then of the beer on the wagon? But perhaps the dealer is wise enough to label each case or keg with the name of the man who is to receive it, is this an act which renders the appropriation irrevocable? Would he be guilty of a conversion if, before the beer left his place of business, he decided not to fill the order and accordingly detached the label and cancelled the charge on his books? Can a bargain be both made and executed by an act unknown to the other party and unknowable except by the admission of him who did the act? A mental decision to accept an offer, undisclosed to the offerer, imposes no liability and gives no rights. Why then should an act that can be undone as easily as one may change his mind?

An acceptance of an offer usually takes effect from the time a letter of acceptance is put in the post-office (where the circumstances justify acceptance by post) but it has yet to be suggested that the result would be the same if the letter were placed in the hands of the acceptor's own servant to carry to the offerer.

The court did not refer to their prior approval of the conviction of Garbracht on the ground that the common carrier was his agent under the contract made by him. The Garbracht case in fact has been recently followed as a controlling authority by the Superior Court.[8a] The Hess decision was made to avoid shocking the common sense of business men. As it did not overrule the Garbracht case, we now have the following distinction. If the seller labels his liquor, he may deliver by his own wagon in unlicensed territory and he is a law-abiding citizen, but if he should contract to deliver to the buyer, he is a criminal though he delivers the liquor to a common carrier at his own place of business. In the Tynnauer case there was no express agreement as to the manner or place of delivery but the buyers were told to get their liquor at the express office. This was held sufficient evidence to justify the jury in finding that it was *impliedly understood* that the seller would deliver in the un-

[8a]See Com. v. Tynnauer, 33 Super. 604, and Com. v. Guinzburg, 46 Super. 488.

licensed territory, that this made the carrier the seller's agent and therefore he was a criminal. If this is the law, is it the "perfection of reason" or the "climax of absurdity"? Hess constantly made delivery by wagon but it was not suggested that this indicated an implied understanding that he was to deliver in the unlicensed territory. Isn't it manifest that the contract as carried out repeatedly must have been the contract as made. Would Hess regularly have made delivery if he had not undertaken to do so? To allow a conviction on the ground that the carrier was the seller's agent, in the absence of clear proof that such was the case and then acquit when delivery is made by the seller's own wagon, seems like jumping from the frying pan into the fire, in the effort to avoid "shocking the common sense of business men."

The opinion of the Chief Justice in the Hess case collects cases of sales of specific chattels, either identified perfectly by description or selected by the joint act of the parties. He professed to think that they were in point but one's suspicions are aroused by the concluding paragraphs. He concludes as follows: "In applying the law to questions of this nature, *we cannot wholly ignore the accepted principles of right and justice*, nor can we, in considering contract relations, ignore the usages which the necessities and wants of business have practically made a part of them. This has sometimes been called the *expansive property of the common law*. . . . The present is a *stiiking illustration of the wisdom of this rule*. . . . To say that a man who may lawfully sell an article to another who may lawfully buy it cannot deliver the article by the usual course of business, is to assert a proposition that is absurd upon its face. It is not sustained by either authority or reason." . . . . "This conviction cannot prevent sales nor diminish the quantity of liquors sold and consumed." And yet, absurd or not, *the law is*, that I may lawfully sell you liquor if I do it in one place, and I may not do so in another place.[9] The convictions of each

[9]The law as laid down in Hess v. Com., 148 Pa. 98, is in the face of a multitude of decisions in other states. The cases are collected in Woollan v. Thornton on Intoxicating Liquors (1910), p. 1284, and the law is there laid down as follows: "Since the place of delivery is the place where the sale is completed, therefore, if the seller take an order for liquor in a county *where* its sale is not forbidden, or *he has a licence to there sell*, and even there receive pay for it, *and then in person or by agent (who is not a common carrier)* delivers it in a county where its sale is forbidden, or *in which he has no license*, the sale is in the latter county, and he is liable

of the six men convicted in Montgomery County at the same time that Hess was convicted, were in turn reversed by the supreme court with the mere statement that they were ruled by the Hess case. Some of them had delivered the beer with one hand and received the cash with the other but they were all acquitted on the theory that the sale was over when the beer was "set apart" at the breweries. This rule was adopted to avoid shocking the common sense of business men. Let us see whether it accomplishes this result as well as the rule that the place of delivery is the place of sale.

The Stegmaier Brewing Company[10] had a Bradford County license but they had valued customers in Luzerne County. They were advised that so long as all orders were received and accepted at the brewery, they might safely distribute either by wagon or carrier. They decided to use both. They sent the beer by the carload to their employes in Sayre and he made deliveries by wagon. The demands of the customers were constant, so standing orders for a certain quantity per week were signed by them and filed with the brewing company. The distributing agent however, had more common sense than knowledge of the law. If he saw that one customer had need of less than the amount of his order, he did not compel him to take it all and this surplus was the cause of his downfall. Instead of sending back to Bradford County to have it newly labeled there, he had the temerity to paste a new label on it in Luzerne County. Again, he found that the moisture of the re-

to the penalty of a statute forbidding sale there *or forbidding a sale without a license,*" citing cases from sixteen different jurisdictions.

In Black on Intoxicating Liquors, Sec. 434, it is said: "Irrespective of the place where the bargain was made or the order received, if the seller, by his own hands or the hands of his servant or agent, carries the liquor to the purchaser, without any intermediate delivery to or through a common carrier, and delivers the liquor to the purchaser at the latter's place and there receive pay for it, the sale is made at the place of delivery, and, if the vendor is not licensed to sell there, he is indictable." This is declared to be the established rule. See also 11 Am. & Eng. Ency. of Law (1st Ed.) p. 741–745. In a careful review of the C. O. D. cases in 4 Col. L. Rev. 541, Professor Gregory declares: "It is plain that, under all principles and authorities, when a common carrier does not intervene between the vendor and vendee but the delivery is made by the vendor in unlicensed territory, without the intervention of any other person whatever, the sale is consummated in the unlicensed territory and the defendant is guilty beyond dispute."

[10]Stegmaier Brewing Co.'s License, 11 D. R. 691.

frigerator car had resulted in some labels coming off and others got wet and became illegible. Again, fatal blunder, he put on fresh labels and perhaps not always on the identical kegs originally marked. He even went so far, this practical business man, as to put labels on kegs that had been shipped without any, in case he found a customer needed more beer than he found marked for him. Of course the court held that his acts were criminal. "When the goods leave the wholesale house they must be absolutely sold to the customer." The brewing company's license was accordingly revoked and the Bradford County competitors had their revenge. The agent might have solicited the order, delivered the beer and collected the price, all in unlicensed territory, and have made no sale, if only the order was filled by his friends at the brewery by there separating the amount of each order and permanently marking it for the orderer before forwarding it to the agent. As the supreme court said in Com. v. Forney, 11 Forum 22, "if the defendant never received more beer than was ordered and had no option but to deliver specified parcels to specified persons, he could no more be indicted for selling beer than could a railroad company by which beer had been consigned to buyers, and whose only duty was to deliver the beer." . . . . "Making payment on a past purchase is not buying, and receiving such payments is not selling." . . . . "To take an order is not a sale. Taking and transmitting it works no change in the ownership or possession of any beer." Nothing multiplied by three is still nothing.

In Com. v. Smith and Schmerber, 16 C. C. 644, another plain business man drove the delivery wagon. He had no trouble with his labels but some customers asked him to let friends take a portion of what he had brought for them. It had already been charged to the men who had ordered it, so of course it was already theirs. The friends were not buying from him but from their friends who had ordered it. Their paying for the beer, of course, was immaterial. They were simply returning a courtesy by paying a debt of a friend. In Trickett on Pa. Criminal Law, p. 336, Note 23, the query is made as to whether "it would not be a sale by the recusant vendee to which the driver made himself a party," but fortunately for the driver this idea did not occur to the court that tried him. He merely warned the jury to beware of "*subterfuges*."

In Com. v. Rosenberg, 35 Pitts. Leg. J. 68, we have a

decision that would make it criminal for the agent to fail to disclose his principal when he takes the order. The agent had taken orders in Washington County for his employer who did business in Pittsburgh, collecting the price in advance, but he omitted to tell the buyers where the liquor would come from. His employers took care to mark each buyer's liquor with his name, then put all the parcels in a barrel and sent the barrel to the agent, who made the deliveries. As late as 1904 Judge McIlvaine[11] had the old fashioned idea that the buyer should actually go to Pittsburgh for his liquor or else get it through a common carrier. He said: "Because he got the money from other people and delivered to them what the money paid for within the jurisdiction of this court" the sale was made in Washington County. "It was the wholesaler's whiskey when it got to the agent. The sale was consumated when the whiskey was delivered to the buyers." What heresy! Had he never seen the Hess case? Paxson has held that charging a buyer's account with the price is the same in effect as getting his money. But Rosenberg's employer *already had the money*. Of course the sale was in Pittsburg! But Judge McIlvaine even gave reasons for his bad law as follows: "If it were not as I charge you, a wholesaler in Pittsburg could have an agent in every town in this county and not pay a cent of license in this county, competing with the men who have paid a license fee in this

[11]In Com. v. Mikesell, 35 Pitts. Leg. J. 149, Judge McIlvaine gives the following friendly suggestions to dealers who want to do business in unlicensed territory without incurring the penalities of the law: "Let each provide a blank order book containing printed skeleton orders in this form: "The——day of———, 190 , ——o'clock—— no.—— kegs and ——doz. bottles for ——— to be delivered at ———, order received from———by———,' and also cards on which are printed the same skeleton order. Whenever an order is received at the brewery, let it immediately be entered in the order book and on one of these cards by filling in the date, the hour, the name of the person *for whom* the beer is ordered, the house, room or place at which it is to be delivered, the *name of the person sending* or giving *the order* and how sent or given, whether by letter, postal, 'phone, wire or in person. Then when a wagon is loaded for delivery let the orders filled be checked off the order book and let the driver have the cards that cover every package that he is to deliver from that loaded wagon. *Let no employe take from the brewery any package not previously sold and entered on the order book*, and let the deliveries be made only to the persons and at the places named in the orders." He might well have added that the packages should be tagged with the buyer's name, and that the wagon driver should refrain from taking orders.

county to sell. You can see why that would be unfair." Of course in the light of the Hess case, this is the "height of absurdity." If Rosenberg did wrong at all, it was because he failed to disclose his employer's name when he took the orders, or because he was a "peddler." There was no suggestion that the agency was not real.

If an agent, so called, is found to be in fact a middleman, he will be convicted though he takes particular pains that the setting apart be done in licensed territory. In Com. vs. Leslie, 30 Super. 529, a groceryman sold oleo only to such persons as first signed orders addressed to a Chicago firm. Upon the receipt of these orders the Chicago firm carefully marked each package with the name of the orderer and forwarded the reassembled packages to the defendant who made deliveries and collected the money. Each shipment was addressed by the Chicago house to "H. C. Leslie, Agent," but whether they deemed him their agent or the agent of the various purchasers in procuring the oleo for them was not clear. The superior court was of the opinion that he was the agent of nobody, that he really bought and sold the oleo and that the packages were merely marked by the Chicago house with the ultimate buyers' names because their customer, the defendant, requested it. They really gave no credit to the ultimate buyers. They made the sales because Leslie sent cash with his orders. They paid him no salary nor commission. He was content that the oleo attracted customers to his store. Had the Chicago house shipped each small package by express to each customer, Leslie would have made a sale in Chicago to each of his customers and the Chicago house would have been his agent to deliver to the carrier, the buyer's agent. They might have been shipped C. O. D. and still all would have been well. But when Leslie undertook to deliver and collect in person, he became a criminal. Or had Leslie required each customer to sign a paper in which the customers requested him as agent for the customer to purchase a pound of oleo and agreed to reimburse him, their agent, upon his execution of the agency, he might have escaped. He would not become an owner merely from having advanced the price for the benefit of his principals and title would pass to the customers when the packages were set apart for them, though reassembled and sent to their agent in their collected, form. It is not selling for an agent to deliver his principal's goods to him and receive reimbursement for his outlay. Of course the

transaction must be in fact what it is in form or it will be condemned as another "subterfuge."

One Hicirrionic was held to have been properly convicted in 39 Super, 510, upon a similar state of facts. He took orders for liquor with the understanding that he was to be paid on delivery. He had the wholesaler label each package and ship all to him, he paying the wholesaler in advance. Judge Orlady said: "None of the parties to whom he delivered the liquor knew from whom he was to purchase it, or where the liquor was to come from. The *device* of marking the several packages with the names of the persons to whom he intended to deliver them, while the assembled packages were continuously under his control, did not change the real character of transaction. Nor was the defendant the agent for the persons to whom he finally delivered the liquor. *All the parties were working together to further a common cause.* The whole proceeding was a crude attempt to evade our license laws."

So in Com. v. Pollak, 33 Super. 600, a grocer was held properly convicted for selling liquor. He was handicapped by the fact that the thirsty buyers were foreigners and could not read or write but he was fortunate, he supposed, in that he was the local express agent. First he sold the customer a money order. The illiteracy of the buyers made it necessary for him to send the money order to the brewing company. The company forwarded the beer by express to the buyers but in care of the express agent or a local drayman. Some of the buyers did not know where the beer was to come from. The drayman was paid by the defendant for making deliveries. Judge Henderson spoke of the transaction as follows: "The ignorant people who bought the beer were unfamiliar with business methods or the *means necessary to be adopted to make their purchase lawful.* . . . The consignment by the brewing company was not necessarily equivalent to a delivery. Whether it had that effect is a *question of intention* to be determined from all the circumstances of the case. The marking of the packages would not conclusively give to the transactions the character of a sale directly to the persons whose names were marked thereon. It might amount to a designation for the convenience of the defendant, and the shipment of the goods in his care, and the acknowledgment to him by the brewing company of the receipt of the money transmitted gives color to that inference." Lest the reader think that Mr. Pollak was sent to jail for being

an over zealous agent of the express company and that his activities were animated solely by a desire to sell money orders and procure express business, it should be added that he also returned empty packages to the brewery and was paid by them for doing so. He got nothing else from the brewery and nothing from the consumers but the empty packages but he was convicted properly for selling liquor as a middleman.

One Guja also dealt with benighted foreigners who failed to comprehend the intricacies of Pennsylvania law and he was held guilty of crime as a result. See Com. v. Guja, 28 Super. 58. The buyers only knew the defendant and knew he could get them the beer they wanted. As they did not understand why they should sign orders or even that they were orders, the court pronounced them "but a colorable device intended to give the business the appearance of a transaction between the buyers and the company." The company put their names on their beer but this too was deemed a subterfuge.

In Com. v. Guinzburg, 46 Super. 489, a *dealer* was convicted because his agent was deemed guilty of peddling. The agent solicited orders and had a "general understanding" that the liquor would be delivered at the buyers' homes, when payment was to be made. The dealer urged that he had been careful to "set apart" the packages ordered and had marked them with the names of the purchasers. It was not the delivery to the buyers by wagon that made the transaction unlawful but the agreement to do so. "The law," said the court, "if necessary, will look beyond the contract, whether in parol or in writing, as framed by the parties to ascertain and determine the real or true contract between them." An implied understanding that delivery is to be made at the buyer's residence will control an express provision to the contrary, the express provision being deemed a subterfuge. The Superior Court declares that the right to deliver by wagon applies equally to orders obtained through a solicitor as to orders obtained by mail but the order must not be accepted by the solicitor. He must transmit offers and they must be accepted at the place of business, and the agent must not agree to deliver to the buyer at his residence.[12] This must be the voluntary act of the dealer. The danger of doing business with foreigners who can't comprehend the intricacies of the law of sales was also strikinkly exemplified in this case. They should understand that they are buying at a dis-

[12]See to same effect Star Brewing Co.'s License, 43 Super. 577.

tant point and should know enough geography to locate the point on the map. They must not lack imagination.

Can we summarize the results of the decisions. Here are two attempts to do so. In Com. vs. Smith, 16 C. C. 644, the court charged as follows: "You may meet a licensed man in the street and order him to send you a gallon of whiskey or a case of wine or a box of beer, but that is not a sale. When he takes your order and goes to his place of business, fills the order and *sets the goods aside, that is a sale.* The sale is complete when the goods are set aside. Then if he sees proper, he may send a wagon to deliver the goods, but he cannot sell liquors from his wagon. *That would be peddling and the law does not permit it to be done.*" In the Guja case, 28 Super. 58, Judge Smith of the Superior Court made this statement: "Under a license to sell liquors a dealer may ship it by a carrier *or by his own conveyance* directly to customers beyond the county in which he is licensed, on orders received in the regular course of business *or on orders obtained outside the county through a solicitor.* In such cases the *sale is regarded as made at the dealer's place of business* and not in the county of the customer's residence, and this even though the price is to be collected by the carrier on delivery. But when a dealer's agent takes orders in another county, and fills them by delivering liquor furnished him by his employer in the county in which the latter is licensed it is a violation of law. In such case the *sale is regarded as made when the order is taken and the liquor delivered.*" . . . . . "The company sent the liquor by rail consigned to the defendant. . . . . The defendant received the liquor at the railroad station, delivered it to the purchasers and received payment. *The sales consisted in the order for the liquors, its delivery, and payment therefor,* all of which took place in Indiana. The sale in its inception and completion was a sale made by the defendant in Indiana." This statement would indicate that while a sale is complete as to a dealer when he sets the goods ordered apart for delivery, yet as to the employee who takes the order and delivers, the sale is where these acts are done. But we have emphatic authority for the proposition that if the sale is lawful as to the dealer it cannot be criminal as to the agent. In Com. v. Ginauder, 148 Pa. 110, Chief Justice Paxson's entire opinion was as follows: "This case is ruled by Com. v. Hess, just decided. The defendant in this case was the driver of Hess' wagon, and delivered the ale and porter to Cottman, the pur-

chaser, at Jenkintown. *Having held that the sale in question was lawful*, and that Hess had not violated the license laws, it follows logically that his driver had not."

The writer suggests the following summary. First, a dealer may sell liquor to one who resides in unlicensed territory if the buyer comes in person and receives the liquor in licensed territory. He may have ordered it before he left home and he may pay the price to a collecting agent at his home. The sale is located where he gets possession. Second, if the buyer sends his agent to receive the liquor from the seller at the latter's place of business, the sale is located where the agent gets the liquor and it is lawful. Third, if the buyer requests shipment by common carrier, the carrier is his agent and the same result follows. Fourth, though the buyer does not request it, if the seller consigns to the buyer by a non-negotiable bill of lading or sends the goods by express, whether C. O. D. or not, the carrier is the buyer's agent and the sale is lawful, unless the contract of sale provided for delivery to the buyer personally, in which case the carrier is the agent of the seller and the sale is unlawful. Fifth, if the title is reserved till payment, as where the seller takes a bill of lading to his own order and forwards it with draft attached, the sale occurs where the buyer gets actual possession and the sale is unlawful. Sixth, if the bill of lading provides that the liquor is deliverable to the buyer's order but the seller sends the bill to an agent to deliver to the buyer upon payment the seller has not reserved title but has merely enforced his lien,[13] as when he ships by express C.O.D., and the sale is lawful. Seventh, if the order is received by mail or wire, the sale is lawful though delivery is made in the seller's own wagon, provided he did not contract to deliver, but did so as a courtesy to the buyer and as his bailee. Title presumable passes unless the seller has something more to do *under the contract*. Eighth, though the order is solicited in unlicensed territory, if the goods are shipped by common carrier, consigned to buyer direct, the sale is lawful. Ninth, if the same man accepts the order at the buyer's home and makes delivery in unlicensed territory, whether common carrier intervened and goods were labeled or not, this is peddling and unlawful, whether he is really an agent or is in fact a middleman. Tenth, if peddling occurs, both agent and principal are liable to conviction. Eleventh, if one man takes the order and another makes deliv-

[13]See Uniform Bill of Lading Act. P. L. of 1911, p. 838, Sec. 40.

eries, the principal only is liable, as each employe did but part of the peddling. Twelfth, to sell and deliver directly from wagon, car or store in unlicensed territory is the extreme case and is manifestly unlawful. Of this class are all shipments made without a previous order. Even the carrier that knowingly carries liquor to a person who has not ordered it; and then deliveries it to the consignee, collecting the price and remitting it to the seller, is guilty. See Adams Express Co. v. Kentucky, 206 U. S. 129.

Whether one may solicit and accept orders by telephoning from the licensed territory and later deliver by wagon is as yet an open question. It hardly seems to be peddling and is probably lawful. Circulating by handbills and newspaper advertisements offers to sell whiskey at certain prices upon all mail orders was resorted to in Com. v. Fleming, 120 Pa. 138, but deliveries were made by carrier.

An express stipulation that the sale is to be deemed as made in the licensed place will not control.[14] If title passes when the parties intend that it should, and the place of sale is the place where goods are when title passes, it would seem that a sale could always be made lawful by the simple declaration of the parties as to their intent. Solicitors have merely to provide in their order blanks that the sale shall be deemed complete when the liquor is set aside and marked. But the courts say this is another "subterfuge."

Though the liquor is shipped in response to an order, if the buyer reserves the right to sample the liquor before accepting it and to return it, if not satisfactory, the sale is only complete upon the buyer's decision to accept the liquor and it would be unlawful. On the other hand an agreement to rescind a complete sale, if the buyer found the liquor unsatisfactory, would be in effect an agreement to repurchase the liquor and the proposed buyer might be deemed to have made an illegal sale when he returned the liquor by carrier. See 1 L. N. S. 497. Plain business men would reason, however, that if A can lawfully sell liquor to B, what criminality can there be in permitting a buyer to sample the liquor as he may sample a box of cigars sold on approval?

Most convictions now are either on the ground that the defendant was a peddler or else a middleman masquerading in the

[14] See Platts v. Beattie, 1 Q. B. 519 (1896).

guise of an agent.[15] For a full definition of a peddler see Trickett on Pa. Criminal Law, p. 337. The man who solicits trade and later makes deliveries direct to buyers is a peddler. See North Wales v. Brownbeck, 10 Super. 227 and 194 Pa. 609. It matters not that he had the goods marked with the buyers' names in another county. But the principal who delivers goods in his own wagon is not a peddler though an agent solicited the orders at the doors of the buyers. See Boistown v. Rochester Brewing Co., 9 C. C. 442.

If the reader thinks the present state of the law gives dealers too much lattitude and is operating to defeat the purpose of limiting sales to a prescribed territory, he will find the dissenting opinion of Justice Williams, concurred in by Justice Clark and McCullom, in Com. v. Fleming, 130 Pa., at p. 163, a most forcible and convincing expression of this feature of the situation. Is it not time for some legislation that will tell these "business men" what they may do and what they may not? Is it not time to locate a sale where some actual transfer is made instead of making it depend upon the buyer's ability to imagine himself at some point where he is not and to "intend" to buy it at such distant point? JOSEPH P. MCKEEHAN.

[15] See Com. v. Butterfield, 46 Super. 280, in which case Ct. J. Rice and Judge Head dissenned. If the judges can't agree, how can the plain man guess the law?

MOOT COURT

POWELL v. MONROE.

Action for Damages as the Result of Fright—Remote and Proximate Cause.

STATEMENT OF FACTS.

Powell was sitting in his library reading when he was startled by a loud explosion near at hand. He involuntarily leaped from his seat, tripped and fell to the floor, striking his head in the fall. His bruises were slight but he has not enjoyed his full mental powers since. He has had to employ a man to take his place as manager of his factory because of loss of memory, etc. Monroe negligently exposed the gasoline tank of his auto and it was this that led to the explosion.

Rogers for Plaintiff.

Westover for Defendant.

OPINION OF THE COURT.

YOUNG, J.—The facts as presented to us, though extraordinary in themselves, are governed by well established principles of law. Monroe and Powell were individuals entirely distinct as to their relations and neither owed the other any extraordinary degree of care We must assume that they were simply neighbors, or for the time being in near proximity to each other. We do not know that they were even acquainted.

Monroe negligently exposed the gasoline tank of his automobile and in the resulting explosion Powell, sitting in his library, involuntarily leaped to his feet, tripped and fell, striking his head.

In an action for damages caused by negligence the true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to follow from his act. 104 Pa. 306. The proximate and not the remote cause of the injury is to be considered. The question is, Did the cause alleged produce the injury without another cause intervening? 116 Pa. 344. Can it be contended that Monroe could have foreseen the accident to Powell? Is the injury Powell sustained the natural and probable consequence of Monroe's act? Certainly not. Nor do we think that Monroe's negligence was the proximate cause of the accident. Rather it appears to us the proximate cause of the accident was the peculiarly sensitive temperament of Powell. Ordinarily men are not so affected by a simple explosion and the law cannot recognize different rules for the differing nervous organizations of individuals. Though the explosion was a cause yet we hesitate to call it a proximate cause and think that recovery could be precluded on the ground of remoteness.

But recovery in this case cannot be had without reversing many decisions in this and other states. Shock and fright are intangible and

unless accompanied contemporaneously with some direct physical injury which that shock injuriously aggravates, by nervous excitemeut, such mental suffering alone is not the subject of legal redress. 1 Lehigh Law Journal 142. "No recovery for fright, terror, alarm, anxiety, or distress of mind, even if these result in physical injury, can be had in an action for negligence where there are no physical injuries except those caused solely by the mental disturbance." 168 Mass. 285. Approved in 151 N. Y. 107, and accepted by U. S. Circuit Court of Appeal, Vol. 9, Page 134.

In 168 Mass. 285, the lower court instructed the jury that a person could not recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury, but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. But the upper Court decreed a reversal as to thc second proposition, citing Pennsylvania authorities, and held that no cause of action arises as a result of any injury caused by mere fright. The reason assigned is that as a general rule this results in justice, that a new rule cannot be laid down for each case, that it would not be fair to change the rule in favor of peculiarly sensitive people, and that otherwise a door would open wide for unjust claims which could not successfully be met. 151 N. Y. 107, affirming, adds that the seriousness of the result operates not in the least to alter the principle.

The case of Chity v. Philadelphia Rapid Transit Co., 224 Pa. 13, is a recent affirmation of the Pennsylvania doctrine. The Court says that the trend of the decisions both in this country and in England is against allowing for mental suffering, or nervous shock, or fright, as elements of damages, and when the injuries relied on to sustain the action flow from such causes the action cannot be sustained. Justice Elkin, who wrote the opinion, declares this to be the settled law in this state. Other Pennsylvania authorities are 147 Pa. 40; 126 Pa, 164; 204 Pa. 551; 2 Sadler 31, and 17 D. R. 1012, permitting a recovery, are distinguished from cases similar to the one at bar and expressly recognize the principles of law applicable here.

Chief Justice Mitchell in 212 Pa. 548, gives a well-considered justification of the principle upon which our decision is based.

Judgment for Defendant.

OPINION OF SUPREME COURT.

There are two distinct objections to a recovery in this case. The first is that the injury to the plaintiff is too remote. The second, which is totally different, is that the effects whether too remote or not, were fright and the consequences of fright.

The automobile was on the highway or in a garage. Powell was sitting in his library. How far was the library from the autocar? Was there any probability that an explosion would result from the "exposure" of the tank which is alleged to have been negligent? or that some one, at the distance at which Powell was, and within a house, would be startled? or that, being startled, he would leap from his seat? or that leaping from his seat, he would trip? or that, tripping, he would fall and strike his head? or that, striking his head, he would injure his brain so as to im-

pair his mind? We think the court properly refused to allow the jury to say that the mental impairment was the natural, the probable consequence, a consequence the like of which ought to have been foreseen, when Monroe committed the negligent act.

The second objection, as we have said, is totally distinct. Let us concede that the surprise, the shock, the leap from the chair, the stumbling, falling, and injury to the brain, were the foreseeable consequences of the explosion and could and should have been foreseen by Monroe, and averted by his avoidance of the exposure of the gasoline tank. Must he compensate Powell for these consequences? The learned court below has come to the conclusion that he need not.

The doctrine that for fear, fright, terror, although it is an unhappy state of mind, there can be no compensation, when the act causing it was merely negligent, is recognized. But, whether, when this fright issues in a bodily injury, there shall be liability for this injury, is a different question. A fear which leaves no perceptible physical effects, is one thing; a fear which produces these effects is another thing. Exemption from liability for the former does not logically entail exemption from liability for the latter. Yet the difference has been but dimly perceived in several of the cases. Ewing v. Railway Co., 147 Pa. 40, the plaintiff alleged that fright, and sickness and corporeal disablement had resulted from the defendant's negligent act. The court thinks it negates the right to recover by the principle that "*mere* fright when unaccompanied by some injury to the person', does not entitle to compensation. The writer of the opinion remarks that there was no allegation that the plaintiff "had received any bodily injury." There was a distinct allegation of sickness, disablement and physical pain. The fright was not "unaccompanied by" physical injury. The principle again appears in Hess v. Manufacturing Co., 221 Pa. 67, "It is settled that *mere* fright *unaccompanied* by physical injury, is not sufficient to sustain an action for negligence."

In Chittick v. Rapid Transit Co., 224 Pa. 13, a step in advance was taken, and for the first time it is distinctly stated that there is no liability for the negligent causation of fright, nor for the corporeal injuries which "flow" from it. "If," says Elkin, J., "the injuries sustained resulted from mental suffering, or from a severe nervous shock or from fright, occasioned by the unusual appearance, the rule certainly applies" [of no liability]. Here then we have the principle that neither for fright nor for the consequences of fright [apparently within the periphery of the body] is there liability. It may be remarked that the principle seems wholly inapplicable to the case before the court, and hence as dictum. A sudden bright light was negligently caused by the defendant. There resulted a temporary blindness, pain in the eyes, impairment of vision, nervous weakness, and these, says the justice, "are the injuries principally relied on to sustain this action for damages." Yet, the blindness, the impairment of sight, the pain in the eyes, did not result from fright. Fright is not mentioned. Nor did they result from "mental suffering"; nor from what is ordinarily kuown as nervous shock. There was a "shock" to the retina, and to the optic nerve, from the excess of light, but that effect is wholly physical, not at all psychical. Irrelevant seems the observation of the justice, "to hold that this is anything but a

case of nervous shock or terrible fright, our eyes must be closed to the facts and our minds to an intelligent understanding of them." The plaintiff did not allege fright, or shock; the facts described by her, did not presupposefright or shock. The assertion that the case was one of "terrible fright"or of "nervous shock" was wholly gratuitous.

The cases in which there has been a denial of the right to recover for the consequences of fright or shock, have been cases in which these consequences have happened within the body, without the medium of any external and visible agency. The case before us, is of a fright which induces a convulsive muscular movement; which ends in a fall, and a blow upon the head.

That certain phenomena will produce fear in horse, or other brute, or man, the courts do not deny. That this fright may induce unreasoning, precipitate muscular movements in horse or man, is well known. That these movements may issue in injury to the body of horse or man, or in injury to vehicles or other property, is also well known. If a horse sees a large piece of white paper wafted from point to point on the road, it takes fright, it rushes against a tree, it kills itself, or injures its driver. The man who negligently allowed the paper to be on the highway is responsible not for the horse's fright possibly; but for the effects of that fright, for the death of the horse, the harm to the owner.

We can as well know (we do know) that the plaintiff was startled as that the horse was frightened; that his leap was the effect, as that the horse's dash into the tree was the effect; that his stumbling, his fall, and his injury resulted, as that the death of the horse and the hurt of the driver resulted. Why then should there not be responsibility for these results in both cases?

In Chittick v. Transit Co., 224 Pa. 13, the plaintiff, startled, fell from the chair to the floor. The court considers that her claim is not for any injury arising thence. Her bruises, the writer observes were of a temporary character and not serious. Possibly he thought that had her action been for these bruises, she might have recovered. In Dumee v. Regal, 17 Dist. 1012, a woman was frightened by a man who advanced towards her with a raised knife; she ran, and the fright, or the effort of running caused a miscarriage. Conceding provisionally that there could be no recovery for the mere fright or mental suffering, the court thought there could be a recovery for the miscarriage that followed from the exertion that she made to escape, although the exertion was the result of the fright. We admit that this case is seriously different from the present case, in that the defendant there did an act which he had reason to believe wonld awaken terror and lead to exertion to gain a place of safety, whereas here the act did not present itself to the defendant's mind as a possible cause of fear to the plaintiff. Dumee v. Regal illustrates, however, the possibility of judicially establishing the existence of human fear as a phenomenon, and the causal relation between it and muscular movements which issue in injury to the body.

Allen, J., in Spade v. Lynn & Boston R. R., 168 Mass. 285, after saying that for the negligent causation of fright which causes immediate injury to the brain, kidneys, lungs, nerves, there is no liability either for the fright or this resulting injury, remarks, "The logical vindication of this rule is that it is unreasonable to hold persons who are merely

negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims which could not successfully be met." The first phrase of this sentence appeals to the natural and probable consequence principle. It is absurd to say that a negligent person ought never to be supposed able to anticipate fright as the result. Fright of horses he is repeatedly held bound to anticipate. The same experience that shows horse-fright to be a probable consequence of an act, will show man-fright to be such a consequence. The situation may be such, (and we have so envisaged the defendant's situation) that he could not properly be held bound to anticipate the fright, or the consequences thereof. It may also be such that to hold him bound thus to anticipate would be entirely sensible and expedient.

The second phrase, to the effect that fraud would be easy, were the consequences of fright allowed to be a ground for damages, strikes us as wanting in force. There are doubtless cases in which the evidence may impose on the jury. There may also be cases where there is no serious risk of such imposition. If a negligent explosion should startle A into a spasmodic effort to flee, and in doing so, he should rush over a precipice and break his neck, what special liability to imposture would there be? Is fright so rare, under such circumstances? Is fright not capable of being evidenced by the *res gestæ* as well as by testimonial assertion of the frightened person? Is fright's causativeness of headlong flight, a matter about which the credulity of juries may be abused? And why are cases in which there is no more than the ordinary risk of error on the part of the jury to be kept from it, because there *are* other cases in which that risk would be extraordinary? Observations similar to those of Justice Allen are the product of too great concentration of attention on some of the members of a class of cases and ignore the immense difference between them and other cases of the same class. The court does well to insist on sufficient proof of the existence of the fright, of the alleged effects, and of the alleged connection between them, but to say that fright shall never be proved, nor the results of fright, as the foundation of damages for negligence strikes us as a fatuous abdication of the functions of a court.

Affirmed.

WM. BUCKLEY v. D. & D. R. R. CO.

Damages Awarded to Son for Negligent Killing of Father by R. R. Company—Residence of Plaintiff Immaterial.

Puderbaugh for Plaintiff.
Underwood for Defendant.

OPINION OF THE COURT.

DICKSON, J.—On the trial the following facts appeared: John Buckley was a hopeless invalid and earned nothing by his own exertions. He supported himself and his son William entirely from the income of United States Government Bonds in which he had $200,000 invested. William is thirty years old and can support himself. He was living in

Europe at the time of his father's death. John Buckley was killed in a wreck on the defendant company's Railroad due to the negligence of the defendant company. William is the sole legatee of his father. His annual allowance had been $2,000, and the count charged that the jury might award such a sum as would purchase an annuity for him of $2,000 for as many years as John's expectancy of life would have been had he not been killed and that the terms of John's will may not be considered. Verdict for $25,000.

This is a motion for a new trial. Counsel for defendant acknowledges the validity of the plaintiff's right of action but contends that the jury was improperly instructed as to the method of computing the damages. He urges that the true measure of damages is the pecuniary loss suffered and that the pecuniary loss is what the deceased would probably have earned by his labor, physical, or intellectual, in his business or profession if the injury that caused his death had not befallen him, which would have gone to the support of his family. In connection with this proposition he further argues that profits derived from capital invested in business cannot be considered as earnings.

The right of action and the parties entitled to it result entirely from two statutes, viz: one of April 15, 1851, Sec. 19; and the other, April 26, 1855, Sec. 1. The former gives the right of action and the latter defines who may sue. The latter act provides that the husband may sue for the loss of the wife, the wife for the husband, and the children for the parents. Penna. R. R. Co. v. Zebe et ux., 33 Pa. 318. This Act makes no distinction between children over age and those under age. . . . If the children, although not living with their parents have a reasonable expectation of pecuniary advantage from the continued life of the parent, they are entitled to recover damages for such loss.' 55 Pa. 499 Pa. R. R. Co. v. Adams: 90 Pa. 15, N. Pa. R. R. Co. v. Kirk; 100 Pa. 95 Lehigh Iron Co. v. Rupp; 160 Pa. 602 Schnatz v. P. & R. R. R. Co.

Stahler v. P. & R. R. W. Co., 199 Pa. 383 presents a controversy in many respects similar to the case at bar. It appeared that the plaintiffs claimed damages for the loss they sustained by reason of the death of their father who was killed in a railroad accident caused by the negligence of defendant's employes. The three plaintiffs, none of whom were less than 39 years of age, showed that the deceased had contributed large sums of money to each annually. The Court stated in its opinion, "The true question is what had these plaintiff's the right to expect to receive from the parent during his life and for the loss of this they are to be compensated. . . The loss spoken of is the taking away of that which they were receiving and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation."

It is on this ground that we are of the opinion that the instruction given by the Court below in the charge was proper.

The defendant urged that the Court should have instructed the jury to find the deceased's earning capacity and multiply that by the number of years he would be expected to live. It appeared that John Buckley was a hopeless invalid, his earning capacity was therefore, "nil." Suppose the court had given the instruction prayed for. What damages would have been awarded? Whether the jury had estimated the de-

ceased's expectancy to be one year or a century the result would have been the same. It requires no intricate mathematical calculation to convince even the most simple minded individual that nothing multiplied by one or nothing increased to a magnitude of one hundred times itself still leaves nothing as a result. It is obvious that this contention possesses no merit. "Compensation," says Chief Justice Thompson, in Penna. R. R. Co. v. Keller, 67 Pa. 300, a case somewhat analogous to the one at issue, "for the loss of life was given to certain survivors by the Act of 1855. The law chose to regard it as property in a certain sense. It was to be estimated by the same standard as property, viz: its pecuniary value, not to be enhanced by any considerations of pain of the deceased, or anguish to the survivors. Life, by law had a value for the loss of which the survivors had a right to be compensated, in view of its circumstances. In estimating it, considerations that personal exertions may ever be required of its possessor, or the possible want of capacity in such possessor, are not to be taken into account."

In view of these clear and concise statements of the law rendered by the learned chief justice but forty years since and considering also that this case is cited and quoted with approval in Stahler v. P. & R. R. Co., 199 Pa. 383, which latter case was decided but ten years ago, can any well-founded doubt exist as to the propriety of the instruction given the jury by the learned court below?

Our conclusion is, therefore: that John Buckley was wrongfully deprived of his life thereby cutting off the plaintiff's annual income which he had been receiving from the deceased and as we have learned from the cases hereinbefore mentioned, it is for this loss that the plaintiff is entitled to recover. The fact of the inheritance and its amount were not admissible in evidence upon the question of damages. 44 Pa. 175 N. Pa. R. R. Co. v. Robinson; 199 Pa. 383 Stahler v. P. & R. R. R. Co.

Defendant's final point was that profits derived from capital invested in business cannot be considered as earnings.

We dismiss this argument without discussion for we have sought earnestly for the relevancy of the terms "profits"; "business"; and "earnings," to the facts here in controversy, but our own search has proved futile. We have here the simple case of an investment of the sum of $200,000 in government bonds yielding an income which supported the Buckleys. There was no "business" from which to derive any "earnings" nor "profits."

The fact that the plaintiff was living in Europe at the time of his father's death does not alter the case. See act entitled "An Act to amend Section One of an act relating to damages for injuries producing death, approved the 26th day of April, 1855, so as to provide that certain surviving relatives be citizens of this Commonwealth or not," approved June 7, 1911, which reads "Be it enacted, etc., That the persons entitled to recover damages for any injuries causing death shall be the husband, widow, children or parents of the deceased and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he,s he, or they be citizens or residents of the Commonwealth of Pennsylvania or citizens or residents of any other state or place subject to the jurisdiction of the United States *or of any foreign country or subject of any foreign pottenate*, and . . . . . "

See also following cases cited supra. 55 Pa. 499 R. R. Co. v. Adams; 90 Pa. 15 N. Pa. R. R. Co. v. Kirk; 100 Pa. 95 Lehigh Iron Co. v. Rupp; 160 Pa. 602 Schnatz v. P. & R. R. R. Co.

We conclude that the points assigned for error are without merit and that judgment should be entered on the verdict for the plaintiff.

Motion for new trial denied.

OPINION OF SUPREME COURT.

In North Penna. R. R. Co. v. Robinson, 44 Pa. 175, it seemed abhorrent to the fastidious mind of Justice Thompson that the recovery for negligent killing of a parent should be based on the pecuniary injury which his death has occasioned. "If such be the rule" he observes, "we shall have the indecent spectacle of an investigation whether the loss of a parent or child, was or was not in fact an advantage rather than a loss, for certainly, if none be allowed to recover but such as are able to show a pecuniary loss, the defendants would, with great apparent reason, at least, be entitled to claim the right to prove the contrary, and to show peradventure, that by the death, the party may have succeeded to an estate or, on the other hand, had been released from the burden of maintenance. In case of the death of aged persons or helpless infants, we might expect in the application of such a rule to have the point discovered whether the death was an actual gain or loss. The law does not open the door to anything so shocking."

Justice Thompson's scruples have not persisted. It is now understood that only those can recover for a death who can show that they have been pecuniarly disadvantaged by it. They must show that they would probably have received periodic benefits, susceptible of appraisal in terms of money, had the deceased continued alive. "Unless such loss be shown" says Mitchell, J., "there can be no recovery." Lewis v. Turnpike Co., 203 Pa. 511. Such an exposition is no doubt "shocking." What more repulsive than for a son to prove in court that he could have got $1,000 a year from his father, but for his death, and to ask the court to console him for that death, by giving him the present worth of these aunual benefactions ?

If then it is true that any compensation for pecuniary loss is to be given, and if it becomes necessary, in ascertaining this compensation, to inquire into the pecuniary loss, it would seem that the inquiry ought at least to be logical and honest. If the death also produced a pecuniary advantage, why is that advantage not to be considered in determining the actual loss? A father would have given a son $500 per year; but in doing so, he would have reduced the estate which the son would inherit, by so much. Death prevents continuance of the annual gifts, but in doing so, it causes an immediate gift of the fund from which these gifts would have been made, a fund therefore so much the larger because of the stoppage of the annual subtractions from it.

In the case before us, John Buckley had no earning power. He had $200,000, which yielded him, let us suppose annually, $10,000. Of this he gave $2,000 to his son every year. His death causes thecessation of the gift of $2,000 per year, but it causes the instant gift of $200,000, or, annually of $10,000. It is evident that the son is a pecuniary gainer by the death of the father. To hold the causer of the

death liable, is simply to abandon the principle that the object of the act of 1855 is to compensate for pecuniary loss, and to give it a different object.

In Stahler v. Railway Co., 199 Pa. 383, the court invents another object. It was attempted to show that the plaintiff having inherited a large estate by his father's death, had actually been pecuniarly benefited by his demise. The court's answer, in part, to this contention is, "If this is the law, what security have the wealthy against the negligence of others." The death of the rich will be pecuniarly more advantageous to their children, than their continuance in life. Hence there will be no damages recoverable from those who cause their death? But, what repressed the killing of the rich, before the acts of 1851 and 1855? Was it the object of these acts to penalize and lessen the probability of negligent or purposed killings? If so the act strangely conceals its object. The courts have been slow in discovering it. The cases are not few, in which the object of the legislature has been declared to be, to compensate for the destruction of the child's or widow's expectation of pecuniary advantage. R. R. Co. v. Kirk, 90 Pa. 15. Mitchell, J., with some exaggeration says in Lewis v. Turnpike Co., 203 Pa. 511, "*All* of the cases from the passage of the act have uniformly held that the damages recoverable under it are compensation for direct pecuniary loss only, and unless such loss be shown, there can be no recovery." The aim of the act is not to punish or frighten people into careful avoidance of killing, but to give pecuniary indemnity to the losers by such killings.

However, in R. R. Co. v. Kirk, 90 Pa. 15, and in Coulker v. Pine Township, 164 Pa. 243, it has been decided that the money obtained on a life policy upon the deceased, cannot be subtracted from the pecuniary losses which his death has caused his heirs or next of kin, and in Stahler v. Ry. Co., 199 Pa. 383, account was not taken of the acceleration of the plaintiff's inheritance of a large estate, because of the death of his father. If these cases were properly decided the conclusion of the learned court below is probably correct. The son has lost the $2,000 annually, payable from the estate of his father, but he has gained the estate and the $10,000 which, less the $2000, his father would have retained. He is in fact benefitted pecuniarly by his father's death. So we must cease to say that the plaintiff may recover only when he has suffered a loss, and substitute for this maxim, the statement, he may recover for what would have been his loss, had the death of the parent not put an estate into his hands, either by inheritauce or devise, by a contract of life insurance, or by some similar way.

Affirmed.

BUCKLAND v. CHICKERING.

Agency—Contract by Unauthorized Agent in Behalf of His Principal—Ratification.

STATEMENT OF FACTS.

Martin was traveling salesman for Chickering for the procuring of orders for the product of Chickering's shoe factory. He had no authority to buy anything for the defendant. Buckland offered to sell him a

quantity of leather for Chickering and Martin signed the defendant's name to a contract in which he agreed to buy the leather. He explained to Buckland that he had no authority but that he believed the purchase would be ratified.

Martin wrote his principal what he had done and posted the letter. Ten minutes later he was accidentally killed. Chickering replied to this letter approving of the purchase but he has since decided not to perform. Buckland brings assumpsit and offers in evidence Chickering's letter to Martin.

Conway for Plaintiff.
Long for Defendant.

OPINION OF THE COURT.

ROOKE, J.—It is a well settled principle that when an agent makes a contract, with a third party, on behalf of his principal, the contract is of no effect unless the principal subsequently ratifies the unauthorized act and thus completes the contract.

The question, which presents itself in the case before us, is whether there was such a ratification in this case by Chickering as would make the contract, between Martin and Buckland a binding one.

We think that there was such a ratification.

Such cases are considered, in Pennsylvania at least, to be in the nature of an offer by the third party, Buckland, to the principal, Chickering, and that as soon as he has ratified the unauthorized act of the agent, he has in a manner, accepted the offer and the contract becomes a binding one from that moment. McClintock v. Oil Co., 146 Pa. 144.

This view taken by the Pennsylvania Courts is contrary to the view taken in England and also to that taken by the courts of Wisconsin. We think, however, that the rule is particularly applicable to the case before us. The facts state that Buckland was in possession of full knowledge that Martin was not authorized to make a contract with him for the purchase of the leather by Chickering, and also that the contract would be of no effect unless Chickering choose to ratify it.

What is there that is more in the nature of an offer than this?

Martin, the agent, was merely the means by which the offer was communicated to Chickering. Why can he not be treated, as far as this transaction is concerned, as the agent of Buckland?

The next question which presents itself is whether there was an "acceptance" of the "offer."

The counsel for the defendant contends that where there is an acceptance of an offer, such acceptance must be communicated to the offeror before the contract becomes a binding one. This contention, however, cannot be supported in view of the facts of the case.

The transaction was carried on by mail and the rule is that the contract becomes binding on the parties as soon as the letter of acceptance has been placed in the post office.

The fact that the letter was addressed to Martin and that Martin had died before he received the letter can make no difference.

Had the letter been addressed to Buckland and gone astray the contract would have been binding. As was said in Barney v. Clark, 22 Pitts. L. J. 69, where a transaction is by mail, the contract is completed by

the deposit in time, in the post office, of a letter, properly addressed, accepting the offer and the parties are bound even though the acceptance never reaches the offeror. P. & L. Dig. of Dec., Vol. 3, Col. 3880.

There is very little difference between the above case and the case at bar. Had Martin lived he would have communicated the letter or rather its contents to Buckland, and the fact that he died cannot, we think alter this.

Had the agent been authorized in the first instance to make the contract, there is no doubt but that it would have been a binding one and it is well settled that subsequent ratification is in every way equivalent to plenary, prior authority. 9 Pa. 40; Huntzinger v. Harper, 44 Pa. 204; Gordon v. Preston, 1 Watts, 385.

Judgment for the plaintiff.

OPINION OF SUPERIOR COURT.

We are not able to consider the transaction as does the lower court. It regards Martin as the agent of Buckland to make an offer of the leather to Chickering. Martin's letter, it thinks, was the means of making this offer. The despatch of Chickering's letter to Martin, was the acceptance of this offer. Doubtless had Martin's letter been an offer for Buckland, the acceptance would have been properly made by the sending of a reply to him. The fact that he did not receive the reply would not expunge the acceptance which would have been consummated by its despatch.

The fact is that Martin was acting as agent of Chickering. As such, he wrote to "his principal," Chickering. That letter did not ask him whether he would accept Buckland's offer, but whether he would approve of the acceptance already made for him, of that offer. The real question is, whether there has been a ratification of an act which, though done for Chickering, has been done without authority.

Ratification is "mental assent" to the act previously unauthorized. R. R. Co. v. Cowell, 28 Pa., 329. No special mode of manifesting this assent is necessary, although there must be some manifestation of it, since, otherwise, its existence could not be known. The letter of Chickering to Martin, "approving of the purchase", shows that this "mental assent" existed. That this letter was never seen by Martin is unimportant. It is not necessary that the agent should be made aware that his act has been approved. The other contracting party is the person who is interested to know that the ratification has occurred, but a formal communication is not essential. 28 Pa. 329, *supra.*

It is scarcely necessary to say that when there has been a "mental assent" to the act of the agent, a subsequent change of mind has no consequences. "When once the principal" says Huffcutt, "has, with knowledge of the facts, free from mistake or fraud, adopted the act of the assumed agent as his own, he cannot afterward, withdraw his ratification." Agency (1st edit.) 44. "Ratification relates back to the time of the contract or act ratified, and the principal and third party are in the same position as if the act had been at that time authorized."

The court's decision that the plaintiff is entitled to recover is correct.

Affirmed,

LOVITT v. BURKHARDT.

Dependence Upon Deceased as Condition to Right of Recovery for Damages—Ambiguous Charge to Jury.

STATEMENT OF FACTS.

The plaintiffs in the court below, John and Mary Lovett, are sueing for the murder of their mother by the defendant, who was convicted and is serving a life sentence for his crime. John had been absent from home and unheard of for 10 years until his return after his mother's murder. Mary was supported by her mother at the time of her death and she is her mother's executrix and sole legatee.

The court below charged the jury to award damages sufficient to compensate Mary for her loss and that John was entitled to half the sum recovered. The defendant contends that this charge led the jury to award double damages to Mary in order that she might be fully compensated after John had taken his half. Appeal from judgment on verdict for $10,000.

Marshall for Plaintiff.

Landis for Defendant.

OPINION OF THE COURT.

McKINNEY, J.—John and Mary Lovett are sueing for the murder of their mother by the defendant who was convicted of the crime and is now serving a life sentence. John had been absent from home and unheard of for ten years until his return after his mother's murder. Mary was supported by her mother at the time of her death and is her mother's executrix and sole legatee. The court charged the jury that Mary was entitled to sufficient damages to compensate her for her loss and that John was entitled to half recovered.

We think there is no doubt as to Mary's right to a recovery. The only questlon left to the court of appeal is, did the trial court err in directing the jury that John was entitled to half the sum recovered. We think he did not. At common law the right of action died with the person for the reason that such a right was personal and, therefore, when the person died the right of action died. The question then is, has the Pennsylvania legislature provided for such cases? We think it has.

The Act of April 15, 1851, Sec, 18, is as follows: "No action hereafter brought to recover damages tor injuries to the person shall abate by reason of the death of the plaintiff; but the personal representative may be substituted and prosecute the suit to final judgment and satisfaction." Section 19: "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or if there be no widow, the personal representative may maintain an action for, and recover damages for the death thus occasioned."

The Act of April 26, 1855, P. L. 309, supplementing this act, is as follows: "Persons entitled to recover damages for ANY injury causing death, shall be husband, widow, children or parents of deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take of his or her personal estate in case of intestacy."

It is hardly supposable that the legislature would allow for substitution in the one case and not in the other and to say that the substitution is allowed where the injury was caused by negligence and that it is not allowed where the attack was wilful would be to encourage crime, lying, etc. The words of the Act of 1851 are "negligence or default." Negligence covers omissions or imperfections of action. Default was, we think, intended to cover positive acts which are wrongful, acts of violence, acts forbidden by law. There would be no motive to preserve from abatement an action brought to redress a wrong consisting in the effect of negligencc which would not require action founded on intentional injuries to be preserved also.

In the case of the North Pennsylvania Railroad Co. versus Robison 44 Pa. Lt. 175, it was held that an action against a railroad company for negligence in causing the death of a father is properly brought in the name of all the children; the recovery is for the benefit of all, and the amount to be distributed as in the case of intestacy. Although the action is in tort yet, under the statute, there can be a joint recovery without showing that a joint damage had been sustained.

In this case of the four children, only one was dependant upon the father. The other three were joined in the action. They were all grown up, lived separately from their father, and derived no benefit fom him at the time of his death. The court was asked to instruct the jury "That to entitle the plaintiffs to recover, all must be entitled to recover in the present suit; that if but one of the plaintiffs suffered pecuniary damages, the defendants are entitled to a verdict."

The court said "I decline so to charge. If any one of the plaintiffs has suffered, the action will lie."

The appellate court said "The apparent incongruity with the rule, in ordinary cases of tort, must not control the terms of the statute which could undoubtedly give the remedy in joint or several form, and has given it in the former. The recovery is for the benefit of all the children for the statute provides that the money recovered shall be distributed in the same proportion as in the case of intestacy. This answers the objection that none of the children may recover but such as are injured by the death. If the rule were that none could recover except some actual pecuniary damage was shown we should have the indecent spectacle of an investigation whether the loss of a parent or child was not in fact an advantage rather than a loss." "The law means not to open the door to anything so shocking. It treats the value of life lost as a species of property and gives it, where the children sue, to them in the same proportion as the personal estate of an intestate."

These views we think sufficiently answer the assignment of error. The trial judge may have instructed the jury somewhat crudely but we are not called upon to revise the instruction of the court in reference to the assessment of the damages in the case. As the judgment stands before us it is in favor of both the plaintiffs and this is in accordance with the law.

Appeal dismissed at the cost of the appellant.

OPINION OF SUPREME COURT.

We are unable to reach the result attained by the learned court below. In an action by a widow, for herself, or for herself and children,

for the death of her husband, their father, or in an action by children for the death of their father, the recovery is to be limited to the amount of pecuniary loss which they may have sustained; what the deceased would probably have earned by his labor, and which would have gone to their support; R. R. Co. v. Armstrong, 52 Pa. 282; R. R. Co. v. Decker, 84 Pa. 419; Bannan v. Lutz, 158 Pa. 166.

John Lovett, one of the two children, who are plaintiffs, had been absent from home and unheard of for 10 years. He had received no support during this time from his mother, and he was probably over age at her decease. If a child is over age, a direct pecuniary loss by him from the death, must be affirmatively shown. "Parents and children in the section [Act of 1855] seem to be words used with an intention to indicate the family relation in point of fact, as the foundation of the right of action, without regard to age. * * * Under age the law presumes the relation to exist, and that stands for proof until the contrary appears. Over age, no doubt but the relation must be shown to exist in point of fact." Pa. R. R. Co. v. Adams, 45 Pa. 499; Lewis v. Turnpike Co. 203 Pa. 511. It is plain that John has not shown himself entitled to any compensation.

The court below has ruled that the damages should be sufficient to compensate Mary. Mary was supported by her mother at the time of the murder of the latter. There was no error in this ruling. But the court has also decided most remarkably that the compensation to Mary for her loss, must be divided between her and John, who has suffered *no* loss.

The learned court below, in refusing a new trial, appeals to the case of R. R. Co. v. Robinson, 44 Pa. 175, in which four children of the deceased sued for the negligent killing by the Company of their father. Only one of these children was dependent on and lived with her father. The other three were grown up, lived apart from the father, and derived no part of their support from him, at the time of his death. The trial court refused to say that if one only of the plaintiffs had suffered pecuniary damage, the verdict should be for the defendant. It said instead that "if any one of the plaintiffs has suffered, the action will lie." It also said that the jury could not assess more damages than the one plaintiff had suffered. No instruction was given as to the division of these damages among the three plaintiffs who had suffered nothing. Thompson J., in the Supreme Court, says, that the amount received is to be distributed equally among the four children. The appeal was not by the one child who alone had suffered the loss but by the Railroad Company, and it could have no interest in the question of distribution. In Lewis v. Turnpike Co., 203 Pa. 511, Justice Mitchell apologizes for the error of Thompson J., by remarking that "the subject was then (1863) new, and there are some expressions in the opinion which would probably not be used now, since the law has been more fully developed and distinctly defined."

The court below was in error in advising the jury that one-half of the verdict would be for the use of John. It is however not Mary who is appealing, and the ground of the appeal is that the court's remarks probably led the jury to double the damages in order that Mary should obtain full compensation despite the equal division of the verdict between her and John. We think the instruction may have led to this result. Mary, the court virtually says, should receive full compensation, but the verdict, whatever it may be, must be divided equally between her and John.

Judgment reversed with v. f. d. n.