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THE NEW DEFINITION OF MURDER IN THE FIRST DEGREE.

DEGREES OF MURDER

At common law there were no degrees of murder, and the punishment for murder was, in all cases, death.[1] The division of murder into degrees originated in Pennsylvania.[2] The second section of the act of April 22d, 1794, entitled "An act for the better prevention of crime, and for the abolishing of the punishment of death in certain cases," divided murder into degrees by declaring that all murder perpetrated in certain designated ways should be murder of the first degree and should be punished by death, and all other kinds of murder should be murder in the second degree, and should be punished by imprisonment.[3]

[1]Clark and Marshall on Crimes, P. 346.

[2]Clark and Marshall, P. 346.

[3]This statute was the forerunner and furnished the model for similar legislation in many states. Mikell's Cases on Criminal Law, P. 360.

The reason for the passage of this statute, as declared in its preamble, was that "the several offences which are included under the general denomination murder differ so greatly from each other in the degree of atrociousness that it is unjust to involve them in the same punishment." The statute, it has been said, "was designed to mitigate the existing rules of the common law, which involved in a common fate convicts almost infinitely separated in the heinousness of their crimes."[4] The legislature, "considering that there is a manifest difference in the degree of guilt, where a deliberate intention to kill exists, and where none appears, distinguished murder into two grades—murder of the first and murder of the second degree."[5]

HISTORY OF MURDER

The act of 1794 completed an interesting cycle of legal history. The term murder is derived from the word murdrum, which is the Latinised form of the Germanic word morth.[6] It has had, in course of time, various meanings.

SECRET KILLINGS

It originally denoted a secret killing.[7] In the case of such killings, the dead man was presumed to be a Norman, unless there was an express "presentment of Englishry," and the township in which the killing occurred was fined. The fine as well as the offence was called murdrum.[8] The presentment that the dead man was an Englishman, called

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[4]Kelly v. Com. 1 Gr. 484.

[5]Com. v. Drum 58 Pa. 9. This is not an entirely accurate statement of the distinction between the two degrees. See infra.

[6]The word murdrum first appears in the laws of Edward the Confessor. Thorpe, 1., 448; 3 Stephen's History of Criminal Law, P. 25.

[7]"Morth" means "secret." Its use in the early law was not confined to homicide, but extended to all secret crimes. It first appears as the name of a kind of homicide in the laws of Aethelstan. Thorpe, 1., 225; 3 Stephen's, P. 25.

[8]Kenny's Criminal Law, P. 124.

a presentment of Englishry, freed the township from this fine.[9] The practical distinction between murder and other forms of homicide was therefore that, in cases of murder, a presentment of Englishry was required, in the absence of which the person found killed was presumed to be a Frenchman (Norman) and the township was fined.

WORST KIND OF HOMICIDES

These fines, which were a remnant of the effects of the conquest of England by Frenchmen, were formally abolished by statute in 1340 on the eve of the great war in which the English conquered France.[10] Indeed, there is evidence that, prior to the passage of this statute, in the 274 years which had elapsed since the Conquest, the presentment of Englishry, and the meaning of the word murdrum in connection with it, had become almost forgotten.

The abolition of these fines and the presentment of Englishry removed the distinction between murder and other forms of homicide, and the word murder necessarily lost its original meaning. It had, however, become a well known and popular term, and its use was not discontinued. It came to be applied to the worst kinds of homicide, though it had no longer any distinctive meaning.[12]

At this time, the following classes of homicide seem to be distinguished:

(1) Murder, indistinctly conceived of as the worst species of the offence.

(2) Homicide per infortunium et se defendendo, which, though blamable to some extent, involved no other consequences than the expense of getting a pardon, forfeiture of goods, and imprisonment before trial.

(3) Justifiable homicide, which entitled a man to be acquitted.

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[9]As to what constituted Englishry there is some doubt.
[10]14Edw. 3, st. 1. C. 4.
[11]Stephen's General View of the Criminal Law, P. 137.
[12]Kenny, P. 124.

(4) Homicides which, though they did not belong to the worst class of all, were neither justifiable nor cases of misfortune or self defence, were distinguished by no particular name, but were capital felonies, though not called murders.[13]

MALICE AFORETHOUGHT

The next step in the history of murder consists in the adoption of the expression "malice aforethought" as the specific distinction between murder and other forms of homicide.

This expression, which had been in use since the 13th century, even before the abolition of Englishry, was first employed by juries in finding special verdicts of self-defence. In order to entitle a man to a pardon on the ground that he had committed a homicide in self-defence, it was necessary for the jury to find that he committed it "in self-defence, and not by felony or malice aforethought."[14]

UNPARDONABLE HOMICIDES

The term "malice aforethought" later came to be used as a test for certain unpardonable homicides. In 1389, the King upon the petition of the Commons, because the pardoning power was much abused, declared that a general pardon should not constitute a defence for murder committed by assault, waylaying, or malice prepense. In order that a pardon might be a defence in such cases, it must have stated that the murder was by assault, waylaying or malice prepense.

This was the first statutory recognition of the term "malice aforethought," which had been previously employed by juries in finding special verdicts of se defendendo. The statute was an indirect statutory definition of murder,

[13]Stephen's History of Criminal Law, P. 41.
[14]3 Stephen, P. 41.

and, after 1389, murder might have been defined as a kind of homicide in defence of which a pardon in general terms could not be pleaded.[15]

UNCLERGYABLE HOMICIDES

The distinction between a killing with malice aforethought and other killings was accentuated and made the specific difference between murder and other forms of homicide by the statutes which excluded murderers from the benefit of clergy. There were four of these statutes passed between 1496[16] and 1547.[17]

The words used in these statutes were "wilfully prepensed murder," "prepensed by murder," "murder upon malice prepensed," "murder of malice prepensed," and "wilful murder of malice prepensed." After the passage of these statutes, the term murder soon became limited, as it still is, to the form of homicide dealt with by the statutes—a killing with malice aforethought.[18]

The result of these acts was to divide homicide as follows:

(1) Murder, killing with malice aforethought—a felony without benefit of clergy.

(2) Wilful homicide without malice aforethought, then and since called manslaughter—a clergyable felony.

(3) Homicide in self-defence or by misadventure, which included many cases of what are now called involuntary manslaughter—not a felony, but requiring a pardon and involving forfeiture of chattels.

(4) Justifiable homicide, which was not criminal at all.[19]

The present definition of murder was therefore settled by the year 1547, but the questions, What amounts to "malice"? and, What is meant by "aforethought"? were

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[15]Stephen's General View of the Criminal Law, P. 139.
[16]12 Henry VII. C. 7.
[17]1 Edw. VI. C. 1, 2, 7, 10.
[18]Kenny, P. 124.
[19]Stephen's General View of the Criminal Law, P. 40.

not decided until a long time afterwards. The subsequent history of the definition of murder consists mainly, though not entirely, of the process by which a definite meaning was given to these words:

UNINTENTIONAL HOMICIDES

The words "malice aforethought," used in the statutes which excluded murders from benefit of clergy, were at first construed in their popular sense, and required, at least, that the killing should be intentional.[20]

The forensic experience of successive generations disclosed many cases of homicide which, though not resulting from a desire to kill, were considered heinous enough to deserve the full penalties of murder. These accordingly, one after another, were brought within the definition of that offence by a wide judicial construction of its language.

MALICE AFORETHOUGHT

The expression "malice aforethought" has therefore become merely a convenient comprehensive expression by which to describe all the various states of mind and circumstances that are considered so heinous that a homicide produced by any of them will be murder. It means a killing with any one of the following states of mind:

(1) An intention to kill.

(2) An intention to inflict great bodily harm.

(3) An intention to do an act which will probably kill or do great bodily harm, without any intention of causing death or inflicting great bodily harm.

(4) An intention to commit a felony.

(5) An intention to oppose any officer of justice in discharging certain of his duties.[21]

It has therefore been truly said that the term "malice aforethought" is now only an arbitrary symbol. For the malice may have in it nothing really malicious; and need

[20]3 Stephen, P. 47; Kenny, P. 132.

[21]See Clark and Marshall, P. 325 et seq. for extended explanation.

never be aforethought, except that every desire must necessarily come before—though perhaps only an instant before—the act which is desired. The word "aforethought" has thus become either false or else superfluous. The word "malice" is neither; but it is apt to be misleading, for it is not employed in its original (and its popular) meaning.[22]

The relevancy of this history of murder is simply this: It shows that the definition of murder was judically extended to include certain unintentional killings because the judges thought that they were as heinous as intentional killings and deserved the same punishment; and that later murder was divided into degrees by statute because the legislators thought that these same unintentional killings were not as heinous as intentional killings and did not deserve the same punishment.

THE ACT OF 1923

The commissioners appointed in 1859 to revise the criminal laws of the state were of the opinion that the act of 1794 "had been so thoroughly considered and its construction and meaning so entirely settled by a long course of judicial decision" that it was "inexpedient to attempt any important alteration thereof." As a consequence, upon their recommendation, it was reenacted by the legislature as section seventy-four of the act of March 31st, 1860.[23] This act, and its predecessor [24] have also furnished the model for the classification of murder in many other states. Nevertheless, in 1923, the legislature thought it desirable to amend it. It now reads as follows:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping shall be

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[22]Kenny, P. 132.
[23]P. L. 382.
[24]Act of April 22d, 1794, 3 Sm L. 186.

deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.[25]

The changes made in the statute, as indicated by the black type, are:

(1) The substitution of the word "attempting" for the word "attempt."

(2) The crimes are called murder in the first degree and murder in the second degree, instead of murder of the first degree and murder of the second degree.[26]

(3) The insertion of the crime of kidnapping.

The first two changes are probably merely formal and unimportant. The third is substantial and important. Before considering its meaning and effect, it is well to consider briefly the meaning and effect of the statute in general.

EFFECT ON DEFINITION OF MURDER

The statute does not define murder or change the definition of murder. It makes nothing murder which would not be murder in absence of the statute; nor does it make anything which would be murder without the statute less than murder; and as, in Pennsylvania, it is only by the common law that murder is defined,[27] it follows that:

(1) Murder in the first degree plus murder in the second degree equals murder at common law.

(2) Murder at common law minus murder in the first degree equals murder in the second degree.

Indeed, as the statute, after defining murder in the first degree, simply declares that "all other kinds of murder shall be deemed murder in the second degree," it is

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[25]Act of May 22d, 1923, P. L. 306.

[26]Under the act of 1794, the crimes were murder of the first and murder in the second degree. Under the act of 1860, they were murder of the first degree and murder of the second degree.

[27]C. v. Exlor 243 Pa. 19. Section 87 of the fact of March 31, 1860 makes an act which, in some cases, was murder at common law, a felony of less grade. C. v. Railing 113 Pa. 37. The act of May 19th, 1923. P. L. 283 makes certain conduct murder.

necessary to solve the second equation in order to ascertain what murder in the second degree is.

MURDER IN THE FIRST DEGREE

The statute apparently declares that four classes of murders shall be murder in the first degree:

(1) Murders by poison.

(2) Murders by lying in wait.

(3) Wilful, deliberate and premeditate murders.

(4) Murders in the perpetration of or attempting to perpetrate arson, rape, robbery, burglary or kidnapping.

MURDERS BY POISON

The statute declares, not that all killings by poison, but that all murders by poison, shall constitute murder in the first degree. Therefore one who gave poison to another believing it to be sugar, or who administered poison to another as a medicine and without negligence, would not be guilty of murder in the first degree if the poison caused death, because his conduct did not constitute murder at common law.[28]

Furthermore, a killing by poison, in order to constitute murder in the first degree, must be intentional—wilful, deliberate and premeditated.[29] The statute classes murder by poison with "other" kinds of wilful, deliberate and premeditated killing, and it is implied that only such killings by poison as result from a specific intent to kill are murder in the first degree. A killing caused by poison administered with the intention of causing a transient and, tho disagreeable or even dangerous, not a fatal illness, would not be murder in the first degree.[30]

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[28]Trickett's Criminal Law, P. 769.

[29]McMeen v. c. 114 Pa. 300.

[30]Trickett, P. 770. But see contra, S. v. Wills. 61 Ia. 629, 17, N. W. 90, 35 L. R. A. N. S. 624.

MURDERS BY LYING IN WAIT

Lying in wait involves watching and secrecy.[31] It consists of concealment for the purpose of taking the victim unawares.[32]

The statute, however, declares, not that all killings by lying in wait, but that all "murder" by lying in wait shall constitute murder in the first degree. It follows that a killing by lying in wait does not constitute murder in the first degree unless it would have been murder at common law.

Furthermore, a killing by lying in wait in order to be murder in the first degree must be intentional—wilful, deliberate and premeditated.[33] Murders by lying in wait are mentioned merely as instances of wilful, deliberate and premeditated killings. It is possible for one to lie in wait for another in order to interview him, to scare him, or to punish him slightly. An unintended killing would not be murder in the first degree simply because it occurred after the perpetrator had lain in wait.[34]

WILFUL, DELIBERATE AND PREMEDITATED MURDERS

There is considerable confusion in the cases as to the meaning of the expression "any other kind of wilful, deliberate, and premeditated killing," but there seems to be no disagreement upon the following points:

(1) The words are not to be construed ejusdem generis so as to be applicable only to acts of the same character as poisoning and lying in wait.[35]

(2) The word "wilful" means, not merely that the act which caused death was intended, but that the mortal ef-

[31]C. v. Gibson 275 Pa. 338.
[32]C. v. Mulferno 265 Pa. 247.
[33]C. c. Mondollo 247 Pa. 526.
[34]Trickett, P. 769. There are cases contra in other jurisdictions, on the theory that there is a conclusive presumption of intention from the means used. 29 C. J. 1111.
[35]P. v. Venunzo 212 Mich. 472, 180 N. W. 502.

fect of the act was intended. A wilful killing is the intentional doing of an act with the further intention of causing death. It is the intention to cause death which makes the act a wilful killing.[36]

(3) No particular time is prescribed as prerequisite to permit the required premeditation and deliberation.[37]

The statute qualifies the killings which are murder in the first degree by three words: wilful, deliberate, and premeditated. An effort is made in some of the cases to assign to each of these words a distinct meaning.[38] The present doctrine is that the words are synonymous, and mean simply that the killing must be intentional. The "true criterion" of murder in the first degree "is the intent to take life."[39] The deliberation and premeditation required are deliberation and premeditation enough to form this intent and not upon the intent after it is formed.[40] If an intent to kill is shown, the deliberation and premeditation are ipso facto discovered because they always exist when the intent exists.

MURDERS IN THE PERPETRATION OF FELONIES

The act of 1794, and its successor, the act of 1860, declared that a murder should be murder in the first degree if it was committed in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary. At common law a killing committed in the perpetration of any felony was murder, even though there was no intent to kill or inflict bodily harm and the act done was one of which death was not a natural and probable

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[36]Weston v. C. iii Pa. 251; C. v. Echerd 174 Pa. 137.

[37]29 C. J. 1113, Trickett, P. 790.

[38]The most well known and futile attempt is that of Judge Agnew in C. v. Drum 58 Pa. 9. It is much to be deprecated that in reading this opinion many lawyers and judges have mistaken eloquence of language for perspicacity of mind and perspicuity of expression.

[39]C. v. Reed 234 Pa. 573.

[40]C. v. Dreher 274 Pa. 325, C. v. Daynarowicz 275 Pa. 235.

consequence.[41] It follows that a killing committed in the perpetration of or attempt to perpetrate one of the enumerated felonies is murder in the first degree although there was no intention to kill or inflict great bodily harm and death or great bodily harm was not a natural consequence of the act done..[42] This is true altho the person killed was not the intended victim of the felony,[43] and the act causing death was done, not by the defendant, but by a confederate in the commission of the felony[44]

CLASSES OF MURDER IN THE FIRST DEGREE

It follows that, in reality, there are only two classes of murder which constitute murder in the first degree:

(1) Intentional murders.

(2) Murders committed in the commission of the enumerated felonies or in attempts to commit them.

Murder of the first degree requires that the death produced by the criminal act shall have been intended, except when it occurs in the commission of or attempt to commit the enumerated crimes. This intention to kill is required in the poisoning and lying in wait cases, for these cases are mentioned merely as special instances of "wilful, deliberate, and premeditated killings."

MURDERS IN KIDNAPPING

The act of 1923 added kidnapping to the felonies in the perpetration of which an unintentional killing shall be murder in the first degree. This addition was made as the legislative reaction to a very atrocious case without any consideration of its meaning or the extent of its application. It gives rise to the following questions:

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[41]Clark and Marshall, P. 340. For the origin of this doctrine, see 3 Stephen, P. 57. For criticism of the doctrine, see Stroud's. Mens Rea, P. 168.

[42]C. v. Flanagan 3 W. & S. 415; C. v. Lessner 274 Pa. 110, 21. Mich. L. R. 95, 36 H. L. R. 222.

[43]C. v. Major 198 Pa. 200.

[44]C. v. Biddle 200 Pa. 640.

(1) What is kidnapping?

(2) When is a killing committed in the perpetration of kidnapping murder in the first degree?

(3) When is a killing committed in the perpetration of or in attempting to perpetrate kidnapping?

WHAT IS KIDNAPPING?

Kidnapping is a misdemeanor at common law, and is usually defined as the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another.[45] There is, however, authority to the effect that sending the person taken into another country is not an essential element of the crime.[46]

It is not clear from the authorities whether the common law crime of kidnapping exists in Pennsylvania, or, if it does, what its definition is.[47] It has, however, been stated that section ninety-four of the act of March 31, 1860, defines "the offense known and punished by the common law as kidnapping."[48]

The act of February 25th, 1875,[49] was intended as an addition to the act of 1860; and the act of April 4, 1901,[50] repealing all inconsistent acts, is entitled "An act to punish kidnappers, their aiders, assistants, and abettors." The offenses defined by these statutes are not precisely the same as the crime of kidnapping at common law; and the effect of these statutes upon the common law crime and upon each other has not been decided.[51]

It is therefore impossible to know what the crime of kidnapping is at present in Pennsylvania; but it seems that, whatever may be the present definition of the crime,

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[45]Clark and Marshall, P. 302; 8 R. C. L. 296; C. v. Eshelman 2 D. & C. 115.

[46]24 Cyc. 797.

[47]See C. v. Eshelman, C. v. Neuhauser 47 C. C. 474; C. v. Francis 53 Super. 278; Burns v. C. 129 Pa. 138; C. v. Myers 146 Pa. 24.

[48]Burns v. C. 129 Pa. 138.

[49]P. L. 382.

[50]P. L. 65.

[51]See C. v. Eshelman; C. v. Neuhauser; C. v. Francis.

the term "kidnapping" as used in the act of 1923 must be construed as referring exclusively to kidnapping at common law.[52] The questions still remain: What is the common law definition of kidnapping in Pennsylvania? Does it require a taking into another state? If so, is the killing of a person stolen in another state, by an act done after the person has been brought into Pennsylvania, murder in the first degree in Pennsylvania?[53] Obviously the death of a kidnapped person in Pennsylvania by an act done in another state would not be murder in the first degree in Pennsylvania; but, under the fourty-seventh section of the act of March 31st, 1860,[54] the killing of a kidnapped person in Pennsylvania, by an act done in Pennsylvania could be punished in Pennsylvania even though the death occurred in another state.

HOMICIDES IN KIDNAPPING

The murder must be committed in the perpetration of or attempting to perpetrate kidnapping. It is therefore necessary to consider:

(1) The beginning of responsibility,

(2) The termination of responsibility,

for murder in the first degree because of the statute.

This responsibility begins as soon as the actor's conduct in pursuance of his intention to kidnap is sufficiently proximate to the kidnapping to constitute an attempt to kidnap. The subject is therefore involved in the very difficult subject of attempts, which has never been discussed by our courts in a satisfactory manner. The difficulty of deciding what constitutes an attempt to kidnap appears from the examination of the discussion in the cases of

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[52]C. v. Exler 243 Pa. 159. This case so defined the term "rape" as used in the act of 1860, and the same reasoning is applicable to the term "kidnapping."

[53]It has been held that acts done in another state may be considered in determining the character of a homicide. Jackson V. C. 100 Ky. 339, 38 S. W. 422.

[54]P. L. 427.

what constitute attempts to commit other crimes.[55] The subject has never been scientifically considered by our courts, and no satisfactory rule by which to determine when action aimed at the commission of a crime becomes an attempt to commit that crime.

The murder must be committed during the commission of kidnapping, and it would seem therefore that it must be committed before the kidnapping has been completed. But when is a kidnapping completed? Is it complete as soon as the taking occurs? Or is it complete only after there has been some, the slightest, carrying away? Or is it incomplete until the destination originally determined upon has been reached? Or is it incomplete until another state has been entered? Or does the crime continue as long as the victim is detained by the kidnappers?[56]

It seems, however, that the fact that the kidnapping is technically complete when the killing occurs is immaterial. In construing the statute, with reference to the other crimes enumerated, it has been held sufficient, although the crime was technically complete, if the homicide was committed before the actor left the premises where the felony was committed or attempted. Thus, after a person has entered a dwelling house, the crime of burglary is complete. Being in the house as a result of entering is not strictly a part of the crime. Nevertheless, if a homicide is committed by a burglar while he is in the house, he is guilty of murder in the first degree.[57] It has even been held that a person is engaged in the commission of a felony while he is fleeing to escape, even though he

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[55]See C. v. Eagen 190 Pa. 10; Kelly v. C. 1 Gr. 484; C. v. Puretta 74 Super. 463.

[56]It has been held that larceny is a continuing crime during the time the thieves are in the possession of the property, so that a killing by the thieves the morning after the theft but while they were still in the possession of the stolen property was a killing in the prepetration of larceny, S. v. Daniels (Wash.) 205 Pac. 1054.

[57]C. v. Biddle, 200 Pa. 640; C. v. Bodner, 16 D. R. 34. But see C. v. Major, 198 Pa. 290.

has left the premises.[58] This rule has been applied where the killing occurred a mile away from the place where the felony was attempted.[59]

MURDERS IN FIRST DEGREE IN KIDNAPPING

At common law kidnapping was a misdemeanor, and therefore a killing committed in the perpetration of kidnapping was not murder, unless there was an intention to kill or to inflict great bodily harm or unless an act was done the natural and probable consequence of which was death or great bodily harm.[60] Since a killing in order to be murder in the first degree must have been murder at common law, it would seem to follow that a killing committed in the perpetration of kidnapping is murder in the first degree only if there was an intention to kill or to inflict great bodily harm or death or great bodily harm was the natural and probable consequence of the act done.

It may be argued that any killing in the perpetration of a statutory felony was murder at common law,[61] and, as kidnapping, so-called, has been made a felony by the act of 1901, a killing in the commission of this crime would be murder at common law, and therefore would be murder in the first degree under the act of 1923. This argument overlooks the fact that the word "kidnapping" in the act of 1923 must be construed as meaning kidnapping at common law and not as meaning the crime defined by the act of 1901.

In criticism of the common law, it is said that its rules are pro re nata, and that, as a consequence, the common law is unscientific and disorderly. Certainly the same thing may be truthfully said of the statutory law, and the common law rules at least have the merit of fitting the cases for which they were devised.

—Walter Harrison Hitchler.

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[58]See C. v. Lessner, 274 Pa. 110.
[59]Francis v. S., 104 Nev. 5, 17 N. W. 675.
[60]Clark and Marshall, p. 325.
[61]Clark and Marshall, p. 342.

MOOT COURT

EMMETT VS. JACKSON

Set-off by Member of Partnership of a Partnership Debt Against an Individual Claim Against Him—Consent of Partner Essential—Equality of Claims Not Essential— 89 Pa. 392 and 65 Super. 357 Approved.

STATEMENT OF FACTS

Emmet is sueing on a note for $250. Jackson in his affidavit of defense alleged that he and one Jenkins were partners, and that Emmet owed the firm $450, and that he with Jenkins' consent elected to set-off so much of the debt as equaled the claim sued upon. The court has given judgment for the plaintiff for $250 and interest. Defendant appeals, claiming the court erred in not granting the set-off.

Hallem, for Plaintiff.

Bradway, for Defendant.

OPINION OF THE COURT

Auker, J. The single question which presents itself for solution is: Can a debt due two or more joint obligees be set-off in an action on one of the obligee's individual note? The plaintiff thru an ingenious argument seeks to sustain his ground by bringing the case within the Partnership Act of 1915. Upon examining the act we can find nothing in its provisions that touches the case at bar. Section V of the act says, "In any case not provided for in this act the rules of law and equity including the law merchant shall govern." However, we are not compelled to rely on that provision for solution of the present question. The late case of Mitz vs. Tri. County Natural Gas Company in 259 Pa. 477, holds that, "One of two joint obligees, with the consent of the other may use the obligation as an equitable defense in an action by the obligor against one of them alone." This same doctrine was likewise held in 22 Pa. 35, Smith and Co. vs. Myler and Aber. We believe that the case at bar comes directly under the doctrine as cited in the above cases, and deem it sufficient authority to say that the set off should be allowed.

In Hibert vs. Lang 165 Pa. 439, which was an action similar to the present one, the court held, "wherever there is practicability of avoiding circuity of action and needless costs, with safety and con-

venience to all and no equities of third parties to be injured a set-off will be allowed on general principles, though the case does not come within the statute." It appears then, that before set-off is allowed two things must concur, (1) there must be no equities of third parties that will be injured thereby, (2) the obligee against whom the action is brought must get the consent of the co-obligee or obligees. We fail to see in the case at bar any equities of third parties that will be injured, none appearing; and the facts show that Jackson had the consent of his partner Jenkins to use the joint claim as a set-off in the action against himself.

One of the earliest cases deciding this question is that of Crist vs. Brindle, 2 Rawle 121, which held that joint obligors on a bond given to an executor for a debt due to the testator may set-off a debt due by testator to one of them, he being the principal and the other a surety. Ten years later in Tustin vs. Cameron 5 Wharton 379, we find the same doctrine held. "In an action on a promissory note given by the defendant in favor of the plaintiff, defendant may set-off a debt due by plaintiff to a company or partnership of which the defendants were members, the other members of the company or partnership giving their consent." The court in this case went on to say that, "an increasing liberality has greatly, but cautiously, and beneficially enlarged the doctrine within a few years past."And that the doctrine has been strictly adhered to to the present day we learn from the cases as cited above.

The plaintiff in his second argument maintains that the plaintiff's consent to set-off is needed. While this seems to be the doctrine in the majority of jurisdictions it is not the law in Penna. and hence not applicable to the case at bar.

We must reverse the decision of the court below in not allowing the set-off and grant the appeal asked for by the defendant.

Decree so entered.

OPINION OF SUPREME COURT

The able and carefully constructed opinion of the learned court below renders extensive discussion by us unnecessary.

It is not necessary that the debt to two or more, A and B, should be assigned by A and B, or by B to A, entitled him to set the debt off against a claim by a creditor of A. Montz vs. Morris, 89 Pa. 392, Edelman vs. Scholl, 65 Super. 357. The consent, otherwise expressed, of the associate of the defendant, to his use of the joint claim as a set-off is sufficient.

Nor is it necessary that the debt to be set-off should be equal to, or less than, the plaintiff's claim; and so much of it as equals

that claim may be used as neutralizing it. In Larkin vs. Cameron, 5 Wharton 379 only a fraction of the debt due by the plaintiff to the defendant and his partner, was absorbed in the extinction of the plaintiff's claim.

The judgment of the learned court below is affirmed.

HAMMOND v. DRUMMOND

Wills—Misdescription in Will—Parole Evidence Allowed to Explain Misdescription—277 Pa. 204 Followed

STATEMENT OF FACTS

One Hammond died and left a will in which he devised "my house and lot, No. 4 East Louther street, Shippensburg," to Hammond. He owned a house and lot, No. 4 West Louther street, Shippensburg. The plaintiff is the devisee. This is ejectment.

Bertman, for Plaintiff.

Bielkowsky, for Defendant.

OPINION OF THE COURT

Claster, J. This action of ejectment is instituted by the devisee under the will of the testator, who claims title to the premises under the will. The defendant claims the premises as the heir at law of the deceased. This action is sought to be sustained on the theory that the will contained a latent ambiguity and that the plaintiff received title to the premises under the will of the testator. This theory is met by that of the defendant, who argues that the plaintiff did not get title to the premises at No. 4 West Louther street, because the will contained a devise of the premises at No. 4 East Louther street.

The will provides for a devise to the plaintiff of the testator's house and lot at No. 4 East Louther street. The testator did not own a house and lot at No. 4 East Louther street but at No. 4 West Louther street.

The testator by making a will intended not to die intestate, but to give certain property which he described as No. 4 East Louther street to the plaintiff. The testator intended to give the plaintiff the premises at No. 4 West Louther street.

The will does not contain a latent ambiguity. Clearly upon the face of the will there is no ambiguity whatever, because the testator devised a definite property at No. 4 East Louther street. The will contains a mistake on the part of the testator. Looking

at the face of the will we must interpret it that the testator being of sound mind, gave to the plaintiff, property which he knew he did not own. He knew he did not own the home and lot on No. 4 East Louther street, because his only property was on West Louther street.

Were the will construed in this way, it would be an absurdity and Pennsylvania courts attempt not to reach absurd decisions.

Counsel for the defendant contends that the deceased died intestate as to the property on West Louther street. There is a rule of law that the courts will not look with favor on construction of a will which leads to intestacy. 221 Pa. 201, 249 Pa. 259.

Although the counsel for the defendant contends that there is an established rule of law, that parol evidence is not admissable to supply or contradict the words of a will, or to explain the intention of the testator when the words used are unambiguous and intelligible, it was held in 76 Pa. 197, 3 Watts 385; 240; 40 Cyc. 1444; that for the purpose of explanation, evidence may be introduced to show what land the testator owned in order to show a mistake in description, number or designation of a lot.

It has also been held in 262 Pa. 62 and 229 Pa. 349 that, "evidence is admissible against a will from necessity to explain that which would be otherwise without operation."

In conclusion, we find that at the time the will was made, the testator being of sound mind, intended to devise the property on West Louther street, but due to a mistake, he wrote East Louther street. He could not devise property which he did not own and did not intend to do so.

In view of the authorities cited above we feel contrained to deny the defendant's right of possession. We therefore issue a writ of ejectment to the plaintiff.

OPINION OF SUPREME COURT

Louther street east of street X, which crossed it at right-angles, was known as East Louther street; and west of street X, West Louther street. Hammond owned a house and lot at No. 4 West Louther street. He made a will in which he devised "my house and lot, No. 4 East Louther street," to Hammond, the plaintiff, who is asserting ownership under this devise to house and lot, No. 4 West Louther street. Did the devise apply to these premises?

This is not a case of ambiguity. No phrase is used which is susceptible of two meanings. Hence parole evidence cannot be received for the purpose of resolving a latent ambiguity.

There is rather a misdescription of the premises intended. Much of the description is correct; viz. house and lot, No. 4, Lou-

ther street, Shippensburg. But West, qualifying Louther street, is erroneous. While wills must be in writing, there are cases in which the interpretation and application of the will may be effected by the aid of facts disclosed by oral evidence extraneous to the will. The description is in part mistaken. Enough remains of the description to justify the emendation of the will, by the substitution of West for East in it. The other elements are correct. The necessity of the alteration is the want of ownership of the lot at 4 East Louther street, and the ownership of the lot at 4 West Louther street. The maximum "falsa demonstratio non nocet" is applicable because it is discoverable what the testator must have intended from the description given, aided by the extraneously revealed facts. Cf. Brooklyn Trust Co. vs. Warrington, 277 Pa. 204, and cases cited by the learned court below, whose judgment is affirmed.

COMMONWEALTH VS. CARSON

Witnesses—Impeachment of a Disappointing Witness—Relevancy of "No Knowledge" Testimony—Justice of Peace as a Witness to Testimony Before Him

STATEMENT OF FACTS

Indictment for robbery. X had accused Carson before a Justice of the Peace who had held him for court. An indictment followed, on the testimony before the grand jury of A and B. At the trial, the district attorney called X, expecting him to repeat what he had sworn to before the Justice. Instead of so testifying, he testified that he had no knowledge whatever of Carson being guilty. The district attorney then called as a witness the Justice, despite objection of defendant, to testify to what X had said before him. Conviction. Motion for new trial.

Mundy, for Plaintiff.

Silverstein, for Defendant.

OPINION OF THE COURT

Croop, J. The error alleged in the case at bar is the allowing of the Justice to testify to X's statements made before him. The question for us decide is, whether a Justice of the Peace can be called to prove contradictory statements made by a witness at a former hearing before him.

In 40 Cyc. p. 2692, section 7, the rule is well stated thus: "Experience has shown that the tendency of the rule against show-

ing contradictory statements of one's own witness is to place a party at the mercy of designing and perhaps hostile witnesses by whom he may be surprised and entrapped, and according to the great weight of authority, a party who has been thus deceived by his own witness may prove that such witness has made prior statements contradictory to his testimony." The law in Pennsylvania is in accord with the weight of authority and fortunately, for this prohibits entrapment and aids in the administration of justice.

The following Pennsylvania cases have held this rule:

1 Brown 176; 2 Brewster 656; 3 Brewster 402; 20 Pa. Super. Ct. 305.

It is sometimes argued that a Justice should produce his records. This rule has no foundation since a Justice's court is not a court of record. And the law does not require a Justice to keep records and it is not the custom for these courts to do so. Since Justice's courts do not ordinarily keep records, the Justice's testimony as to what took place in his court is the best evidence possible.

In 40 Cyc. p. 2748, section B, we find the rule: "It is not necessary to have resort either to the stenographer or to his minutes, or to the testimony of an official but any person who was present at the trial or hearing and heard the testimony of the witness, is competent to testify to what was stated by the witness.

In Payne vs. State 66 Ark. 545 the court held "That a Magistrate before whom testimony was taken, the clerk who took it down, or any other witness who was present and heard it, is competent to prove what the statements were."

This rule has been followed in;

119 Ga. 467; 144 Ill. App. 198; 239 Ill. App. 621; 172 Ind. 357; 78 Iowa 432; 54 N. H. 465; 60 N. Y. 463; 25 Gratt 921; 15 Wash. 418.

In Commonwealth vs. Marrow and Dougherty, 8 Philadelphia 440, the facts were analogous to those in the case at bar. In that case the witness gave testimony under oath before the Mayor and when called upon by the Commonwealth at the trial of the prisoner for murder he proved hostile. The Mayor was called and allowed to testify to the contradictory statements of the witness. He also was allowed to state what the witness said at the previous hearing.

In 259 Pa. 272 it was held that it was discretionary on the part of the trial judge and that it was not error to permit the district attorney to offer testimony as to what a witness' previous state-

ments had been. It is admitted for the purpose of neutralizing the effect of his testimony.

To introduce former evidence, it is sufficient that the substance or even the effect of the former testimony can be given by the reporting witness. Pennsylvania courts do not require a strict adherence to what was said by the witness, provided it appears that a substantially correct report of his testimony is given. Helper vs. Mt. Carmel Savings Bank, 97 Pa. 420.

Wolf vs. Wgeth 11 S. & R. 149.

In the case of Commonwealth vs. Reeves 267 Pa. 361 the facts are similar to the facts at bar. In that case the defendant was being tried for a felony and the witness had testified before a coroner, and at the trial his testimony on the same point was directly in conflict with his former testimony. The rule laid down by the court in this case was—"The rule that a party calling a witness is not permitted to ask leading questions, and is bound by his testimony, is liberally construed in modern practice. It apparently proceeds upon the theory that a rigid adherence in practice in the ordinary cases would be mala fide to the tribunal, and the weight of authority is in favor of the rule that where a party is surprised in the testimony of a witness unexpectedly turning hostile, counsel may exercise the right of cross-examination of the witness. Such exceptions have been recognized in Pennsylvania, and are permitted to prevent failure of justice. Whether such practice will be permitted, is within sound discretion of the court, and its action will not be reversed by the appellate court unless there is an abuse of that discretion in permitting the testimony." This case further held "that the court did not abuse its discretion in permitting the Commonwealth to call the coroner as a witness."

In view of the foregoing authorities we find that there was no error in admitting the testimony of the Justice. Motion for new trial dismissed.

OPINION OF SUPREME COURT

X, called as a witness, testifies that he has no knowledge that Carson is guilty. Then his testimony can offer no basis for the conviction of Carson.

What is the utility of proof that on another occasion he had sworn that Carson was guilty? It would show the untrustworthiness of X as a witness, but what is the use of that? Let him be ever so untrustworthy, are we to transmute his testimony that he does not know of Carson's guilt into evidence that he does know? He has said, under oath, that he does not know. He furnishes no evidence for or against the defendant's guilt. If the testimony

before the Justice was that Carson was guilty, that testimony cannot be used to prove his guilt. To prove the inconsistency, the incredibility of X, is entirely irrelevant.

The district attorney may feel chargin at having called a witness who does not support his cause but the practice before the court is not to be shaped so as to alleviate this chargin.

If X had positively damaged the cause of the prosecution by evidence favorable to the defendant, it would be desirable to lessen the weight of this testimony, and the district attorney might expose the inconsistency between the present and the former statements of the witness.

In Sturgis vs. State, 20 Okl. Cr. 302, Wigmore's Cases, page 347, one of the conditions prescribed for the privilege of showing that a disappointing witness has previously made an inconsistent statement is that he "must have testified to facts injurious to the party calling him." In some of the Pennsylvania cases the principle is latent. In Commonwealth vs. O'Donnell, 71 Super. 80, Henderson, J., observes that the testimony of the witness impeached "tended to show that the offence was not committed by the defendant." In Commonowealth vs. Reeves, 267 Pa. 361, Kephart, J., remarks that the witness' testimony "was directly opposed to that given in his former testimony." Precisely what a direct opposition was, we do not know. Perhaps at the trial he said that the defendant was not guilty, or stated facts inimical to the theory of guilt. In Commonwealth vs. Wickett, 20 Super. 350, a forgery of a note case, the witness whose name was on the note as maker, said, on the witness-stand, that he had signed the note. He had previously said that the signature was forged. In Commonwealth vs. Marrow & Dougherty, 8 Phila. 440, the witness had previously averred that the defendants were guilty. At the trial he denied their guilt.

Of much of the opinion of the learned court below we must approve. The justice was not incompetent to prove what the witness had said before him; but the testimony before him was irrelevant. Proof of it could subserve no proper purpose.

The judgment of the court below is reversed.

HOFFMAN VS. HARRISON

Contracts—Fraud—Bailment Sale—Recission of Sale for Fraud—Sec. 49 Sales Act—22 Super. 164 Criticised

STATEMENT OF FACTS

Plaintiff negotiated with defendant for the sale of an automobile to the latter, under a bailment contract which provided

for the payment of moneys periodically. $100 was paid by the defendant on the car as the first installment and nothing since. Defendant was given the car for three weeks trial before any contract of sale was negotiated. Title was to rest in defendant buyer when the last installment had been paid. Defendant refused to pay any of the remaining installments, or to restore the car to the vendor.

Wayne, for Plaintiff.

Irwin, for Defendant.

OPINION OF THE COURT

Yergey, J.

The case is one of replevin by the plaintiff and is by no means an uncommon one. To accept an article, put it to use and then claim it was not the one contracted for, as an excuse for non-payment and for retaining possession, would certainly be adverse to any law both civil and moral. Sec. 49, of the Uniform Sales Act covers the case to the very point. It provides that—"If, after acceptance of the goods, the buyer fails to give notice to the seller of any breach of a promise or warranty within a reasonable time, after the buyer knows or ought to know of such breach, the seller shall not be liable therefore." Certainly the defendant knew or ought to have discovered the defect of which he has complained before his installment became due. If it were not the car he contracted to buy his remedy was for fraud and rescission of the whole contract. In Wood vs. Wood 263 Pa. 521 the rule was laid down, that: "where a party desires to rescind upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose and adhere to it. If he is silent and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred." Therefore I think that an action of replevin will lie inasmuch as it is strictly a possessory action, and lies only on behalf of the one entitled to possession. Plaintiff has a right of immediate possession as soon as default has been made, and the defendant thereby loses any right of set off or recoupment. 22 Pa. Sup. 528, 53 Sup. 316 so hold as to set-off. Recoupment may lie where there has been a breach of warranty plus evidence tendency to show that the defendant has suffered damages which in the contemplation of the parties, or according to the natural or usual course of things, where the consequences of the breach of warranty, or fraudulent representations, 120 U. S. 648. However, the court did not reverse the decision on this ground or allow recoupment but merely set aside the verdict

and ordered a new trial. In the case before us however no injury was proven by the defendant and since the decision in the case of 120 U. S. 648 which is a Pa. case, has been decided, our statutes have entirely changed the law as shown in Sec. 49 of the Sales Act. We therefore think that replevin will lie and the defendant is ordered to return the automobile to the plaintiff.

Judgment accordingly.

OPINION OF SUPREME COURT

Harrison agreed to buy an automobile which we shall call X. He tried X and was satisfied with it. An agreement for the sale of X was entered into, the price to be payable in installments, and the ownership of X to pass only on the completion of these payments. The possession was to be in Harrison while the payments of the installments were being made.

Another automobile than X, (we shall call it Y), has been delivered to Harrison. He has found it to be different from, and very inferior to X. Before making this discovery he has apparently paid two installments of $50 each. After making it, he refuses to pay any more. He claims the return of the $100 paid as a precondition to the return of the Y automobile.

We do not see that he should be compelled to redeliver the car until there is a redelivery of the money. The circumstances, we think, entitle him to a lien on the car until repayment of the $100 has been tendered.

Harrison is not rescinding the contract. He finds no fault with it. He complains simply that the pretended performance of the contract by Hoffman was no performance; that a fraudulent substitution of Y for X was perpetrated, he not knowing it at the time of acceptance of Y and paying the $100.

We do not realize the relevancy of the remark in Stern vs. Haven, 22 Super. 164, that on the discovery of the substitution, Harrison had to elect either to rescind or not, and that, if he did not rescind, he must pay the installments or lose possession; and, if he rescinded, he must return the car and be content to "demand" the installments paid. He is not attempting a recission. We think he was entitled to retain the car until the installments paid were tendered back.

We must therefore reach a conclusion different from that of the learned court below, and its judgment must be reversed with v. f. d. n.

WARREN v. TOWNSEND

Contracts for Sale of Land—Stipulation for Liquidated Damages—Waiver of Such Stipulation—Specific Performance of the Contract

STATEMENT OF FACTS

Warren, owning land in Baltimore, contracted to sell it to Townsend for $2000, payable in quarterly installments of $200. The contract said: "In case of any default by Townsend in the payment of any installment for two weeks, all his right under the contract shall cease and the money already paid by him shall be retained by Warren as liquidated damages." After paying $1000, Townsend ceased to pay. Although six months have elapsed since the last payment, Warren now sues for the remaining $1000. Townsend defends, that having lost all rights under the contract, he is discharged from the duty of making further payments.

Miss Stroh, for plaintiff.

Wise, for defendant.

OPINION OF THE COURT

O'Donnell, J. The contention of the defendant's counsel is that the forfeiture of the $1000 was to be the exclusive remedy and the defendant having lost all his rights under the contract, the plaintiff cannot now seek to enforce that contract.

However, the defendant being in default, cannot set up his own wrong to work a rescission of the contract.

Justice Porter has laid down the law on this question in a case on all fours with the present one. He says: "Covenants that the contract shall become void or that the estate shall cease and terminate on failure by the grantee or lessee to pay at the time specified are not self operating and do not make the contract void except at the option of the grantor or lessor."

Cape May Real Estate Company vs. Henderson, 42 Superior 1, affirmed. 231 Pa. 82.

If a covenant does not provide by clear, precise and unequivocal language that the purchaser may terminate it by his own default, such effect will not be given it. Korman vs. Trainer, 258 Pa. 362.

That legal effect, no matter what form or cumulation of phrases be used can only be changed by an express stipulation that the contract shall be voidable at the option of either party.

No such stipulation appears in this case. Cochran vs. Pew, 159 Pa. 184.

The provision is that upon default by the defendant, "all his rights under the contract shall cease, and the money already paid by him shall be retained by Warren as liquidated damages." There is nothing to indicate that it was the intention of the parties that the defendant should be released from his liability upon the contract. This was manifestly a covenant inserted for the benefit of the grantor to enable him to secure the performance of the contract. The effect was to give the plaintiff, upon default by the defendant, the right of election to either assert and enforce forfeiture or to insist upon performance of the contract.

There is no doubt that the grantor may waive the remedy either expressly or by estoppel arising from acts tending to mislead the grantee or lull him into the belief that strict performance will not be exacted. In this case there is no evidence of such acts and in our opinion a delay of six months was not unreasonably long. Vito vs. Birkel, 209 Pa. 206.

This contract was to be performed in the State of Maryland but the laws of a sister State must be proved as facts and in the absence of allegations or evidence to the contrary must be presumed to be the same as that of the forum. Cape May Real Estate Co. vs. Henderson, 231 Pa. 83; Musser vs. Stauffer, 178 Pa. 99; Van Auken vs. Dunning, 81 Pa. 464.

OPINION OF SUPREME COURT

The interpretation put upon the contract by the learned court below, is incontestable. It reserved to the vendor the right, but did not put on him the duty, of regarding the interest of the vendee, on his own default, as ended. The vendor waives his right and may then compel performance of his promise by the vendee.

The judgment is affirmed.

REX vs. THOMPSON

Stockbrokers—Liability for Purchase Price on Sale of Stock for a Customer—277 Pa. 282 Approved

STATEMENT OF FACTS

Rex delivered certificates of stock in a corporation, of the par value of $2000, to Thompson, a stock-broker, in order that he might sell them at not less than $2200. After a time Thompson reported that he had sold the shares. A month later he stated that he was

not able to collect the money from the vendee who had returned the certificates. This is an action for $2200.

OPINION OF THE COURT

Behman, J. It is essential to a recovery in this case that the plaintiff show that not only the stock-broker engaged in the business of a selling and purchasing stock, but that he also had the legal capacity to be a guarantor for the price of the stock sold.

According to 9 Corpus Juris 511, Sec. 12, we find that his position is greater than that of a mere agent. Not only does he perform the duties of an agent, but likewise the role of a trustee is enacted by him, insuring to his principal the solvency of the purchaser.

The counsel for the defense advances the argument that the stock-broker is not a guarantor and is liable only upon failure to exercise reasonable care and diligence in the performance of his duties. In support of such contention is cited the recent Pa. case Vollmer vs. Newburger and al., 277 Pa. 282. Upon perusal of this case the court finds that the judge admitted that reasonable care and diligence would tend to disprove the fact that a sale had been made, but the admission of such a fact does not confirm the idea that a stock-broker does not guarantee the solvency of the purchaser.

The case of Vollmer vs. Newburger proceeds as follows: "Where a broker sells stock and notifies his customer that it has been sold, he becomes liable for the price. He may prove also in fact that no sale has been made but this must be proved by competent evidence. If this cannot be shown, then the stock-broker is liable for the price." Applying such dicta to the case at bar we can readily determine whether or not the defendant should be excused from payment of the price.

The plaintiff in the case at bar has made out a prime facie case having shown that there was an order to sell, delivery of the stock, and notice to him by the stock broker that such stock had been sold. It then devolves upon the defendant to show cause why the money was not collected from the purchaser. In the case at bar he has failed to show that the report of the sale to the principal was a mistake on his part. Not only that, admitting that it was a mistake, the defendant has failed to exercise due diligence and care in acquainting the principal of such.

Therefore due to the stringent measures necessary for the protection of the public in such cases and the great responsibility resting upon stock-brokers, the court has no recourse but to enforce strictly the rule that a stock-broker is primarily liable for

the price of the stocks sold and since there has been advanced no competent evidence by the defendant, we find for the plaintiff for the sum of $2200.

Judgment for plaintiff.

OPINION OF SUPREME COURT

When a stock-broker undertakes to sell, and sells stock, he guarantees that it will be paid for, and he is primarily liable to the client. Vollmer vs. Newberger, 277 Pa. 282.

After a sale, the broker cannot escape liability for the price because the vendee is unable to pay the price. The broker may, if he will, cancel the liability of the buyer, but he cannot cancel his liability to his customer.

Was there a sale? The broker, defendant, "reported that he had sold the shares." That is adequate evidence of the sale. Nor is there any contradiction of this report. A month later the defendant said, what? That he had not sold? No, but that he had not been able to collect the money from the vendee who had returned the certificates. This latter communication was not contradictory of the earlier. It shows the consummation of the sale but the failure to pay the price. The broker did wisely in taking back the certificates when he found that payment could not be realized but he did not cancel his guaranty of payment to Rex, his customer.

The judgment of the learned court below is affirmed.