fugitive, it would constitute a battery as to the fugitive if he were hit, and if a bystander were hit it would be a battery as to him.[12]

The result in the principal case would seem to be justified also upon the ground of negligence. Firearms are recognized by the courts as dangerous instruments,[13] and it has been generally agreed that a high standard of care should be required of anyone using them.[14] That standard has been determined by some courts to be a "great" degree of care[15] and by others a "high" degree of care.[16] Shooting a firearm in a public street is obviously an act likely to produce injury. In *Conradt* v. *Clauve*[17] the court held the defendant negligent where he permitted a target range to be operated on a fairgrounds. In *Combs* v. *Thompson*[18] the court declared that the discharge of a toy cannon in the street of the most populous city in the state was a reckless act. In *Askay* v. *Maloney*,[19] where the officer was lawfully engaged in pursuing a felon, the court said that he was under a duty to use care commensurate with the danger involved, in discharging firearms in a public street, but that whether such degree of care was exercised or not was a question for the jury to decide. Where, as in the principal case, the shooting was wrongful in itself, it would seem that the defendant was obviously negligent in shooting in a public street for no better reason than to frighten an escaping misdemeanant. F. A. R.

Torts — Negligence — Liability for Fright

Plaintiff, a woman about fifty years old, was a passenger on defendant's bus. When leaving the bus, the folding doors at the rear closed and caught her, holding her for from thirty seconds to two minutes. She was not bruised and suffered no apparent physical injury. Plaintiff introduced evidence to show fright and shock resulting in mental and

(1923); *People* v. *Kline*, 305 Ill. 141, 137 N.E. 145 (1922); *Pales* v. *Paoli*, 5 F. (2d) 280 (1st. Cir. Ct. App. 1925).

[12] *Supra*, note 9.

[13] *American Railway Express Co.* v. *Tait*, 211 Ala. 348, 100 So. 328 (1924); *Szasz* v. *Joyland Co.*, 84 Cal. App. 259, 257 Pac. 871 (1927); *Corn* v. *Shepard*, 179 Minn. 490, 229 N.W. 869 (1930); *Gibson* v. *Payne*, 79 Or. 101, 154 Pac. 422 (1916).

[14] Cooley on Torts, (3d ed., 1906) p. 1232; *State* v. *Cunningham*, *supra*, note 11; *Moebus* v. *Becker*, 46 N. J. Law 41 (1884); *Loreno* v. *Ross*, 222 Ala. 567, 133 So. 251 (1931).

[15] Great Care, *Szasz* v. *Joyland Co.*, *supra*, note 13; Utmost Caution, *Brittingham* v. *Stadiem*, 151 N. C. 299, 66 S.E. 128 (1909).

[16] *McLaughlin* v. *Marlatt*, 296 Mo. 656, 246 S.W. 548 (1922); *Atchison* v. *Procise*, — Mo. App. —, 24 S.W. (2d) 187 (1930); *Lindh* v. *Protective Motor Service Co.*, 310 Pa. 1, 164 Atl. 605 (1933).

[17] 93 Ind. 476, 47 Am. Rep. 388 (1883).

[18] 68 Kan. 277, 74 Pac. 1127 (1904).

[19] 92 Or. 566, 179 Pac. 899 (1919).

nervous disturbance, described as a major hysteria, and manifesting itself in a paralysis of part of the plaintiff's body. *Held:* No liability for fright and its consequences in a negligence action, when the fright is unaccompanied by some contemporaneous physical injury.[1]

This ruling follows the case of *Miller* v. *The Baltimore and Ohio South Western Ry. Co.*,[2] in which the rule of non-liability for fright in negligence actions was first laid down in Ohio. The older case relied on the doctrines of proximate causation in denying recovery. The recent case sets forth almost all the arguments for and against recovery and makes *stare decisis* the controlling factor. By affirming the conservative view, Ohio is placed definitely in the conservative minority wing in regard to recovery for the consequences of fright.

This doctrine was first announced in this country in New York State in *Mitchell* v. *Rochester Railway Co.*,[3] but since the turn of the century many courts have become more liberal in regard to recovery and have disapproved the harsh rule.

Thirteen states, among which are the largest jurisdictions, deny recovery for the consequences of fright.[4] However, courts in some of these jurisdictions will allow recovery if there is an impact; and then have defined impact to include, *inter alia*, dust in the eye;[5] a forcible seating on the floor;[6] a slight jarring resulting to a passenger from an automobile accident.[7]

Many jurisdictions, twenty in all, will allow recovery when there is no contemporaneous physical injury and no impact, but only the resulting physical consequences of fright.[8] While the first English case denied recovery,[9] this rule has been changed, and England has permitted recovery for the last thirty-eight years.[10]

The trend of decisions since the *Mitchell* case in 1896 has been

[1] *Davis* v. *Cleveland Railway Co.*, 135 Ohio St. 401, 21 N.E. (2d) 99, 14 Ohio Op. 287 (1939).

[2] 78 Ohio St. 309, 85 N.E. 499, 125 Am. St. Rep. 699, 18 L.R.A. (N.S.) 949 (1908).

[3] 151 N. Y. 107, 45 N.E. 354 (1896).

[4] Report of the Law Revision Commission of the State of New York 1936, 383; *Weissman* v. *Wells*, 306 Mo. 82, 267 S.W. 400 (1924); *Alexander* v. *Pachalek*, 222 Mich. 157, 192 N.W. 652 (1923); *Cook* v. *The Village of Mohawk*, 207 N. Y. 311, 100 N.E. 815 (1913); *Spade* v. *Lynn and Boston R. R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897).

[5] *Porter* v. *Del. Lack. and W. R. R. Co.*, 73 N.J.L. 405, 63 Atl. 860 (1906).

[6] *Driscoll* v. *Gaffey*, 207 Mass. 102, 92 N.E. 1010 (1910).

[7] *Comstock* v. *Wilson*, 257 N. Y. 231, 177 N.E. 431 (1931).

[8] Report of the Law Revision Commission of the State of New York, 1936, 406, with cases cited; *Baltimore and Ohio Ry.* v. *Harris*, 121 Md. 254, 88 Atl. 282 (1913); *Purcell* v. *St. Paul City Ry. Co.*, 48 Minn. 134, 50 N.W. 1034, 16 L.R.A. 203 (1892); *Hill* v. *Kimball*, 76 Tex. 210, 13 S.W. 59, 7 L.R.A. 618 (1890); *Great Atlantic and Pacific Tea Co.* v. *Sophie Roche*, 160 Md. 189, 153 Atl. 22 (1930).

[9] *Victorian Railway Comm'rs.* v. *Coultas*, L.R. 13 A.C. 222 (1888).

[10] *Dulieu* v. *White*, 2 K.B. 669 (1901).

definitely in favor of recovery in this type of case. Courts have granted recovery when defendant's negligence consisted of including a dead rat in a package of groceries, causing plaintiff to faint;[11] where defendant negligently shot a dog in plaintiff's presence, causing fright and subsequent miscarriage.[12] And in a recent case, a Nebraska court went farther than any court had previously gone in allowing recovery. There the defendant's negligence consisted in selling unlabeled poisoned bran, which caused death of buyer's cows and loss of dairy business. Subsequent mental and nervous shock because of worry over loss of dairy business and fear of communicating poison to dairy customers, resulted in buyer's death from decompensating heart. Recovery was allowed for injuries both to person and property.[13] In this case, there was fear not of personal injury, but only of injury to business and yet recovery was granted.

In the face of the fact that the Ohio rule, as laid down in the principal case, is more conservative than that adopted by any court in a recent decision, in denying recovery for injuries resulting from fright even when there is a physical impact, it is interesting to note that Judge Zimmerman in the principal case cites with approval the test of the more liberal Texas court, as set out in *Gulf, C. & S. F. Ry. Co.* v. *Hayter*.[14]

It would seem that the court had a fine opportunity to follow the more liberal trend in at least allowing recovery if there is a contemporaneous impact, as some of the more conservative courts have done in attempting to soften the rigors of the rule. Ohio's rule is now even more harsh than that followed in New York in the *Mitchell* case. The Ohio court justifies the narrow rule with the statement that "when right of recovery for fright and its effects is made dependent upon the sustaining of a contemporaneous physical injury, such injury should be of sufficient gravity to bear some causal relation or proximate relevance to the fright and its consequences." If theories of proximate cause justify the result, the reasoning is sound. But most courts following the minority doctrine rest their conclusions upon expediency alone, and hold that there is too much danger of fictitious claims, unless some safeguards are established. The requirement of an impact, such as being caught in the door as in the principal case, would seem to furnish a satisfactory safeguard even without a resulting physical injury.

J. W. L.

[11] *Great Atlantic and Pacific Tea Co.* v. *Sophie Roche*, 160 Md. 189, 153 Atl. 22 (1930).

[12] *Ala. Fuel and Iron Co.* v. *Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916).

[13] *Rasmussen* v. *Benson*, 135 Neb. 232, 280 N.W. 890 (1938).

[14] 93 Tex. 239, 242, 54 S.W. 944, 945, 47 L.R.A. 325, 77 Am. St. Rep. 856 (1900).