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M'ALISTER or DONOGHUE (Pauper) Appellant

v.

STEVENSON. Respondent

Lords Present

Lord Buckmaster
Lord Atkin
Lord Tomlin
Lord Thankerton
Lord Macmillan

Judgment

Lord Buckmaster (read by **Lord Tomlin**)

MY LORDS,

The facts of this case are simple.

On August 26th, 1928, the Appellant drank a bottle of ginger beer, manufactured by the Respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged and, at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro enteritis. She accordingly instituted the proceedings against the manufacturers which have given rise to this appeal.

The foundation of her case is that the Respondent, as the manufacturers of an article intended for consumption and contained in a receptacle which prevented inspection owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that they neglected such duty and are consequently liable for any damage caused by such neglect. After certain amendments which are now immaterial, the case came before the Lord Ordinary who rejected the plea in Law of the Respondent and allowed a proof. His interlocutor was revoked by the second Division of the Court of Session from whose judgment this appeal has been brought.

Before examining the merits two comments are desirable —

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(1) That the Appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and
(2) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the Appellants or by any of your Lordships, that the English and the Scots law on the subject are identical.

It is, therefore, upon the English law alone that I have considered the matter and in my opinion it is on the English law alone that in the circumstances we ought to proceed.

The law applicable is the common law and, though. its principles are capable of application to meet new conditions not contemplated when the law was laid down, yet themselves they cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in the judgments of the Judges entrusted with its administration. The law books give no assistance because the work of living authors (however deservedly eminent cannot be used as authorities though the opinions they express may demand attention, and the ancient books do not assist. I turn therefore to the decided cases to see if they can be construed so as to support the Appellant's case. One of the earliest is the case of *Langridge v. Levy* , 2 M. & W.,519. It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B. who in delivering the judgment of the Court used these words

> "We should pause before we make a precedent by our decision which would be an authority for an action against the vendors even of such instruments and articles as are dangerous in themselves at the suit of any person whomsoever into whose hands they might happen to pass and who should be injured thereby, and in *Longmeid v. Holliday* , 5 Ex., 761, the same eminent Judge points out that the earlier case was based on a fraudulent misstatement, and he expressly repudiates the view that it has any wider application.
>
> The case of *Langridge v. Levy* , therefore, can be dismissed from consideration with the comment that it is rather surprising it has so often been cited for a proposition it cannot support.
>
> The case of *Winterbottom v. Wright* , 10 M. & W., 109, is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction for there can be nothing in the character of a coach to place it in a special category. It may be noted also that in this case Alderson B. said "The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that there is no reason why we should not go fifty."

Longmeid v. Holliday was the case of a defective lamp sold to a man whose wife was injured by its explosion. The vendor of the lamp against whom the action was brought was not the manufacturer so that the case is not parallel to the present, but the statement of Baron Parke in his judgment covers the case of manufacturer for he said:

> "It would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that if a machine not in its nature dangerous but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the manufacturer, to another, the former should be answerable to the latter for the subsequent damage accruing by the use of it."

It is true that he uses the words "lent or given" and omits the word; "sold", but if the duty be entirely independent of contract and is a duty owed to a third person, it seems to me the same

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whether the article be originally given or sold. The fact in the present case that the ginger beer originally left the premises of the manufacturer on a purchase as was probably the case cannot add to his duty, if such existed, to take care in its preparation.

It has been suggested that the statement of Baron Parke does not cover the case of negligent construction but the omission to exercise reasonable care in the discovery of a defect in the manufacture of an article where the duty of examination exists is just as negligent as the negligent construction itself.

The general principle of these cases is stated by Lord Sumner in the case of *Blacker v. Lake & Elliot* , 106, L.T. 533, in these terms:

> "The breach of the Defendant's contract with A. to use care and skill in the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving defective."

From this general rule there are two Well-known exceptions—

> (1) In the case of an article dangerous in itself and
>
> (2) where the article not in itself dangerous is in fact dangerous due to some defect or for any other reason, and this is known to the manufacturer. Until the case of *George v. Skivington* , L.R., 5 Ex., 1,I know of no further modification of the general rule.

As to (1), in the case of things dangerous in themselves, there is, in the words of Lord Dunedin, "a peculiar duty to take precaution imposed on those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity" — *Dominion Gas Coy. v. Collins* , 1909, A.C., 640. And as to (2) this depends on the fact that the knowledge of the danger creates the obligation to warn, and its concealment is in the nature of fraud.

In this case no one can suggest the ginger beer was an article dangerous in itself, and the words of Lord Dunedin show that the duty attaches only to such articles, for I read the words "a peculiar duty" as meaning a duty peculiar to the special class of subject mentioned.

Of the remaining cases *George v. Skivington* is the one nearest to the present and without that case and the statement of Baron Cleasby in *Francis v. Cockrell* , L.R., 5 Q.B. 501, at p. 515, and the dicta of Lord Esher M.R. in *Heaven v. Pender* , 11 Q.B.D., 503 at pp. 500 et seq., the Appellants would be destitute of authority. *George v. Skivington* related to the sale of a noxious hairwash and a claim made by a person who had suffered from its use based on it having been negligently compounded was allowed. It is remarkable that *Langridge v. Levy* was used in support of the claim and influenced the judgment of all the parties to the decision; both Kelly B. and Pigott B. stressed the fact that the article had been purchased to the knowledge of the Defendant for the use of the Plaintiff as in *Langridge v. Levy* , and Cleasby B. who, realising that *Langridge v. Levy* was decided on the ground of fraud, said:

> "Substitute the word 'negligent' for 'fraud' and the analogy between *Langridge v. Levy* and this case is complete".

It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence.

I do not propose to follow the fortunes of *George v. Skivington* ; few cases can have lived so dangerously and lived so long. Sumner L. in the case of *Blacker v. Lake & Elliot* , 106, L.T., 533, closely examines its history and I agree with his analysis. He said that he could not presume to say that it was wrong but he declined to follow it on the ground which is I think firm that it was in conflict with *Winterbottom v. Wright* .

In *Francis v. Cockrell* the Plaintiff had been injured by the fall of a stand on a race course for a seat in which he had paid. The Defendant was part-proprietor of the stand and acted as receiver of the money. The stand had been negligently erected by a contractor though the Defendant was not aware of the defect. The Plaintiff succeeded. The case has no bearing upon the present .but in the course of his judgment Cleasby B. made the following observation:

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> "The point that Mr. Matthews referred to last was raised in the case of *George v. Skivington* where there was an injury to one person, the wife, and a contract of sale with another person, the husband. The wife was considered to have a good cause of action and I would adopt the view which the Lord Chief Baron took in that case. He said there was a duty in the vendor to use ordinary care in compounding the article sold and that this extended to the person for whose use he knew it was purchased and their duty having been violated and he having failed to use reasonable care was liable in an action at the suit of the third person."

It is difficult to appreciate what is the importance of the fact that the vendor knew who was the person for whom the article was purchased unless it be that the cage was treated as one of fraud and that without this element of knowledge it could not be brought within the principle of *Langridge v. Levy* . Indeed this is the only view of the matter which adequately explains the references in the judgments in *George v. Skivington* to *Langridge v. Levy* and the observations of Cleasby B. upon *George v. Skivington* .

The dicta of Lord Esher M.R. in *Heaven v. Pender* are rightly relied on by the Appellant. The material passage is as follows:

> "The proposition which these recognised cases suggest and which is therefore to be deduced from them is that wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other a duty arises to use ordinary care and skill to avoid such danger. … Let us apply this proposition to the case of one person supplying goods or machinery or instruments or utensils or the like for the purpose of their being used by another person but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods or machinery or the like for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would if he thought recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons or one of a class of persons where it would be obvious to the person supplying it if he thought that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not or whether they would be used before there would probably be means of observing any defect or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty."

"The recognised cases" to which the Master of the Rolls refers are not definitely quoted, but they appear to refer to cases of collision and carriage and the cases of visitation to premises on which there is some hidden danger, cases far removed from the doctrine he enunciates. None the less this passage has been used as a *tabula in naufragio* for many litigants struggling in the seas of adverse authority. It cannot, however, be divorced from the fact that the case had nothing whatever to do

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with the question of manufacture and sale. An unsound staging had been erected on premises to which there had been an invitation to the plaintiffs to enter and the case really depended on the duty of the owner of the premises to persons so invited. None the less it is clear that Lord Esher considered the cases of manufactured articles, for he examined *Langridge v. Levy* , and says that it does not negative the proposition that the case might nave been supported on the ground of negligence.

In the same case, however, Cotton L.J., in whose judgment Bowen L.J. concurred, said that (he was unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertained inasmuch as there were many cases in which the principle was impliedly negatived.

He then referred to *Langridge v. Levy* , and stated that it was based upon fraudulent misrepresentation and had been so treated byColeridge J. in Blackmore v. Bristol and Exeter Railway Co. (8 E. & B. 1035), and that in Collis v. Selden (2 M. & W. 519 and M. & W. 337) Willes J. had said that tine judgment in *Langridge v. Levy* was based on the fraud of the Defendant. The Lord Justice then proceeded as follows:

> "This impliedly negatives the existence of the larger general principle which is relied on and the decisions in Collis v. Selden and in *Langmeid v. Hollidayd* (in each of which the plaintiff failed) are in my opinion at variance with the principle contended for. The case of *George v. Skivington* and especially what is said by Cleasby B. in giving judgment in that case seem to support the existence of the general principle. But it is not in terms laid down that any such principle exists and that case was decided by Cleasby B. on the ground that the negligence of the Defendant which was his own personal negligence was equivalent for the purposes of that action to fraud on which (as he said) the decision in *Langridge v. Levy* was based. In declining to concur in laying down the principle enunciated by the Master of the Rolls I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument as a gun in such a way as to cause danger or who without due warning supplies to others for use an instrument or thing which to his knowledge from its construction or otherwise is in such a condition as to cause danger not necessarily incident to the use of such an instrument or, thing is liable for injury caused to others by reason of his negligent act."

With the views expressed by Cotton L.J. I agree.

In *Le Liecre v Gould* , 1893, 1 Q.B. 491, the mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees and there was no contractual relationship between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates and they could not maintain an action against him by reason of his negligence. In this case Lord Esher seems to have qualified to some extent what he said in *Heaven v. Pender* , for at p. 497 he says this:

> "But can the plaintiffs rely upon negligence in the absence of fraud? The question of "liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

The case of *Heaven v. Pender* has no bearing upon the present question. That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that person or may injure his property.

In the same case at p. 504 A. L. Smith L.J. said:

> "The decision of *Heaven v. Pender* was founded upon the principle that a duty to take care did arise when the person or property of one was in such proximity to the person

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> or property of another that if due care was not taken damage might be done by one to the other. *Heaven v. Pender* goes no further than this, though it is often cited to support all kinds of untenable propositions."

In *Earl v. Lubbock* , 1905, 1 K.B. 253, the plaintiff had been injured by a wheel coming off a van which he was driving for his employer and which it was the duty of the defendant under contract with such employer to keep in repair. The County Court Judge and the Divisional Court both held that even if negligence was proved the action would not lie. It was held by the Appeal Court that the defendant was under no duty to the plaintiff and that there was no cause of action. In his judgment Sir Richard Henn Collins M.R. said the case was concluded by the authority of *Winterbottom v. Wright* , and he pointed out that the dictum of Lord Esher in *Heaven v. Pender* was not a decision of the Court and that it was subsequently qualified and explained by Lord Esher himself in *Le Lievre v. Gould* . Stirling L.J. said that in order to succeed in the action the plaintiff must bring his case within the proposition enunciated by Cotton L.J. and agreed to by Bowen L.J. in *Heaven v. Pender* , while Mathew L.J. made the following observation:

> "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van and that it followed as a matter of law that anyone in their employment or indeed anyone else who sustained an injury traceable to that negligence had a cause of action against the defendant. It is impossible to accept such a wide proposition and indeed it is difficult to see ' how if it were the law trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade."

In Bates v. Batey & Co. Ld., 1913, 3 K.B. 351, the defendants, ginger beer manufacturers, were held not liable to a consumer (who had purchased from a retailer one of their bottles) for injury occasioned by the bottle bursting as the result of a defect of which the defendants did not know, but which by the exercise of reasonable care they could have discovered. In reaching this conclusion Mr. Justice Horridge stated that he thought the judgments of Parke B. in *Langmeid v. Hollidayd* , of Cotton and Bowen L.JJ. in *Heaven v. Pender* , of Stirling L.J. in *Earl v. Lubbock* , and of Hamilton J. in Blacker v. Lake and Elliot, made it clear that the plaintiff was not entitled to recover, and that he had not felt himself bound by *George v. Skivington* .

So far therefore as the case of *George v. Skivington* and the dicta in *Heaven v. Pender* are concerned it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

One further case mentioned in argument may be referred to certainly not by way of authority but to gain assistance by considering how similar cases are dealt with by eminent judges of the J.S. A. That such cases can have no close application and no authority is clear, for though the source of the law in the two countries may be the same, its current may well flow in different channels. The case referred to is that of *Thomas v. Winchester* , 6 N.Y. 397 There a chemist issued poison in answer to a request for a harmless drug and he was held responsible to a third party injured by his neglect.

It appears to me that the decision might well rest on the principle mat he in tact sold a drug dangerous in itself, none the less so because he was asked to sell something else, and on this view the case does not advance the matter.

In another case of *Macpherson v. Buick Motor Co* , 1916, 217 N.Y. 382, where a manufacturer of a defective motor car was held liable for damages at the instance of a third party, the learned Judge appears to base his judgment on the view that a motor car might reasonably be regarded as a dangerous article.

In my view, therefore, the authorities are against the Appellant's contention, and apart from authority it is difficult to see how any common law proposition can be formulated to support her claim.

The principle contended for must be this: that the manufacturer or indeed the repairer of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle, for such rights undoubtedly exist in successive steps from the

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original manufacturer down to the ultimate purchaser, embraced in the general rule that an article is warranted as reasonably fit for the purpose for which it is sold. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrines applicable to sale and purchase.

The principle of tort lies completely outside the region where such considerations apply and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food, apart from that implied by contract or imposed by statute. If such a duty exists it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did. exist according to the laws of Babylon. Were such a principle known and recognised, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that with the exception of *George v. Skivington* , no case directly involving the principle has ever succeeded in the Courts, and were it well known and accepted much of the discussion of the earlier cases would have been waste of time.

In *Mullin v. Barr* , 1929 S.C. p. 461, a case indistinguishable from the present, excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this:

> "In a case like the present where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that if such responsibility attached to the Defenders, they might be called on to meet claims of damages which they could not possibly investigate or insure."

In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this Appeal should be dismissed, and I beg to move your Lordships accordingly.

Lord Atkin

MY LORDS,

The sole question for determination in this case is legal: do the averments made by the pursuer in her pleading if true disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial 'capacity: important both because of its bearing on public health and because of the practical test which it applies to the system of law under which it arises. The case has to be determined in accordance with Scots Law: but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session that for the purposes of determining this problem the law of Scotland and of England are the same. I speak with little authority on this point, but my own research such as it is satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law: and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether as a matter of law in the circumstances alleged the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the

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particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property whether real or personal with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other whether manufacturer salesman or landlord, customer, tenant, stranger and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or introduce non-essentials. The attempt was made by Lord Esher in *Heaven v. Pender* in a definition to which I will later refer. As framed it was demonstrably too wide, though it appears to me if properly limited to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes m law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* as laid down by Lord Esher when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould* , 1893,1 Q.B. 497. Lord Esher at p. 497 says :

> "That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property."

So A. L. Smith L.J.:

> "The decision of *Heaven v. Pender* was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that if due care was not taken damage might be done by the one to the other."

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity; but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness or "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender* at p. 510 of the application of his doctrine to the sale of goods :

> "This" (i.e. the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons or one of a class of persons where it would be obvious to the person supplying if he thought that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not or whether there

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> would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property."

I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time; and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in *Le Lievre v. Gould* , 1893, 1 Q.B. 491, I think the judgment of Lord Esher expresses the law of England; without the qualification I think that the majority of the Court in *Heaven v. Pender* were justified in thinking the principle as expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently in the course of preparation he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. My Lords, if this were the result of the authorities I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that in the assumed state of the authorities not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circumstances alleged there would be no evidence of negligence against anyone other than the manufacturer; and except in the case of a consumer who was also a purchaser no contract and no warranty of fitness and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, when the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where everyone including the manufacturer knows that the articles will be used by other persons than the actual ultimate purchaser, viz., by members of his family and his servants, and in some oases his guests. My Lords, I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found I think on examination that there is no case in which the circumstances have been such as I have just suggested where the. liability has been negatived. There are numerous cases where the relations were much more remote where the duty has been held riot to exist. There are also dicta in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey, and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decisionaAlone should carry authority proper weight of course being given to the dicta of the judges.

In my opinion several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is *George v. Skivington* L.R. 5 Ex. 1. That was a decision on a demurrer to a declaration which averred that the defendant professed to sell a hair wash made by himself and that the plaintiff Joseph George bought a bottle to be used by his wife, the plaintiff Emma George, as the defendant then knew and that the defendant had so negligently conducted himself in preparing and selling the hairwash that it was unfit for use whereby the female plaintiff was injured. Kelly C.B. said that there was no question of warranty

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but whether the chemist was liable in an action on the case for unskilfulness and negligence in the manufacture of it; "Unquestionably, there was such a duty toward the purchaser and it extends in my judgment to the person for whose use the vendor knew the compound was purchased." Pigott & Cleasby B.B. put their judgments on the same ground. I venture to think that Fry L.J. in Heaven v: Pender 12 Q.B.D. at p. 517 misinterprets Cleasby B.'s judgment in the reference to *Langridge v. Levy* 4 M. & W. 337. Cleasby B. appears to me to make it plain that in his opinion the duty to take reasonable care can be substituted for the duty which existed in *Langridge v. Levy* not to defraud. It is worth noticing that *George v. Skivington* was referred to by Cleasby B. himself sitting as a member of the Court of Exchequer Chamber in *Francis v. Cockrell* (L.R. 5 Q.B. at p. 515) and was recognised by him as based on an ordinary duty to take care. It was also affirmed by Lord Esher M.R. in Cunnington v. South Western Railway Co., 1883 49 L.T. 392, decided on July 2nd at a date between the argument and the judgment in *Heaven v. Pender* , though as in that case the Court negatived any breach of duty the expression of opinion is not authoritative. The existence of the duty contended for is also supported by *Hawkins v. Greville* (1896) 12 T.L.R. 532, where a dock labourer in the employ of the Dock Co. was injured by a defective sack which had been hired by the consignees from the defendant who knew the use to which it was to be put, and had been provided by the consignees for the use of the Dock Company, who had been employed by them to unload the ship on the Dock Company's premises. The Divisional Court, Day and Lawrence J.J., held the defendant liable for negligence. Similarly in *Elliott v. Hall* (1885) 15 Q.B.D. 315 the defendants, colliery owners, consigned coal to the plaintiff's employers, coal merchants, in a truck hired by the defendants from a wagon company. The plaintiff was injured in the course of unloading the coal by reason of the defective condition of the truck and was held by a Divisional Court, Grove and A. L. Smith J.J., entitled to recover on the ground of the defendant's breach of duty to see that the truck was not in a dangerous condition. It is to be noticed that in neither case was the defective chattel in the defendant's occupation, possession or control or on their premises, while in the latter case it was not even their property. It is sometimes said that the liability in these cases depends upon an invitation by the defendant to the plaintiff to use his chattel. I do not find the decisions expressed to be based upon this ground but rather upon the knowledge that the plaintiff in the course of the contemplated use of the chattel would use it: and the supposed invitation appears to me to be in many cases a fiction and merely a form of expressing the direct relation between supplier and user which gives rise to the duty to take care. A very recent case which has the authority of this House is *Chapman v. Sadler & Co.* . , 1929 A.C. 584. In that case a firm of stevedores employed to unload a cargo of maize in bags provided the rope slings by which the cargo was raised to the ship's deck by their own men using the ship's tackle, and then transported to the dockside by the shore porters of whom the plaintiff was one. The porters relied on examination by the stevedores and had themselves no opportunity of examination In these circumstances this House reversing the decision of the First Division held that there was a duty owed by the stevedore company to the porters to see that the slings were fit for use and restored the judgment of the Lord Ordinary, Lord Morison, in favour of the pursuer. I find no trace of the doctrine of invitation in the opinions expressed in this House of which mine was one : the decision was based upon the fact that the direct relations established especially the circumstance that the injured porter had no opportunity of independent examination gave rise to a duty to be careful.

I should not omit in this review of cases the decision in *Grote v. Chester and Holyhead Railway* (1848) 2 Ex. 251. That was an action on the case in which it was alleged that the defendants had constructed a bridge over the Dee on their railway and had licensed the use of the bridge to the Shrewsbury and Chester Railway to carry passengers over it, and had so negligently constructed the bridge that the plaintiff, a passenger of the last named railway, had been injured by the falling of the bridge. At the trial before Vaughan Williams J. the judge had directed the jury that the plaintiff was entitled to recover if the bridge was not constructed with reasonable care and skill. On a motion for a new trial the Attorney-General, Sir John Jervis, contended that there was misdirection, for the defendants were only liable for negligence and the jury might have understood that there was an absolute liability. The Court of Exchequer, after consulting the trial judge as to his direction, refused the rule. This case is said by Kelly C.B. in *Francis v. Cockrell* in the Exchequer Chamber (1870) L.R. 5 Q.B. at p. 505 to have been decided upon an implied contract with every person lawfully using the bridge that it was reasonably fit for the purpose. I can find no trace of such a ground in the pleading or in the argument or judgment. It is true that the defendants were the owners and occupiers of the bridge. The law as to the liability to invitees and licensees had not then been developed. The case is interesting because it is a simple action on the case for negligence, and the Court upheld the duty to persons using the bridge to take reasonable care that the bridge was safe.

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It now becomes necessary to consider the cases which have been referred to in the Courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this.

In *Dixon v. Bell* , 1816 5 M. & S. 198, the defendant had left a loaded gun at his lodgings and sent his servant, a mulatto girl aged about 13 or 14, for the gun, asking the landlord to remove the priming and give it her. The landlord did remove the priming and gave it to the girl, who later levelled it at the plaintiff's small son, drew the trigger and injured the boy. The action was in case for negligently entrusting the young servant with the gun. The jury at the trial before Lord Ellenborough had returned a verdict for the plaintiff. A motion by Sir William Garrow, Attorney-General, for a new trial was dismissed by the Court. Lord Ellenborough and Bayley J.J., the former remarking that it was incumbent on the defendant, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious.

In, *Langridge v. Levy* (1837) 2 M. & W. 519 (1838) 4 M. & W. 337 the action was in case and the declaration alleged that the defendant by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons confiding in the warranty used the gun, which burst and injured him. Plea not guilty and no warranty as alleged. The report is not very satisfactory. No evidence is reported of any warranty or statement except that the gun was an elegant twist gun by Nock. The judge left to the jury whether the defendant had warranted the gun to be by Nock and to be safe: whether it was in fact unsafe: and whether the defendant warranted it to be safe knowing that it was not so. The jury returned a general verdict for the plaintiff. It appears to have been argued that the plaintiff could recover wherever there is a breach of duty imposed on the defendant by contract or otherwise, and the plaintiff is injured by reason of its breach: by this is meant apparently that the duty need not be owed to the plaintiff but that he can take advantage of the breach of a duty owed to a third party. This contention was negatived by the Court, who held, however, that the plaintiff could recover if a representation known to be false was made to a third person with the intention that a chattel should be used by the plaintiff, even though it does not appear that the defendant intended the false representation to be communicated to him. See per Parke B. 2 M. & W. at p. 531. The same view was adopted by the Exchequer Chamber, the user by the plaintiff being treated by the Court as one of the acts contemplated by the fraudulent defendant. It is unnecessary to consider whether the proposition can be supported in its widest form. It is sufficient to say that the case was based as I think in the pleading and certainly in the judgment on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion. *Winterbottom v. Wright* 1842 10 M. & W. 109 was a case decided on a demurrer. The plaintiff had demurred to two of the pleas as to which there was no decision by the Court, but on the hearing of the plaintiff's demurrer the Court in accordance with the practice of the day were entitled to consider the whole record including the declaration, and coming to the conclusion that the declaration disclosed no cause of action, gave judgment for the defendant - See Sutton's "Personal Actions at Common Law" page 113. The advantage of the procedure is that we are in a position to know the precise issue at law which arose for determination. The declaration was in case and alleged that the defendant had contracted with the Postmaster-General to provide the mail coach to convey mails from Hartford to Holyhead and to keep the mails in safe condition, that Atkinson and others with notice of the said contract bad contracted with the Postmaster-General to convey the road mailcoach from Hartford to Holyhead : and that the plaintiff relying on the said first contract hired himself to Atkinson to drive the mailcoach, but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that the defendant having the means of knowing and well knowing all the aforesaid premises, the mailcoach being in a dangerous condition owing to certain latent defects and to no other cause gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged, in other words no duty was alleged other than the duty arising out of the contract : it is not stated that the defendant knew or ought to have known of the latent defect. The argument of the defendant was that on the face of the declaration the wrong arose merely out of the breach of a contract, and that only a party to the contract could sue. The Court of Exchequer adopted that view, as clearly appears from the judgments of Alderson and Rolfe B.B. There are dicta by Lord Abinger which are too wide as to an action of negligence being confined to cases of breach of a public duty. The actual decision appears to have been manifestly right; no duty to the plaintiff arose out of the contract; and the duty of the defendant under the contract with the Postmaster General to put the coach in good repair could not have involved those direct relations with the servant of the persons whom the Postmaster-General employed to drive the coach as would give rise to a duty of care owed to such servant. We now come to *Langmeid v. Holliday*

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(1851) 6 Ex. 761, the dicta in which have had considerable effect in subsequent decisions. In that case the declaration in case alleged that the plaintiff, Frederick Langmeid, had bought from the defendant, the maker and seller of " the Holliday lamp," a lamp to be used by himself and his wife Eliza in the plaintiff's shop; that the defendant induced the sale by the false and fraudulent warranty that the lamp was reasonably fit for the purpose; and that the plaintiff Eliza, confiding in the said warranty, lighted the lamp which exploded whereby she was injured. It is perhaps not an extravagant guess to suppose that the plaintiffs pleader had read the case of *Langridge v. Levy* . The jury found all the facts for the plaintiffs except the allegation of fraud; they were not satisfied that the defendant knew of the defects. The plaintiff Frederick had already recovered damages on the contract of sale for breach of the implied warranty of fitness. The declaration made no averment of negligence. Verdict was entered at the trial by Baron Martin for the plaintiff but with liberty to the defendant to move to enter the verdict for him. A rule having been obtained plaintiff's counsel sought to support the verdict on the ground that this was not an action for a breach of duty arising solely from contract but for an injury resulting from conduct amounting to fraud. Baron Parke, who delivered the judgment of the Court, held that fraud having been negatived the action could not be maintained on that ground. He then went on to discuss cases in which a third person not a party to a contract may sue for damages sustained if it is broken. After dealing with the negligence of a surgeon or of a carrier, or of a firm in breach of contract committing a nuisance on a highway, he deals with the case where anyone delivers to another without notice an instrument in its nature dangerous or under particular circumstances', as a loaded gun, and refers to *Dixon v. Bell* , though what this case has to do with contract it is difficult to see. He then goes on:

> "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that if a machine not in its nature dangerous, a carriage for instance, but which might become so by a latent defect entirely unknown although discoverable by the exercise of ordinary care should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

It is worth noticing how guarded this dictum is. The case put is a machine such as a carriage not in its nature dangerous which might become dangerous by a latent defect entirely unknown. Then there is the saving although discoverable by "the exercise of ordinary care," discoverable by whom is not said; it may include the person to whom the innocent machine is "lent or given". Then the dictum is confined to machines "lent or given" (a later sentence makes it clear that a distinction is intended between these words and delivered to the purchaser under the contract of sale), and the manufacturer is introduced for the first time even by the person who manufactured it. I do not for a moment believe that Baron Parke had in his mind such a case as a loaf negligently mixed with poison by the baker which poisoned a purchaser's family. He is in my opinion confining his remarks primarily to cases where a person is seeking to rely upon a duty of care which arises out of a contract with a third party; and has never even discussed the case of a manufacturer negligently causing an article to be dangerous and selling it in that condition whether with immediate or mediate effect upon the consumer. It is noteworthy that he only refers to "letting or giving" chattels, operations known to the law where the special relations thereby created have a particular bearing on the existence or non-existence of a duty to take care. Next in this chain of authority come *George v. Skivington* , 1869, L.R. 5, Ex. 1, and *Heaven v. Pender* , 1883, 11 Q.B.D. 503, which I have already discussed. The next case is *Earl v. Lubbock* , 1905, 1 K.B. 253. The plaintiff sued in the County Court for personal injuries due to the negligence of the defendant. The plaintiff was a driver in the employ of a firm who owned vans. The defendant, a master wheelwright, had contracted with the firm to keep their vans in good and substantial repair. The allegation of negligence was that the defendant's servant had negligently failed to inspect and repair a defective wheel, and had negligently repaired the wheel. The learned County Court judge had held that the Defendant owed no duty to the Plaintiff, and the Divisional Court, Lord Alverstone, L.C.J., Wills and Kennedy, J.J., and the Court of Appeal agreed with him. The Master of the Rolls, Sir R. Henn Collins, said that the case was concluded by *Winterbottom v. Wright* , 10 M. & W. 109. In other words he must have treated the duty as alleged to arise only from a breach of contract; for as has been pointed , out that was the only allegation in *Winterbottom v. Wright* , negligence apart from contract being neither averred nor proved. It is true that he cites with approval the dicta of Lord Abinger in that case: but obviously I think his approval must be limited to those dicta so far as they related to the particular facts before the Court of Appeal: and to cases where as Lord Abinger says the law, permits a contract to be turned into a tort. Stirling, L.J., it is true said that to succeed the

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Plaintiff must bring his case within the proposition of the majority in *Heaven v. Pender* that any one who without due warning supplies to others for use an instrument which to his knowledge is in such a condition as to cause danger is liable for injury. I venture to think that the Lord Justice is mistakenly treating a proposition which applies one test of a duty as though it afforded the only criterion.

Mathew, L.J., appears to me to put the case on its proper footing when he says at p. 259 the argument of the Plaintiff was that the Defendant's servants had been negligent in the performance of the contract with the owners of the van and that it followed as a matter of law that any one in this employment had a cause of action against the Defendant. " It is impossible to accept such a wide proposition and indeed it is difficult to see how if it were the law trade could be carried on." I entirely agree. I have no doubt that in that case the Plaintiff failed to show that the repairer owed any duty to him. The question of law in that case seems very different to that raised in the present case. The case of *Blacker v. Lake & Elliot* Ltd. 1912 (104 L.T. 533) approaches more nearly the facts of this case. I have read and re-read it having unfeigned respect for the authority of the two learned judges, Hamilton and Lush, J.J., who decided it: and I am bound to say I have found difficulty in formulating the precise grounds upon which the judgment was given. The Plaintiff had been injured by the bursting of a brazing lamp which he had bought from a shopkeeper who had bought it from the manufacturer, the Defendant. The Plaintiff had used the lamp for 12 months before the accident. The case was tried in the County Court before that excellent lawyer, the late Judge Sir Rowland Roberts. That learned judge had directed the jury that the Plaintiff could succeed if the Defendants had put upon the market a lamp not fit for use in the sense that a person working it with reasonable care would incur a risk which a properly constructed lamp would not impose upon him. The jury found that the lamp was defective by reason of an improper system of making an essential joint between the container and the vaporiser; that the Defendants did not know that it was dangerous but ought as reasonable men to have known it. Hamilton J. seems to have thought that there was no evidence of negligence in this respect. Lush J. expressly says so and implies "I also think" that Hamilton J. so thought. If so the case resolves itself into a series of important dicta. Hamilton J. says at p. 536 that it has been decided in authorities from *Winterbottom v. Wright* to *Earl v. Lubbock* that the breach of the Defendants' contract with A, to use care and skill in and about the manufacture or repair of an article does not itself give any cause of action to B when injured by the article proving to be defective in breach of that contract. He then goes on to say how is the case of the Plaintiffs any better when there is no contract proved of which there could be a breach. I think with respect that this saying does not give sufficient weight to the actual issues raised by the pleadings on which alone the older cases are an authority. If the issue raised was an alleged duty created by contract it would have been irrelevant to consider duties created without reference to contract: and contract cases cease to be authorities for duties alleged to exist beyond or without contract. Moreover it is a mistake to describe the authorities as dealing with the breach of care or skill in the manufacture of goods, as contrasted with repair. The only manufacturing case was *Langmeid v. Hollidayd* where negligence was not alleged. Hamilton J. recognises that *George v. Skivington* was a decision which if it remained an authority bound him. He says that without presuming to say it was wrong he cannot follow it because it is in conflict with *Winterbottom v. Wright* . I find this very difficult to understand: for *George v. Skivington* was based upon a duty in the manufacturer to take care independently of contract while *Winterbottom v. Wright* was decided on demurrer in a case where the alleged duty was based solely on breach of a contractual duty to keep in repair and no negligence was alleged. Lush J. says in terms that there are only 3 classes of cases in which a stranger to a contract can sue for injury by a defective chattel: one is fraud, the second is articles dangerous or noxious in themselves where the duty is only to warn, the third is public nuisance. He does not bring the cases represented by *Elliott v. Hall* (the defective coal wagon) within his classes at all. He says they belong to a totally different class "where the control of premises or the management of a dangerous thing upon premises creates a duty." I have already pointed out that this distinction is unfounded in fact, for in *Elliott v. Hall* as in Hawkins v. Smith (the defective sack) the defendant exercised no control over the article and the accident did not occur on his premises. With all respect I think that the judgments in the case err by seeking to confine the law to rigid and exclusive categories: and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to those who will be immediately injured by lack of care. The last case I need refer to is Bates v. Batey & Co., Ltd. (1913, 3 K.B., 351), where manufacturers of ginger beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking proper means to discover whether the bottle

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was defective or not. Horridge, J., found that a bottle of ginger beer was not dangerous in itself, but that this defective bottle was in fact dangerous; but as the Defendants did not know that it was dangerous they were not liable though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger beer who caused the defect in the bottle : but on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that as the manufacturers must have contemplated the bottle being handled immediately by the consumer they owed a duty to him to take care that he should not be injured externally by explosion just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing. My Lords, I do not find it necessary to discuss at length the cases dealing with duties where a thing is dangerous, or in the narrower category belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton, L. J., in Hope & Son v. Anglo American Oil Co. (1922), 12 Lloyds List 183 at p. 187, a case which was ultimately decided on a question of fact:

> "Personally I do not understand the difference between a thing dangerous in itself as poison, and a thing not dangerous as a class but by negligent construction dangerous as a particular thing. The latter if anything seems the more dangerous of the two : it is a wolf in sheep's clothing instead of an obvious wolf."

The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In the Dominion Natural Gas Co., Ltd. v. Collins & Perkins 1909 A.C. 640 the Appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs —were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin in giving the judgment of the Judicial Committee consisting of himself, Lord Macnaghten, Lord Collins and Sir Arthur Wilson, after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded:

> "There may be, however, in the case of anyone performing an operation or setting up and installing a machine a relationship of duty. What that duty is will vary according to the subject matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis* there is a particular duty to take precaution imposed upon those who send forth or instal such articles where it is necessarily the case that other parties will come within their proximity."

This with respect exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject matter involved, but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no "difference in the creation, of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun. In both cases the actual work is innocuous: it is only when the gun is loaded or the apparatus charged with gas that the danger arises. My Lords, I do not think it necessary to consider the obligation of a person who entrusts to a carrier goods which are dangerous or which he ought to know are dangerous. As far as the direct obligation of the consignor to the carrier is concerned, it has been put upon an implied warranty (*Brass v. Maitland* (1856) 6 E. & B. 470), but it is also a duty owed independently of contract, e.g. to the carrier's servant (*Farrant v. Barnes* 11 C.B.N.S. 563). So far as the cases afford an analogy they seem to support the proposition now asserted. I need only mention to distinguish two cases in this House which are referred to in some of the cases which I have reviewed. *Caledonian Railway Co. v. Warwick* 1898 A.C. 216 in which the appellant company were held not liable for injuries caused by a defective brake on a coal wagon conveyed by the railway company to a point in the transit where their contract ended and where the wagons were taken over for haulage for the last part of the journey by a second railway company on which

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part the accident happened. It was held that the first railway company were under no duty to the injured workman to examine the wagon for defects at the end of their contractual haulage. There was ample opportunity for inspection by the second railway company. The relations were not proximate. In the second *Cavalier v. Pope* (1906 A.C. 428) the wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house on the ground that the landlord had contracted with her husband to repair the house. It was held that the wife was not a party to the contract: and that the well-known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence.

In the most recent case *Bottomley v. Bannister* (1932) 101 L. J. K.B. 46 an action under Lord Campbell's Act the deceased man the father of the plaintiff had taken an unfurnished house from the defendants who had installed a gas boiler with a special gas burner which if properly regulated required no flue. The deceased and his wife were killed by fumes from the apparatus. The case was determined on the ground that the apparatus was part of the realty and that the landlord did not know of the danger : but there is a discussion of the case on the supposition that it was a chattel. Greer L.J. at p. 54 states with truth that it is not easy to reconcile all the authorities: and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care then in cases of a proximate relationship this case will I trust supply the deficiency.

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger beer bottle in the U.S. before it appeared in Scotland but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in *McPherson v. Buick Motor Co.* in the New York Court of Appeals (1916) 217 N.Y. 382 in which he states the principles of the law as I should desire to state them and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business by giving opportunities of examination to the immediate purchaser or otherwise prevented the relation between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

My Lords if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumers life or property owes a duty to the consumer to take that reasonable care. It is a proposition that I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter as in most others is in accordance with sound common sense. I think that this appeal should be allowed.

Lord Tomlin

MY LORDS,

I have had an opportunity of considering the opinion prepared by my noble and learned friend Lord Buckmaster which I have already read. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to everyone who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover the fact that an article of food is sent out in a sealed container can have no relevancy on the question of

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duty. It is only a factor which may render it easier to bring negligence home to the manufacturer.

Secondly I desire to say that in my opinion the decision in *Winterbottom v. Wright* , 10 M. & W. 109, is directly in point against the appellant.

The examination of the report makes it, I think, plain (1) that negligence was alleged and was the basis of the claim, and (2) that the wide proposition which I have indicated was that for which the plaintiff was contending.

The declaration averred (*inter alia*) that the defendant "so improperly and negligently conducted himself" that the accident complained of happened.

The plaintiff's counsel said, "here the declaration alleges the accident to have happened through the defendant's negligence and want of care."

The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said, "For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle."

That the action which was in case embraced a cause of action in tort is I think implicit in its form and appears from the concluding sentence of Lord Abinger's judgment, which was in these terms:

> "By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer and after all matters between them had been adjusted and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him."

I will only add to what has been already said by my noble and learned friend Lord Buckmaster with regard to the decisions and dicta relied upon by the appellant, and the other relevant reported cases that I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded. Upon the view which I take of the matter the reported cases, some directly, others impliedly, negative the existence as part of the Common Law of England of any principle affording support to the appellant's claim, and therefore there is in my opinion no material from which it is legitimate for your Lordships' House to deduce such a principle.

Lord Thankerton

MY LORDS,

In this action the Appellant claims reparation from the Respondent in respect of illness and other injurious effects resulting from the presence of a decomposed snail in a bottle of ginger beer, alleged to have been manufactured by the Respondent, and which was partially consumed by her, it having been ordered by a friend on her behalf in a cafe in Paisley.

The action is based on negligence, and the only question in this appeal is whether, taking the Appellant's averments *pro veritate* , they disclose a case relevant in law, so as to entitle her to have them remitted for proof. The Lord Ordinary allowed a proof, but, on a reclaiming note for the Respondent, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and dismissed the action, following their decision in the recent cases of *Mullen v. Barr & Co.* and *McGowan v. Barr & Co.* , 1929 S.C. 461.

The Appellant's case is that the bottle was sealed with a metal cap, and was made of dark opaque glass, which not only excluded access to the contents before consumption if the contents were to retain their aerated condition, but also excluded the possibility of visual examination of the contents from outside; and that on the side of the bottle there was pasted a label containing the name and address of the Respondent, who was the manufacturer. She states that the shopkeeper, who supplied the ginger beer, opened it and poured some of its contents into a tumbler, which contained some ice cream, and that she drank some of the contents of the tumbler; that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler, when a snail, which had been, unknown to her, her friend, or the shopkeeper, in the bottle, and was in a state of

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decomposition, floated out of the bottle.

The duties which the Appellant accuses the Respondent of having neglected may be summarised as follows:

> (a) that the ginger beer was manufactured by the Respondent or his servants to be sold as an article of drink to members of the public (including the Appellant), and that accordingly it was his duty to exercise the greatest care in order that snails would not get into the bottles, render the ginger beer dangerous and harmful, and be sold with the ginger beer,
>
> (b) a duty to provide a system of working his business which would not allow snails to get into the sealed bottles, and in particular would not allow the bottles when washed to stand in places to which snails had access,
>
> (c) a duty to provide an efficient system of inspection, which would prevent snails getting into the sealed bottles, and
>
> (d) a duty to provide clear bottles, so as to facilitate the said system of inspection.

There can be no doubt, in my opinion, that equally in the law of Scotland and of England it lies upon the party claiming redress in such a case to show that there was some relation of duty between her and the defender which required the defender to exercise due and reasonable care for her safety. It is not at all necessary that there should be any direct contract between them, because the action is not based upon contract, but upon negligence; but it is necessary for the pursuer in such an action to show there was a duty owed to her by the defender, because a man cannot be charged with negligence if he has no obligation to exercise diligence — *Kemp & Dougall v Darngavil Coal Co.* , 1909 S.C. 1314, per Lord Kinnear at p. 1319; See also *Clelland v. Robb* , 1911 S.C. 253, per Lord President Dunedin and Lord Kinnear at p. 256. The question in each case is whether the pursuer has established, or, in the stage of the present appeal, has relevantly averred, such facts as involve the existence of such a relation of duty.

We are not dealing here with a case of what is called an article per se dangerous or one which was known by the defender to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it. The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that, neither the Law of Scotland nor the Law of England, will hold that the manufacturer has any duty towards the consumer to exercise diligence. In such a case the remedy of the consumer, if any, will lie against the intervening party from whom he has procured the article. I am aware that the American Courts, in the decisions referred to by my noble and learned friend Lord Macmillan, have taken a view more favourable to the consumer.

The special circumstances, from which the Appellant claims that such a relationship of duty should be inferred, may, I think, be stated thus, viz. that the Respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer, that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her showing that the article has reached her intact, and that she has been injured by the harmful nature of the article owing to the failure of the manufacturer to take reasonable care in its preparation prior to its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer.

In my opinion the existence of a legal duty under such circumstances is in conformity with the principles of both the Law of Scotland and of the Law of England. The English cases demonstrate how impossible it is to finally catalogue, amid the ever varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract, and each of these cases relates to its own set of circumstances, out of which it was claimed that the duty had arisen. In none of these cases were the circumstances identical with the present case as regards that which regard as the essential element in this case, viz., the manufacturer's own action in bringing himself into

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direct relationship with the party injured. I have had the privilege of considering the discussion of these authorities by my noble and learned friend Lord Atkin in the judgment which he has just delivered, and I so entirely agree with it that I cannot usefully add anything to it.

An interesting illustration of similar circumstances is to be found in *Gordon v. McHardy* , (1903) 6 F. 210, in which the pursuer sought to recover damages from a retail grocer on account of the death of his son by ptomaine poisoning, caused by eating tinned salmon purchased from the defender. The pursuer averred that the tin, when sold, was dented, but he did not suggest that the grocer had cut through the metal and allowed air to get in, or had otherwise caused injury to the contents. The action was held irrelevant, the Lord Justice Clerk remarking, "I do not see how the defender could have examined the tin of salmon which he is alleged to have sold without destroying the very condition which the manufacturer had established in order to preserve the contents, the tin not being intended to be opened until immediately before use." Apparently in that case the manufacturers' label was off the tin when sold, and they had not been identified. I should be sorry to think that the meticulous care of the manufacturer to exclude interference or inspection by the grocer in that case should relieve the grocer of any responsibility to the consumer without any corresponding assumption of duty by the manufacturer.

My Lords, I am of opinion that the contention of the Appellant is sound and that she has relevantly averred a relationship of duty as between the Respondent and herself, as also that her averments of the Respondent's neglect of that duty are relevant.

The cases of *Mullen* and *McGowan* which the learned Judges of the Second Division followed in the present case related to facts similar in every respect except that the foreign matter was a decomposed mouse. In these cases the same Court—Lord Hunter dissenting—held that the manufacturer owed no duty to the consumer. The view of the majority was that the English authorities excluded the existence of such a duty, but Lord Ormidale (at p. 471) would otherwise have been prepared to come to a contrary conclusion. Lord Hunter's opinion seems to be in conformity with the view I have expressed above.

My conclusion rests upon the facts averred in this case, and would apparently also have applied in the cases of *Mullen* and *McGowan* , in which, however, there had been a proof before answer, and there was also a question as to whether the pursuers had proved their averments.

I am therefore of opinion that the appeal should be allowed and the case should be remitted for proof, as the pursuer did not ask for an issue.

Lord Macmillan

MY LORDS,

The incident which in its legal bearings your Lordships are called upon to consider in this appeal was in itself of a trivial character, though the consequences to the appellant, as she describes them, were serious enough. It appears from the appellant's allegations that on an evening in August, 1928, she and a friend visited a cafe" in Paisley, where her friend ordered for her some ice cream and a bottle of ginger beer. These were supplied by the Shopkeeper, who opened the ginger beer bottle and poured some of the contents over the ice cream which was contained in a tumbler. The appellant drank part of the mixture and her friend then proceeded to pour the remaining contents of the bottle into the tumbler. As she was doing so a decomposed snail floated out with the ginger beer. In consequence of her having drunk part of the contaminated contents of the bottle the appellant alleges that she contracted a serious illness. The bottle is stated to (have been of dark opaque glass, so that the condition of the contents could not be ascertained by inspection, and to have been closed with a metal cap, while on the side was a label bearing the name of the respondent, who was the manufacturer of the ginger beer of which the shopkeeper was merely the retailer.

The allegations of negligence on which the appellant founds her action against the respondent may be shortly summarised. She says that the ginger beer was manufactured by the respondent for sale as an article of drink to members of the public, including herself; that the presence of a decomposing snail in ginger beer renders the ginger beer harmful and dangerous to those consuming it; and that it was the duty of the respondent to exercise his process of manufacture with sufficient care to prevent snails getting into or remaining in the bottles which he filled with ginger beer. The

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appellant attacks the respondent's system of conducting his business, alleging that he kept his bottles in premises to which snails (had access and that he failed to have his bottles properly inspected for the presence of foreign matter before he filled them.

The respondent challenged the relevancy of the appellant's averments and, taking them *pro veritate* , as for this purpose he was bound to do, pleaded that they disclosed no ground of legal liability on his part to the appellant.

The Lord Ordinary repelled the respondent's plea to the relevancy and allowed the parties a proof of their averments, but on a reclaiming note their Lordships of the Second Division (Lord Hunter dissenting, or perhaps more accurately, protesting) dismissed the action and in doing so followed their decision in the previous cases of *Mullen v. Barr & Co.* and *McGowan v. Barr & Co.* , 1929 S.C. 461. The only difference in fact between those cases and the present case is that it was a mouse and not a snail which was found in the ginger beer. The present appeal is consequently in effect against the decision in these previous cases, which I now proceed to examine.

The two cases, being to all intents and purposes identical, were heard and decided together. In *Mullen v. Barr & Co.* the Sheriff-Substitute allowed a proof, but the Sheriff on appeal dismissed the action as irrelevant. In *McGowan v. Barr & Co.* the Sheriff-Substitute allowed a proof and the Sheriff altered his interlocutor by allowing a proof before answer, that is to say, a proof under reservation of all objections to the relevancy of the action. On the cases coming before the Second Division on the appeals of the pursuer and the defenders respectively their Lordships ordered a proof before answer in each case arid the evidence was taken before Lord Hunter. It will be sufficient to refer to *ullen's* case in which their Lordships gave their reasons for assoilzieing the defenders in both cases. The Lord Justice-Clerk held that negligence had not been proved and therefore did not pronounce upon the question of relevancy. Lord Ormidale held that there was no relevant case against the defenders, but would have been prepared if necessary to hold that in any case negligence had not been established by the evidence. Lord Hunter held that the case was relevant and that negligence had been proved. Lord Anderson held that the pursuer had no case in law against the defenders, but that if this view was erroneous, negligence had not been proved.

I desire to draw special attention to certain passages in the opinions of their Lordships. At p. 470 the learned Lord Justice Clerk states that he prefers " to base his judgment on the proposition that the pursuer has failed to prove fault on the part of the defenders" and feels " absolved from expressing a concluded opinion on the thorny and difficult question of law whether, assuming fault to be proved on the part of the defenders, the pursuer has in law a right to sue them." In the present case his Lordship, after pointing out that he had formally reserved his opinion on the point in *Mullen v. Barr & Co.* proceeds :—

> "I think I indicated not obscurely the view which I entertained on a perusal of the English cases,"

and to that view, in deference to the English cases which his Lordship has reconsidered, he has given effect adversely to the present appellant. That the opinions of the majority of the judges of the second Division in *Mullen's* case on the question of relevancy are founded entirely on their reading of the series of English cases cited to them is made clear by Lord Ormidale. After stating the questions in the case, the first being "whether, in the absence of any contractual relation between the pursuers and the defenders, the latter owed a duty to the pursuers, as the consumers of the beer, of taking precautions to see that nothing of a poisonous or deleterious nature was allowed to enter and remain in the bottles," his Lordship proceeds:

> "I recognise the difficulty of determining the first of these questions with either confidence or satisfaction; and were it not for the unbroken and consistent current of decisions beginning with *Winterbottom v. Wright* (1842, 10 M. & W., 109) to which we were referred I should have been disposed to answer it in the affirmative. The evidence shows that the greatest care is taken by the manufacturers to ensure by tab and label that the ginger beer should pass, as it were, from the hand of the maker to the hand of the ultimate user uninterfered with by the retail dealer—who has little interest in, and no opportunity of, examining the contents of the containers. Accordingly it would appear to be reasonable and equitable to hold that, in the circumstances and apart altogether from contract, there exists a relationship of duty as between the maker and the consumer of the beer. Such considerations, however, as I read the authorities, have

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> been held to be irrelevant in analogous circumstances."

Lord Ormidale thus finds himself constrained to reach a conclusion which appears to him to be contrary to reason and equity by his reading of what he describes as an "unbroken and consistent current of decisions beginning with *Winterbottom v. Wright* ." In view of the deference thus paid to English precedents it is a singular fact that the case of *Winterbottom v. Wright* is one in which no negligence in the sense of breach of a duty owed by the defendant to the plaintiff was alleged on the part of the defendant. The truth, as I hope to show, is that there is in the English reports no such "unbroken and consistent current of decisions" as would justify the aspersion that the law of England has committed itself irrevocably to what is neither reasonable nor equitable, or require a Scottish judge in following them to do violence to his conscience. "In my opinion," said Lord Esher in Emmens v. Pottle, 1885, 16 Q.B.D., 354 at pp. 357-8, "any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England."

At your Lordships' bar Counsel for both parties to the present appeal, accepting, as I do also, the view that there is no distinction between the law of Scotland and the law of England in the legal principles applicable to the case, confined their arguments to the English authorities. The appellant endeavoured to establish that according to the law of England the pleadings disclose a good cause of action; the respondent endeavoured to show that on the English decisions the appellant had stated no admissible case. I propose therefore to address myself at once to an examination of the relevant English precedents.

I observe in the first place that there is no decision of this House upon the point at issue, for I agree with Lord Hunter that such cases as *Cavalier v. Pope* [1906] A.C. 428 and Cameron v. Young [1909] A.C. 640 which decided that "a stranger to a lease cannot found upon a landlord's failure to fulfil obligations undertaken by him under contract with his lessee" are in a different chapter of the law. Nor can it by any means be said that the cases present "an unbroken and consistent current" of authority for some flow one way and some the other.

It humbly appears to me that the diversity of view which is exhibited in such cases as *George v. Skivington* , 1869, L.R. 5 Ex. 1 on the one hand and *Blacker v. Lake & Elliot* , 1912, 106 L.T. 533, on the other hand—to take two extreme instances—is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand there is the equally well-established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence of course in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject:

> "It appears," says Sir Frederick Pollock (Law of Tarts, 13th ed., p. 570) "that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. The authorities formerly relied on for this proposition really proved something different and much more rational, namely, that if A breaks his contract with B (which may happen without any personal default in A or A's servants) that is not of itself sufficient to make A liable to C, a stranger to the contract, for consequential damage. This, and only this, is the substance of the perfectly correct decision of the Court of Exchequer in *Winterbottom v. Wright* (cit. sup.) and *Longmeid v. Holliday* (1851, 6 Ex. 761). In each case the defendant delivered under a contract of sale or hiring a chattel which was in fact unsafe to use but in the one case it was not alleged, in the other was alleged but not proved, to have been so to his knowledge. In each case a stranger to the contract using the chattel—a coach in the one case, a lamp in the other—in the ordinary way came to harm through

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> its dangerous condition and was held not to have any cause of action against the purveyor. Not in contract, for there was no contract between these parties; not in tort, for no bad faith or negligence on the defendant's part was proved."

Where, as in cases like the present, so much depends upon the avenue of approach to the question it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between manufacturer and the consumer and thus the plaintiff if he is to succeed is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If on the other hand you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of sale becomes irrelevant and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves or known to be in a dangerous condition has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

With these preliminary observations I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to non-suit the appellant. It will be found that in most of them the facts were very different from the facts of the present case and did not give rise to the special relationship and consequent duty which in my opinion is the deciding factor here. *Dixon v. Bell* , 1816, 5 M. & S. 198 is the starting point. There a maidservant was sent to fetch a gun from a neighbour's house; on the way back she pointed it at a child and the gun went off and injured the child. The owner of the gun was held liable for the injury to the child on the ground that he should have seen that the charge was drawn before he entrusted the gun to the maid-servant. "It was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious." This case in my opinion merely illustrates the high degree of care, amounting in effect to insurance against risk, which the law exacts from those who take the responsibility of giving out such dangerous things as loaded firearms. The decision if it has any relevance is favourable to the appellant who submits that human drink rendered poisonous by careless preparation may be as dangerous to life as any loaded firearm. *Langridge v. Levy* 1837, 2 M. & W. 519; 4 M. & W. 337, is another case of a gun, this time of defective make and known to the vendor to be defective. The purchaser's son was held entitled to sue for damages in consequence of injuries sustained by him through the defective condition of the gun causing it to explode. The ground of the decision seems to have been that there was a false representation by the vendor that the gun was safe, and the representation appears to have been held to extend to the purchaser's son. The case is treated by commentators as turning on its special circumstances and as not deciding any principle of general application. As for *Winterbottom v. Wright* (cit. sup.} and *Longmeid v. Holliday* (cit. sup.), neither of these cases is really in point for the reason indicated in the passage from Sir Frederick Pollock's treatise which I have quoted above. Then comes *George v. Skivington* , 1869, L.R. 5 Ex. 1, which is entirely in favour of the appellant's contention. There was a sale in that case by a chemist of some hair wash to a purchaser for the use of his wife, who suffered injury from using it by reason of its having been negligently compounded. As Kelly C.B. points out the action was not founded on any warranty implied in the contract of sale between the vendor and the purchaser, and the plaintiff, the purchaser's wife, was not seeking to sue on the contract to which she was not a party. The question, as the Chief Baron stated it, was "whether the defendant, a chemist, compounding the article sold for a particular purpose and knowing of the purpose for which it was bought is liable in an action on the case for unskilfulness and negligence in the

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manufacture of it whereby the person who used it was injured." And this question the Court unanimously answered in the affirmative. I may mention in passing that Lord Atkinson in this House speaking of that case and *Langridge v. Levy* (cit. sup.) observed that "in both these latter cases the defendant represented that the article sold was fit and proper for the purposes for which it was contemplated that it should be used and the party injured was ignorant of its unfitness for these purposes." It is true that George v. Skiving ton. has been the subject of some criticism and was said by Hamilton, J., as he then was, in *Blacker v. Lake & Elliot* , 1912, 106 L.T. 533, to have been in later cases as nearly disaffirmed as is possible without being expressly overruled. I am not sure that it has been so severely, handled as that. At any rate I do not think that it deserved to be and certainly, so far as I am aware, it has never been disapproved in this House. It has been cited in a judgment of the Privy Council by Lord Dunedin without any indication of disapproval (Dominion Natural Gas Co. v. Collins [1909], A.C. 640, at p. 646). Heaven v. Fender, 1883, 11 Q.B.D. 503, has probably been more quoted and discussed in this branch of the law than any other authority, because of the dicta of Sir Baliol Brett, M.R., as he then was. on the general principles regulating liability to third parties. In his opinion "it may safely be affirmed to be a true proposition" that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The passage specially applicable to the present case is as follows:

> "Whenever one person supplies goods … for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises, to be enforced by an action for negligence."

Cotton, L.J., with whom Bowen, L.J., agreed, expressed himself as "unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains inasmuch as there are many cases in which the principle was impliedly negatived," but the decision of the Court of Appeal was unanimously in the plaintiff's favour. The passages I have quoted like all attempts to formulate principles of law compendiously and exhaustively may be open to some criticism and their universality may require some qualification but as enunciations of general legal doctrine I am prepared, like Lord Hunter, to accept them as sound guides. I now pass to the three modern cases of *Earl v. Lubbock* [1905], 1 K.B. 253, *Blacker v. Lake & Elliot* , cit. sup. and Bates v. Batey & Co., Ltd. [1913], 3 K.B. 351. The first of these cases related to a van which had recently been repaired by the defendant under contract with the owner of the van. A driver in the employment of the owner was injured in consequence of a defect in the van which was said to be due to the careless manner in which the repairer had done his work. It was held that the driver had no right of action against the repairer. The case turns upon the rule that a stranger to a contract cannot found an action of tort on a breach of that contract. It was pointed out that there was no evidence that the plaintiff had been invited by the defendant to use the van and the van owner was not complaining of the way in which the van had been repaired. The negligence, if negligence there was, was too remote and the practical consequences of affirming liability in such a case were considered to be such as would render it difficult to carry on a trade at all. No prudent man,says Mathew, L.J., "would contract to make or repair what the employers intended to permit others to use in the way of his trade. The *species facti* in that case seems to me to differ widely from the circumstances of the present case where the manufacturer has specifically in view the use and consumption of his products by the consumer and where the retailer is merely the vehicle of transmission of the products to the consumer and by the nature of the products is precluded from inspecting or interfering with them in any way. The case of *Blacker v. Lake & Elliot* (cit. sup.) is of importance because of the survey of previous decisions which it contains. It related to a brazing lamp which, by exploding owing to a latent defect, injured a person other than the purchaser of it and the vendor was held not liable to the party injured. There appears to have been some difference of opinion between Hamilton, J., and Lush, J., who heard the case in the Divisional Court, as to whether the lamp was an inherently dangerous thing. The case seems to have turned largely on the question whether, there being a contract of sale of the lamp between the vendor and the purchaser, the article was of such a dangerous character as to impose upon the vendor in a question with a

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third party any responsibility for its condition. This question was answered, in the negative. So far as negligence was concerned, it may well have been regarded as too remote, for I find that Hamilton, J., used these words at p. 537 :—

> "In the present case all that can be said is that the defendants did not know that their lamp was not properly safe and had no reason to believe that it was not so, in the sense that no one had drawn their attention to the fact, but that had they been wiser men or more experienced men they would then have known what the plaintiff's experts say that they ought to have known."

I should doubt indeed if that is really a finding of negligence at all. The case on its facts is very far from the present one and if any principle of general application can be derived from it adverse to the appellant's contention I should not be disposed to approve of such principle. I may add that in White v. Steadman [1913] 3 K.B., 340, at p. 348, I find that Lush, J., who was a party to the decision in *Blacker v. Lake & Elliot* t, expressed the view "that a person who has the means of knowledge and only does not know that the animal or 'chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows". As for *Bates v. Batey & Co.* , Ltd., cit. sup., where a ginger beer bottle burst owing to a defect in it which though unknown to the manufacturer of the ginger beer could have been discovered by him by the exercise of reasonable care, Horridge J., there held that the plaintiff, who bought the bottle of ginger beer from a retailer to whom the manufacturer had sold it and who was injured by its explosion, had no right of action against the manufacturer. The case does not advance matters for it really turns upon the fact that the manufacturer did not know that the bottle was defective and this in the view of Horridge J., as he read the authorities, was enough to absolve the manufacturer. I would observe that in a true case of negligence knowledge of the existence of the defect causing damage is not an essential element at all.

This summary survey is sufficient to show what more detailed study confirms that the current of authority has by no means always set in the same direction. In addition to *George v. Skivington* cit. sup. there is the American case of *Thomas v. Winchester* , 1852, 6 N.Y., 397, which has met with considerable acceptance in this country and which is distinctly on the side of the appellant. There a chemist carelessly issued in response to an order for extract of dandelion, a bottle containing belladonna which he labelled extract of dandelion, with the consequence that a third party who took a dose from the bottle suffered severely. The chemist was held responsible. This case is quoted by Lord Dunedin in giving the judgment of the Privy Council in *Dominion Natural Gas Co. v. Collins* (cit. sup.) as an instance of liability to third parties and I think it was a sound decision.

In the American Courts the law has advanced considerably in the development of the principle exemplified in *Thomas v. Winchester* . In one of the latest cases in the United States, *Macpherson v. Buick Motor Co* ., 1916, 217 N.Y. 382, the plaintiff who had purchased from a retailer a motor car manufactured by the defendant company was injured in consequence of a defect m the construction of the car and was held entitled to recover damages from the manufacturer. Cardozo, J., the very eminent Chief Judge of the New York Court of Appeals, and now an Associate Justice of the United States Supreme Court, thus stated the law :

> "There is no claim that the defendant knew of the defect and wilfully concealed it. … The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. The principle of *Thomas v. Winchester* is not limited to poisons, explosives and things of like nature, to things which, in their normal operation, are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable … There must also be knowledge that in the usual course of events the danger will, be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. … The dealer was indeed the one person of whom it

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> might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. "

The prolonged discussion of English and American cases into which I have been led might well dispose your Lordships to think that I had forgotten that the present is a Scottish appeal which must be decided according to Scots law. But this discussion has been rendered inevitable by the course of the argument at your Lordships' bar which, as I have said, proceeded on the footing that the law applicable to the case was the same in England and Scotland. Having regard to the inconclusive state of the authorities in the courts below and to the fact that the important question involved is now before your Lordships for the first time I think it desirable to consider the matter from the point of view of the principles applicable to this branch of law which are admittedly common to both English and Scottish jurisprudence.

The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What then are the circumstances which give rise to this duty to take care ? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care and on the other side to a right to have care taken To descend from these generalities to the circumstances of the present case I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that if the appellant establishes her allegations the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter may reasonably be characterised as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in (his process of manufacture. The question is, does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for this own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger beer, had directly in contemplation that it would be consumed by members of the public; can it be said that he could not be expected as a reasonable man to foresee that if lie conducted (his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as 'he did not know that any poison bad got into it, his only liability was for breach of warranty under his. contract of sale to those who actually bought the poisoned bread from him? Observe that I have said through carelessness and thus excluded the case

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of a pure accident such as may happen where every care is taken. I cannot believe, and I do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge and the civil consequence of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

My Lords, the recognition by counsel that the law of Scotland applicable to the case was the same as the law of England implied that there was no special doctrine of Scots law which either the appellant or the respondent could invoke to support her or his case and your Lordships have thus been relieved of the necessity of a separate consideration of the law of Scotland. For myself I am satisfied that there is no specialty of Scots law involved and that the case may safely be decided on principles common to both systems. I am happy to think that in their relation to the practical problem of everyday life which this appeal presents the legal systems of the two countries are in no way at variance and that the principles of both alike are sufficiently consonant with justice and common sense to admit of the claim which appellant seeks to establish.

I am anxious to emphasise that the principle of judgment which commends itself to me does not give rise to the sort of objection stated by Parke, B., at p. 768, in *Longmeid v Holliday* (cit. sup.), where he said :-

> "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that if a machine, not in its nature dangerous, a carriage for instance, but which might become so by a latent defect entirely unknown although discoverable by the exercise of ordinary care should be lent or given by one person, even by the person who manufactured it to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

I read this passage rather as a note of warning that the standard of care exacted in human dealings with each other must not be pitched too high, than as giving any countenance to the view that negligence may be exhibited with impunity. It must always be a question of circumstances whether the carelessness amounts to negligence and whether the injury is not too remote from the carelessness. I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious and for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So also where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user. But where as in the present case the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer and the manufacturer takes steps to ensure this by sealing or otherwise closing the container, so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded and was in fact in the present case excluded. It is doubtful whether in such a case there is any redress against the retailer (*Gordon v. McHardy* , 1903, 6 F. 210).

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim *res ipsa loquitur* . Negligence must be both averred and proved. The appellant accepts this burden of proof and in my opinion she is entitled to have an opportunity of discharging it if she can. I am accordingly of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed and the judgment of the Lord Ordinary restored.

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