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THE BASIS OF AFFIRMATIVE OBLIGATIONS IN THE LAW OF TORT.

(Continued from page 310.)

III. AMERICAN CASES UPON THE LIABILITY OF MANUFACTURERS AND VENDORS OF PERSONAL PROPERTY.

The tendency throughout the United States is, with but few exceptions, to regard the act of sale as terminating all liability on the part of the maker or vendor of a defectively constructed article or structure, unless the article is either a drug-chemical or explosive, and so "imminently dangerous to human life," or the defect is known to and concealed by the vendor.

In New York and some other states it would appear that where the maker sells or provides an article for immediate use in its existing condition, and the defect is not patent to any reasonable inspection, the maker is liable to one who may be expected to come in contact with the article in the course of such use if he be injured, but if the defect be patent, if it is known or could probably be discovered by the purchaser or him to whom the article is supplied if he properly perform his duty of examination, then the liability, if

any, is upon him who with knowledge, or (probably) with means of knowledge, uses the article for a purpose for which it is unfit. Much the same idea is expressed by Mr. Beven in his admirable work on "The Law of Negligence."¹ He adopts the view of Brett, M. R., in *Heaven v. Pender*, that wherever a reasonable man would, if he stopped to think, realize that unless he took care some person or class of persons might probably be injured, a duty of care existed towards such person or class, subject to this qualifying statement: "To fix liability for injuries brought about through a complicated state of facts, the last conscious agent must be sought. If between the agency setting at work the mischief, the original setter in motion of the mischief, and the actual mischief done there intervenes a conscious agent which might or should have averted it, the mischievous agency ceases to be liable. On the other hand, there may intervene various stages in the development of the mischief, yet if none of these is due to conscious volition, the last conscious agent must be sought."

At first glance this would seem to be intended to convey the idea that an admittedly existing liability is terminated by the mere existence of a conscious, a sentient human agency, able by action, whether voluntary or legally obligatory, to prevent the original actor's wrong from working out its injurious tendencies through the normal course of natural sequence to their legitimate result; the wrong, even though if not so directed, being in itself efficient to produce in the natural course of events the injury sustained.

However, it is quite impossible to believe that such was Mr. Beven's thought. No man can justify an action threatening injury to others by the hope that some stranger will volunteer to prevent it working out its natural injurious tendencies, nor will he be relieved even if some other is legally bound to observe the danger created and to act so as to avert the particular injury suffered.

In such case the last obligation does not displace all those prior to it. On the contrary, a new additional liability is created to which the injured party may look for compensa-

¹ Page 61.

tion at his election.² A man who creates an obstruction in the highway is not relieved from liability by the fact that the city or township is bound to remove it and to repair the highway after the defect is brought to its attention. If it does not do so, it may also be liable, but the creator of the nuisance remains responsible for all injuries caused by it till it is actually removed. It would seem quite evident that Mr. Beven does not mean that the mere existence of a conscious agent able to avert the mischief releases the original actor from liability for the natural consequence of his act. In all the cases which he cites there is more than the mere passive existence of an unexercised ability or duty to avert mischief. There is action by the conscious agent without which the original actor's wrong would not have resulted in the injury in question. The intervention of any agency, conscious or unconscious (for a convulsion of nature, such as a flood or cyclone, is as effective a diverting agency as conscious human action), may, if it acts and diverts the course of events, release the actor of liability in two ways: 1st. Where the original act threatened no probable injury, in the absence of some action by such independent agent, where such action is necessary to render dangerous an act normally harmless. In such case there is no wrong, no negligence in doing the act, because no injury is threatened as a probable consequence of the actor's conduct, unless the action of the intervening agent be one which human experience shows will naturally be caused by the conditions created by the original actor's conduct.³ Such intervention being then both natural and probable, it is within the reasonable expectation of the actor, as a probable consequence of his act, that injury will be caused by it. 2d. If the actor's conduct does threaten some injury and so is wrongful, he is only liable for injuries which are the natural consequences of his wrong. So if an intervening

² See Woodward, J., *Carson v. Godley*, 26 Pa. 111, page 116. Even if the United States be liable, "does it follow that Godley is not liable? By no means. An injured party is often entitled to redress from more than one wrongdoer, and it is never an objection to his action that he has passed by the intermediate agents of the wrong and charged the responsibility home to the author of the evil."

³ *Lane v. Atlantic Iron Works*, 111 Mass. 136; *Clark v. Chambers*, L. R. 3 Q. B. D. 330, and cases cited therein.

agent does act and divert the course of events so that some new result is caused different from that which, unassisted, the wrong was itself efficient to bring about, for this the actor is not liable. But here again if the intervening action is itself a natural result of the conditions created by the original actor's wrong, all that it effects are themselves natural consequences of the original wrong. The intervening agent becomes but one link in the chain of natural causation, of the normal sequence of events through which the wrong operates to effect the injury.⁴

To return to Mr. Beven's statement, a careful reading of his treatment of the cases from which he deduces it will, it is submitted, show that not only must the agent act and intervene, but his act must be conscious, not merely the exercise of independent volition, but an act done with a consciousness of its effect—a conscious wrongful act. It is the knowledge of the defect or, what Mr. Beven treats as its legal equivalent, his means of knowledge, coupled with a legal obligation to utilize them by inspection, that makes the intervening agent's use of the defective article the intervening act of a conscious agent, terminating the original actor's liability. It may perhaps be said that while no one may regulate his conduct on the supposition that others will go to the trouble of taking some action which it is their duty to take, and which will prevent injury to others by his conduct, every one has the right to expect that others will not act wrongfully and that there is, therefore, no legal wrong in supplying another with the means of committing a wrongful act. While there is no right to expect positive, affirmative well doing, there is no reason to anticipate positive wrongdoing.

Where the maker, when he sells, is unaware of the defect, though patent to inspection, his wrong consists in the negligent conduct of his business, whereby the defect is created, and not in any misconduct as vendor, since he, as vendor, is not bound to inspect the goods he sells.⁵ A maker when

⁴Of course, if the particular action by the intervening agency is actually expected, or if it is the very thing which the actor's conduct was intended to cause, whatever results from it is both natural and probable.

⁵*Longmeid v. Holliday*, 6 Exch. 761, *supra*, page 307.

he engages in the manufacture of articles for general use is bound to anticipate that others than the purchasers will use them and will be dependent for their safety on his care and skill.⁶ The purchaser's act in using such an article for a purpose for which it is patently unfit is thus properly to be considered as a wrongful and thus legally unexpected and unnatural action by a conscious agent breaking the chain of natural causation and diverting the effects of the maker's negligence to a new and abnormal result.

That the act of a purchaser who uses the article, though known to be defective for the very purpose for which it is sold, for which the vendor knows it is to be used, should be regarded as legally unnatural and unexpected is a relic of the distinction between legal and actual probability once common to all subjects.⁷ The courts have been slow in giving recognition to the actual probability of injury as the test of liability. In many matters the idea that no man can be legally required to expect that another will do wrong, no matter how evident it is that such is his purpose, remains firmly fixed. Where the rights and obligations of owners, vendors, lessors, and occupiers of real property are concerned, the courts have, as is to be expected from their conservative attitude in regard to such matters, been especially

⁶Mr. Beven's rule, while it expresses, when properly understood, a widely current conception of the effect of the intervening action of an independent agent, wrongful and so legally unexpected in terminating the liability of an admitted wrongdoer, does not assist in ascertaining when the act or omission of the defendant is wrongful, as being the breach of a duty owed to the plaintiff. As has been seen in the first part of the article, the rule announced by Brett, M. R., is too broad, covering, as it does, the duty to refrain from probably injurious omissions as well as actions, requiring every man to take affirmative precautions to protect his neighbors as well as to refrain from injuring them. However, in the cases under discussion, the maker of an article or structure for sale, or one w.o., as his business, supplies them for use, is bound to exercise care in their preparation, and is liable for acts of negligent omission as well as of commission. The duty of care to prevent the wrong is therefore present. See *supra*, pages 293 *et seq.*

⁷*Vicars v. Wilcocks*, 8 East. 1, 2 Smith's L. C. 521. An action of slander in which Lord Ellenborough held that the special damage must be the legal and natural consequence of the words spoken. This rule was sharply criticised in *Lynch v. Knight*, 9 H. L. C. 577, by Lords Campbell, Cranworth, and Wensleydale, and is no longer law in such cases. See notes to *Vicars v. Wilcocks* in Eleventh English Edition of Smith's Cases, by Miller Chetty, Herbert Williams, and Herbert Chetty. (1903)

tenacious of the earlier and formal conception. The rule announced in *Robbins v. Jones*,⁸ that in the absence of fraud a lessor of ruinous property is not responsible for injuries received by one coming on the premises by the invitation or permission of the tenant, prevails, save, possibly, in New York, where, in the more recent cases,⁹ the courts have regarded the actual probability of injury as decisive. It is not surprising to find the same rule applied to the cases now under discussion, which concern so intimately the obligation of those making, using, or transferring the possession of personal property. Where the article is capable of more than one use, for some one or more of which, though defective, it is still reasonably safe, and there is no actual knowledge that it is to be used for that particular use for which it is unfit, this conception would appear to be wholesome and in accordance with sound public policy.¹⁰ Where, however, the article

⁸ 15 C. B. N. S. 221, *supra*, page 275. The reason for this rule is well put in *Cheadle v. Burdick*, 26 Ohio, 393 (1875). "The shelves which fell and injured the plaintiff," said McIlvaine, J., "were not erected (by the landlord) in violation of any right of the public or member thereof. They could only harm those who came into the shop, and no one could rightfully come there save by the owner's permission and invitation. Persons who are invited into dangerous premises must seek their remedy against their invitor. There is no implied undertaking that the premises are fit for the use to which the tenant intends to put them. If they are unfit, it is the duty of the tenant to fit them for the intended use and the landlord may reasonably expect him to do so." See, however, *contra*, *Hernberg v. Wilcox*, 96 Tenn. 163, and *Hines v. Wilcox*, 96 Tenn. 148, in which it was held that a landlord was liable both to a tenant and his guest for a failure to discover by inspection the dangerous condition of the leased premises.

⁹ *Shields v. Edgor*, 59 N. Y. 28; *Fox v. Buffalo Assoc.*, 21 App. Div. N. Y., 321, *supra*, page 277; *Barrett v. Ontario Co.*, 174 N. Y., *supra*, page 276, though only in cases where the building leased is to be thrown open to the public for its use.

¹⁰ Similarly where the contractor has fulfilled all the terms of his contract, but the article as planned and ordered by the purchaser is unfit for the use to which the latter intends to put it, if injury results from such use the purchaser is alone responsible: *Marvin Safe Co. v. Ward*, 46 N. J., Law, 19. There defendant had contracted to build a bridge for the Counties of Essex and Hudson. During the work they contracted to furnish a temporary bridge. The Marvin Safe Company attempted to haul over the temporary bridge a heavy safe. The bridge gave way and the safe was precipitated into the river. The company sued the contractor, who pleaded that he had fulfilled all the terms of his contract with the counties. It was held on demurrer that the plea was good. The decision is manifestly correct. The work as planned was done in a workmanlike and competent manner, there was no negligence therein, nor was the contractor bound to anticipate that the counties

can only be used for the very purpose for which it is dangerously unfit and the vendor knows that the purchaser is buying it, intending to put it at once to such use, it is submitted that the vendor having for his own profit subjected the user of it to actual risk of injury, the courts should, as the New York courts have done in the Real Estate cases, look to actualities instead of legal fictions and hold the vendor liable for what he must, had he thought, have realized would probably result from his conduct.

It seems quite clearly established where the purchaser, actually knowing the defective nature of the article, puts it to a use for which it is unfit and unsafe, any injury received therefrom is due to his misuse and not to the act of him who created the defect. But even the cases cited by Mr. Beven do not afford actual support to his view that a duty to examine, which if performed would have discovered the defect, is equivalent to actual knowledge of it.

would plan a bridge inadequate to accommodate any expectable traffic or that they would permit heavy hauling upon it if it were not, as planned, safe therefor. In no case should the contractor be liable for injury resulting from the plan of the work, but only for carelessness in execution of it as planned. Nor where by contract or law an affirmative duty is assumed or imposed should one to whom the performance thereof is delegated be liable for a mere failure to adequately perform it. The original obligor remains responsible for the adequacy of the protection afforded. See *Winterbottom v. Wright*, *supra*, page 281 *et seq.*, and note 26, page 284, but where the contractor is guilty of acts of misfeasance in the course of his work, which threaten injury to those upon whose persons or property his business is exercised, he should be held liable for any resulting damage. So a landlord is not liable to a customer of a tenant for a failure to repair, even though the lease binds him to do so, the tenant being bound as to his customer to have the premises maintained in good order and the clause in the lease merely delegating the performance, and not transferring the obligation. (See discussion of *Winterbottom v. Wright*, *supra*, page 282 and cases cited in note 21.) But if he does repair but badly he is liable for his misfeasance, *Gregor v. Cady*, 82 Me. 131, so while a contractor is making repairs for a landlord he is responsible to a tenant injured by his negligent acts while in control of the work of repair and executing it: *Butts v. Sweeney*, 25 N. Y., Supp. 531, 72 Hun. 562. In *Cobb v. Clark Co.*, 118 Ga. 483 (1902), the court, while correctly holding that an owner who had been injured because a contractor employed by his neighbor to remove the party wall had failed to erect a sufficient temporary wall as agreed between the two owners, the court saying, "the defendant may have been employed to do just exactly what he has done," overlooking this distinction also held that he was not liable for injuries caused by the negligent manner in which his servants moved the plaintiffs' fixtures.

Heaven v. Pender,¹¹ Mr. Beven says, "must be taken to imply that there was no duty on the part of any one subsequent to the dock owner to test the staging, because otherwise if there was a duty on the part of either the ship owner or ship painter, the chain of causation would have been broken." But not one word is said by any judge in the Court of Appeal to indicate that no such duty existed or that if it did it could affect the dock owner's liability, while the Court of Queen's Bench¹² considered the ship owner was certainly liable; though the dock owner was not, because they thought that the evidence indicated that the staging had become defective after the dock owner had parted with the possession and control, and so the injury was due to improper repair and not a defect in the thing as originally supplied. In *Elliott v. Hall*¹³ the court refused to consider whether the Railway Company at whose yards the defendants' trucks had stood for six weeks might not also be liable for the failure of their inspector to discover their defective condition. If an obligation to examine on the part of him last in control was destructive of any prior obligation as to the condition of the trucks, as Mr. Beven states, this point would have been the very crux of the case. Nor is there any discussion in *Mulholland v. R. R.*¹⁴ as to whether a railroad does or does not owe a duty to inspect cars of connecting lines before putting them in the hands of their employees for further transportation. The current of American decision is strongly in favor of such a duty, nor is there any case cited by Mr. Beven in his chapter on "The Master's Duties to his Servants" to indicate a contrary view in England.

In *Moon v. R. R.*¹⁵ the question was flatly presented. A brakeman of the Manitoba Railroad being injured by reason of the defective condition of a car furnished to his road by the defendant, a connecting road, for the carriage of through freight, it was held th. the admitted negligence of the

¹¹ L. R. 11 Q. B. D. 503, *supra*, pages 229, 230.

¹² L. R. 9 Q. B. D. 306, *supra*, page 229.

¹³ L. R. 15 Q. B. D. 315, *supra*, page 231.

¹⁴ L. R. 1868, A. C. 218, *supra*, page 232.

¹⁵ 46 Minn. 106.

Manitoba Railroad (in not having the car inspected, which would have discovered the defect and averted the mischief) did not excuse or relieve the defendant from liability. Here, at least, Mr. Beven's rule is brought forward, argued, and flatly rejected. Nor on principle should it relieve the original actor who has carelessly put forth a dangerously defective thing that another could by proper care discover the defect and so avoid a use for which it was unfit, though a use for which the article was designed and sold. The actor's wrong in itself is efficient to cause the injury if not diverted; that the purchaser would use it in the very way which caused the injury, unless the defect was discovered, was not only probable but intended, and the injury was to be expected, except on the unwarranted expectation that the purchaser will not merely do no conscious wrong, but will efficiently discharge all his affirmative legal obligations.

Mr. Beven's rule operates, as stated, only to terminate the liability of the vendor or suppliers, when the defect in the article is known to the vendee, or him to whom it is supplied, or is patent to an examination which the latter is legally bound and personally competent to make.¹⁶ Mr. Beven expressly says: "If such person (the person last in charge of the article) undertook in law no duty of examination and is entitled to hand over the article in the state in which he received it from someone else antecedent to himself, the liability for the injury is, so to speak, thrown back."

It would appear that if the vendor knew from the circumstances that the vendee could not examine the article before it was put to use, as where articles are sent direct to a servant of the purchaser for his immediate use, distant from the purchaser, the case would be like that of *Devlin v. Smith*. The vendor must know that there can be no opportunity for the purchaser to discover the defect if any exist and (while the servant may be barred by his own act in using the article if the defect is patent to an inspection he is competent to make) the vendor cannot assert that the injury resulted from the purchaser's misuse of the article in putting it to a use for

¹⁶ *Devlin v. Smith*, 89 N. Y. 470 *infra*, page 361.

which it was unfit. The injury results immediately from the vendor's act without the intervention of any conscious agency.

Where the defect is latent, there is no "conscious agency which might or ought to avert the mischief." If the defect could not be discovered by any examination which the purchaser was legally bound and personally competent to make, the liability is, as he says, thrown back to him by whose negligence it was created. However, the great majority of the American courts have regarded the obligations and liabilities attaching to the manufacture of personal property as arising wholly out of the ownership, possession, or control of the property, and so terminating with its transfer, the owner out of possession, the vendor, are none of them liable for the condition of the article transferred.

The influence of a statement by Dr. Francis Wharton's book on "Negligence" has contributed perhaps more than anything else to this result. He says: "There must be causal connection between the negligence and the hurt, and such causal connection is broken by the interposition of a conscious human agency."¹⁷ He then gives as an instance a traveller injured by the defective condition of a city bridge after it has been accepted by the city, the defects being caused by the contractor's negligence.¹⁸ "The contractor," he says, "is

¹⁷ Compare Beven's Statement, *ante*, page 338.

¹⁸ This instance is apparently taken from *Cunliffe v. Mayor*, 2 N. Y. 170. In fact, the whole statement seems based upon this dictum by Strong, J., in that case: "I know of no case where a stranger can recover for injuries sustained by the defective construction of an object after title to the object has changed and it has passed out of his possession and is no longer subject to his control and is in no way used pursuant to any authority or directions from him. The reason is because there is no connection between the wrong done and the person whom it is sought to charge with the consequence. The wrongdoer is not at the time in control over the subject matter or in the power or right to remedy the evil. Damage in all such cases arises from the continued use of the defective subject, and with that the builder who has parted with the title, possession, and control of it has not and cannot have anything to do." This statement was much broader than the facts of the case required.

By an act of Legislature the city of Albany was authorized to erect a bridge. The bridge was erected by a competent architect in pursuance of a contract with the city corporation. The bridge, after acceptance by the city, was sold by it to a private corporation in whose possession it was when a traveller, passing over it with its permission, was injured

not liable to the traveller. The reason sometimes given is that otherwise there would be no end of suits, but a better ground is that there is no causal connection between the traveller's hurt and the contractor's negligence. The traveller reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveller. The traveller reposed confidence in the city that it would have its roads and bridges in good order, but between the contractor and the traveller interposed the city, an independent responsible agent, breaking the causal connection." *Winterbottom v. Wright*, he says, is a case where a carriage was defectively built (though, as has been seen, the declaration alleged merely a failure to keep it in repair), and "no confidence was exchanged between the plaintiff and the contractor. Between them is the Postmaster General, acting independently, forming a distinct legal centre of responsibilities and duties." Now anything approaching a careful reading of the case will show that the very thing that the plaintiff alleged as the direct ground of the right to recover was his knowledge of and reliance upon the existence and performance of the defendant's contract. Evidently, then, reliance upon defendant, confidence actually reposed in him, can create no duty. Nor can it matter whether the defendant has accepted such confidence or no. Such a conception of the origin of obligation is appropriate only to the law of contract, duties in the law of tort do not arise out of the consent of the party to

by a defect therein. Now here there was no active misfeasance on the part of the city or its servants. They neither planned nor erected the bridge, this was done by the architect, an independent contractor. Therefore the city, had the bridge still been in its possession, would only have been liable if under absolute duty to answer for it that the bridge had been carefully constructed. The act of Legislature being held invalid, there was no positive obligation to perform or exercise carefully a statutory duty or power. Such an absolute duty could only arise from offering the bridge to the public for use as a municipal highway. The bridge having been sold was being used by the pier company and not the city. It was the company's duty to see to it that the bridge was fit for the use of persons coming on it at the company's invitation and for their purposes. There being no misfeasance in construction and no breach of positive duty, the city was, of course, not liable. In fact, it was a case in which only he who was in possession and control of the bridge, and using it for his purposes, could be liable. As Strong, J., said, "the damage resulted from the continued use of the defective subject."

assume them. Nor, in fact, is it true of one passing over a bridge in a highway. If he stop to think, which he rarely does, he must realize that he can only rely on the city doing its duty by selecting a competent builder and inspecting the bridge when finished and that for protection from any defects not patent to inspection he must trust to the care of the builder. In truth, it is not actual confidence reposed and accepted that is important, but whether, there being a duty to take care, there is a right to rely on its performance.

As actual confidence imposed or accepted is legally of no moment, since confidence can only properly be important when it is reliance on the performance of an existing duty, Dr. Wharton's use of the term only beclouds the subject; it does not aid in ascertaining when the duty of care arises, but merely by expressing the question in a different form removes the discussion one step further away from solution. Nor could he well have found a less happy instance of the absence of liability than that of the builder of a city bridge. Baron Parke, a very accurate and careful judge, as well as a great master of the common law, gives this very case as an example of admitted liability.¹⁹ And Lord Abinger in *Winterbottom v. Wright* excepts from the general rule of non-liability the case of a public nuisance created under a contract such as a defective bridge on a public highway would undoubtedly be.

Here is the idea that no duties arise save between those who come directly in contact with one another, that the

¹⁹ *Longmead v. Holliday, supra*, page 307: "So if a mason contract to erect a bridge or other work in a public street, which he constructs, but not according to contract, and the defects of which are a nuisance to the highway, he may be responsible to a third person who is injured by the defective construction and he cannot be saved from the consequences of his illegal act in committing the nuisance on the highway by showing that he was also guilty of a breach of contract and responsible for it." In *Herzog v. Dougherty*, 145 Ind. 255, 44 N. W. 457, the court held that a passer-by on the sidewalk could not recover against a builder for injuries received by the fall of a building, unskillfully and negligently built by him, after transfer to the owner, though the defects were after completion latent. Such a structure would seem to be a public nuisance, nor could the injury be said to have been caused by the use to which the owner had put it, but the court decided the case on the authority of Dr. Wharton's Statement of *Winterbottom v. Wright* as reported by him, without noticing that this particular case had been expressly excepted by Lord Abinger in his opinion therein.

nearest legal centre of responsibility must necessarily absorb all the outstanding obligations and liability and that recourse must be had to it for a remedy if injury is sustained. The thought appears to be that of a consent necessarily implied to look only to him with whom one deals, and no one else, much the same inference which led to the exploded theory that when a passenger was injured by a collision caused by the negligence of his carrier and another, his only recourse was against the carrier in whom he had reposed confidence, with whom he had dealt, whom he knew, who was the nearest centre of legal responsibility. It apparently did not matter in Dr. Wharton's opinion that the intervening conscious human agency is doing just what the defendant expected, and intended him to do, or whether his act was wrongful or not. According to Dr. Wharton's statement it appears to be quite immaterial whether in the city bridge case the city knew that the bridge was defective when it threw it open to traffic. It is the acceptance of the bridge which is the human action by which all the contractors' obligations are extinguished save to the city. One of the most recent of American decisions is typical of the attitude of the majority of American courts towards this question.

In *Husset v. J. I. Case Machine Co.*²⁰ the declaration averred that a threshing-machine manufactured by the defendant company had been sold by it to the employer of the plaintiff, whose duty it was, in order to feed the machine, to stand upon a covering placed over the cylinder. The first day it was put in use the covering, having been defectively constructed, collapsed and the plaintiff had his leg crushed. A demurrer was dismissed, but only because there was an allegation that the defendants knew of the defect and had concealed it.

The court, Sanborn, J., held that, with certain exceptions, a manufacturer's liability after sale for the defective condition of his product was only to the purchaser himself. For this he gave two reasons: 1st. That by the intervention of the conscious agency of the purchaser, the causal connection

²⁰ 120 Fed. 865 (1903).

between the manufacturers' wrong and the injury to anyone but the purchaser is broken. 2d. That public policy demands a definite limitation to the makers and manufacturers of complicated structures and machines. As to the first he said: "No one is liable save for the natural and probable consequences of his acts—an injury is not actionable which would not have resulted from an act of negligence save from the interposition of an independent cause. One who makes or sells a machine, a building, or an article of merchandise designed for a special use is liable to the person who in the natural course of events uses it for the purpose for which it was made or sold. But when a contractor builds a house or bridge or a manufacturer constructs a car or carriage for the owner thereof under a special contract with him, an injury to any other than the owner cannot be foreseen as the probable result of negligence in its construction. So when a manufacturer sells articles to a wholesale or retail dealer or to those who are to use them, injury to third persons is not generally the natural or probable result of negligence in their manufacture, because, (1) such a result cannot be ordinarily anticipated, and (2) because an independent cause, the responsible human agency of the purchaser, without which the injury could not result, intervenes, and, as Wharton²¹ says, insulates the negligence from the injury."

There is no averment in the declaration, no word in the opinion, indicating that the defect was obvious or even discoverable by any reasonable inspection. On the contrary, it would appear that after the machine was completed the defect was entirely concealed from any but a destructive inspection. To say that the purchaser necessarily ignorant that it is not perfectly safe is a conscious agent is to confuse consciousness with mere action.

Whatever may be said in favor of the position, practically that of Mr. Beven, that there is no reason to anticipate that a purchaser will neglect his duty of examination and so will put the article sold to a use for which inspection will show it to be unfit, where the defect is, as here, latent

²¹ Wharton on Negligence, 2d ed. 438.

after the article is finished, to any reasonable inspection, so that to discover it would require practically tearing the machine to pieces, where it is made and sold, and is manifestly designed and adapted for the very use to which it was being put and where the injury was received by one of the very class for whose use it was sold; it is certain that the maker must contemplate and intend just such a use by just such a person, and the purchaser, in putting the servant to work, is not a conscious agent, for he neither does nor can know the effect of his act, nor does his act intervene, for it is both natural and expected and intended that he should do just as he has done.

To say, as Judge Sanborn says, that where a maker sells such an article to a wholesale or retail dealer no injury is to be expected save to such dealer is contrary to every teaching of human experience. On the contrary, it would be infinitely more true to say that the dealer is the only person who cannot be expected to sustain any physical injury if it be defective. So in *Huset v. Co.* it is quite outside of the normal course of events, if not impossible, that the purchaser should alone operate such a threshing-machine—in fact, that he should be personally present at all was highly unlikely. Nor would the act of the purchaser in putting it to such use be in any way the intervention of a conscious responsible agent, diverting the normal course of events. He is not conscious actually or by legal implication, for he does not, nor should he, know of the defect; he is not legally responsible because he is not bound to refrain from using this machine in this way, since he neither knows nor has the means of ascertaining that it is unfit for use. His duty to his servants is not to warrant the safety of the appliances he furnishes them, but merely to use care to obtain safe ones. This he fulfils by buying of a reputable maker and subjecting it to a reasonable inspection, and there is no allegation that any reasonable inspection would have discovered the defect. In a word, his act does not in any true sense intervene, it is only one link in the chain of expectable causation through which the negligence creating a dangerous defect must operate and be expected to operate to work out its injurious tendencies to their natural and also their probable consequence.

Where the defect is latent after manufacture, it seems evident that the maker's immunity after sale cannot be supported on any correct application of principle that an independent intervening agency destroys the causal connection between the maker's negligence and the injury.²² Such immunity can only be supported on the grounds that public policy demands that liabilities continuing after sale are against public policy as tending to discourage alienation and place unwise burdens upon manufacture and commerce. That, in a word, it is for the interest of society that trade should be fostered even at the expense of injury to private rights. Sanborn, J., says: "A wise public policy demands that a definite limit shall be set to the liability of the makers of complicated structures and machines which are to be used and operated by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties who cannot be known to him and who use the articles all over the country hundreds of miles from the place of sale," and this limit, he says, "shall be the same for negligence and breach of contract."

It is evident that Sanborn, J., had in mind the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse. As to this there can be no two opinions, but there is no need to invoke public policy to afford this protection. The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker. But where, as in the case in hand, the machine is being carefully used for the very purpose for which it is designed, and for which, if care be not taken in its manufacture, it will be dangerously unfit, why should the maker's liability be affected by the fact that the person using it and injured by it is not personally known, and uses it many hundreds of miles away, or because the user is not the purchaser?

²² Sanborn, J., appears himself far from satisfied with the correctness of Dr. Wharton's theory, and evidently prefers the view that public policy demands a definite limitation to a manufacturer's liability.

If there is any liability for negligence to the user as distinguished from breach of contractual obligation to the purchaser, it is because from lack of care there is reasonable probability of injury to him, not because of the personal acquaintance existing between him and the maker. It is this reasonable probability of injury to some class of persons that raises the duty of care, not personal acquaintanceship nor certainty as to the identity of the person threatened. Reasonable probability of injury is the test of proximity as creative of legal duties, not propinquity in space, nor is the duty one of mere neighborliness. The duty is not one created by the contract of sale and so restricted to those party thereto, but is a legal incident to the vendor's previous position as manufacturer, a position voluntarily assumed for his own profit, and so extends to all whose safety must depend on his care in manufacture.

It may, perhaps, often be difficult to ascertain whether the injury was caused by the original defect in the machine or some deterioration in it subsequent to sale, for which, of course, the vendor would not be liable, or some careless misuse of it. The fear that the court will be unable to prevent the jury from working injustice if such nice distinctions of fact are held legally important appears really to be the basis of this whole conception of Sanborn, J. It is, however, to solve these very difficulties that courts of justice exist, surely they are competent to ascertain and give due effect to the true facts of the case. To deny recovery in a meritorious class of cases from fear of their inability to ascertain the truth is a terrible arraignment of the jury system, a pitiable confession of judicial inability to control the course of justice.²³ Paxson, C. J., in *Curtin v. Somerset*,²⁴ invokes for the

²³ In *Dulien v. White*, L. R. 1901, 2 K. B. 669, Kennedy, J., says: "If it be admitted that such damage is not too remote in principle to be recoverable at law, I should be sorry to bar all such claims on the ground of public policy alone to prevent the possible success of groundless actions. Such a course involves a denial of redress in meritorious cases and shows a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of cases." While the question he was discussing was a different one, his remarks are singularly appropriate to the matter under discussion.

²⁴ 140 Pa. 70.

manufacturer the protection of public policy upon somewhat different grounds. He says: "If a contractor who erects a house, a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupation on such conditions. It is better and safer to confine such liability to the parties immediately concerned."

What he evidently had in mind was the impolicy of requiring the maker to warrant to all the world his product free from hidden defects, whether caused by his misconduct or not. In this he is, beyond question, right; but no such obligation has been even contended for in any case save, perhaps, *Longmeid v. Holliday*. No one has at common law the right to the use of a perfect article, such a right can only be created by contract, by private grant extending only to those party to it, but every man has the right to be protected from injury due to the misconduct of others; while no one save a party to the warranty can complain because he has been deprived of the benefit of a perfect article or because injured by a defect which no reasonable care on the maker's part would have prevented; it is quite a different thing to say that one who must be expected to use an article has no right to demand that he who makes it, for his own profit, shall take care in its preparation so that it shall not be unfit and unsafe for its manifest purpose.²⁵ While it is highly burdensome to require that the manufacturer shall answer to all the world that the article he makes contains no hidden defect which he himself could not by proper conduct of his business prevent, it is not too much to ask that he shall conduct his business carefully, otherwise the manufacturer who obtains the profits from the business is relieved from all liability for injuries caused by the manner in which he conducts it. He

²⁵"The parties immediately concerned" in such case are he who makes and he who must be expected to use the article. While the purchaser may be concerned in the defect, in that by it he may be deprived of some beneficial use of it, the user is normally the only person concerned in its condition as a protection from personal injury.

is allowed to reap the profits enhanced by the saving inherent in cheap labor, insufficient equipment, inferior material, and generally incompetent and careless supervision and management, while those who must use his product bear the burden and pay the price in insufficient protection to the safety of their persons and property. To encourage commerce and industry by removing all duty and incentive to protect the public is to invite wholesale sacrifice of individual rights on the altar of commercial greed.²⁶ A similar public policy in railroad matters throughout the United States²⁷ has resulted in the yearly sacrifice of thousands of lives and injury to tens of thousands of persons, both employees, passengers, and others. It would appear to be high time to consider whether this price is not too high to pay for industrial expansion, and whether those who profit by the operation of a business should not bear at least the burden of exercising reasonable competence and care therein. That such a burden is not too onerous, that such care is compatible with the profitable conduct of business, is shown by the fact that reputable manufacturers do habitually the world over exercise the greatest care in order that the reputation of their products may be maintained. Surely it is not too much to require of the others that they shall take at least equally as great care to protect their patrons, the public who use their products, from injury. While it is undoubtedly to the interests of society, especially in a country the natural resources of which are still comparatively undeveloped, to encourage trade and manufacture, it cannot be to the interest of any community to encourage carelessness and disregard of human life and property therein.

Sanborn, J., sets forth three exceptions²⁸ to the general rule: 1st. "Where the act of negligence of a maker or

²⁶ By far the sounder view is that expressed in *Godley v. Carson*, 26 Pa. 111, by Woodward, J., page 116.

²⁷ Coupled with an extraordinary recklessness apparently inherent in the American character.

²⁸ See argument for the defendant in *Blagdon v. Perkins-Campbell Co.*, 87 Fed. 109, for an elaborate citation of cases.

vendor is imminently²⁰ dangerous to the life and health of mankind, and is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life."³⁰

2d. "Where the act of the owner causes injury to one invited to use the defective appliance upon the owner's premises."

3d. "Where one sells or delivers an article known to be imminently dangerous to life or limb without notice of its qualities."³¹

The second exception does not in reality deal with the liability of a manufacturer after sale, but with the quite distinct obligation³² to take care that appliances supplied for use for the purposes of the supplier's business shall be safe therefor. This obligation is generally recognized throughout the United States. The duty arises from interest in the use and not from ownership and control of the article or of the premises whereon it is to be used. In some few cases it is supplied to be used on premises in the possession of the defendant as owner, as in *Globe Co. v. Coughtry*,³³ sometimes to be used as an appurtenance of the premises leased by the defendant, as in *Heaven v. Pender*.³⁴ More often the article has passed completely from the defendant's possession and control, and is used far from any premises owned or controlled by him, as in *Elliott v. Hall*,³⁵ *Hayes v. R. R.*,³⁶ *Sweny v. Rozell*,³⁷ *Moon v. R. R.*,³⁸ *Wakefield's*

²⁰ Sometimes the word used is "eminently," *Burke v. De Castro*, 11 Hun. N. Y. 354, sometimes "inherently" dangerous, *Slatery v. Colgate*, 55 Atl. Rep. 639.

³⁰ Citing *Dixon v. Bell*, 5 M. and S. 193; *Thomas v. Winchester*, 6 N. Y. 497; *Elkins v. McLean*, 79 Pa. 343; *Bishop v. Webber*, 139 Mass. 411; *Peters v. Johnson*, 50 W. Va. 645.

³¹ Citing *Langridge v. Levy*, 2 M. and W.; *Wellington v. Downer*, 104 Mass. 64; *Lewis v. Levy*, 111 Cal.

³² Considered at length *supra*, pages 305 to 310.

³³ 56 N. Y. 124, overruling *Barrett v. Co.*, 31 N. Y. Super. 545.

³⁴ L. R. 11 Q. B. D. 503, *supra*.

³⁵ L. R. 15 Q. B. D. 315. In this case the defendant never had owned the defective article.

³⁶ 150 Mass. 457.

³⁷ 31 N. Y. Misc. 54, overruling *Burke v. De Castro*, 11 Hun. N. Y. 354.

³⁸ 46 Minn. 106.

Adm'r v. Standard Oil Co.,³⁹ *Roddy v. R. R.*,⁴⁰ *Bright v. Barrett*,⁴¹ *Hadley v. Cross*,⁴² *Fish v. Kerlin Electric Light Co.*,⁴³ and *Thomas Adm'r v. Mayville Gas Co.*⁴⁴

Of the first exception Sanborn, J., gives, as instances, chemicals, firearms, explosives, and foodstuffs. "In all these cases," he says, "the natural and probable result of a sale was not an injury to the party to whom the sale was made, but to those who, after the purchaser had disposed of them, consume them."⁴⁵

While this is usually true, it is not because of any peculiarity in the physical nature of the articles in question,⁴⁶ but because drugs, chemicals, explosives, and food are to be used for only one purpose, because defects in them are generally latent, except to expert inspection, because they are generally sold in original packages, and so are not open even to such

³⁹ 102 Va. 824. In this case naphtha was shipped in defendant's car and unloaded by the plaintiff. The valve of the car being defective, the naphtha fumes escaped and plaintiff was injured by explosion. It was held he could recover, naphtha if it escaped being apt to work injury without any intermeddling by an outsider. In *Goodlander v. Oil Co.*, 63 Fed. 400, it is conceded that a shipper of crude oil is bound to take precautions to provide a car sufficient to prevent the oil from becoming ignited by any of the risks incident to transportation or the ordinary risks of unloading, though in fact the company was not liable because the oil was ignited by the unforeseeable misconduct of the consignee in unloading an oil-car known to have a leaky valve within a few feet of a boiler furnace.

⁴⁰ 104 Mo. 234.

⁴¹ 88 Wis. 289, *supra*, page 280, note 18.

⁴² 34 Vermont, 586.

⁴³ 99 N. W. 1092, S. Dak., *supra*, page 280, note 18.

⁴⁴ 56 S. W. 153, *supra*, page 280, note 18.

⁴⁵ Change the wording slightly and the statement exactly covers the case in hand. No personal injury was probable to the purchaser of the threshing-machine, but only to him who, after the purchaser had put it to its normal use, would in the course of that use be compelled to come into contact with it.

⁴⁶ If the defect be patent, or the article is capable of many distinct uses for the most of which it is safe, the maker is not liable for injuries received by reason of the purchaser's misuse or unusual and unexpected use of the article. So in *Towne v. Carter*, 103 Mass. 507, the vendor, who sold gunpowder to a child who took it home and gave it to his parents but got hold of it again because of their negligent custody, was held not liable for injuries received by the child from its explosion, and so in *Davidson v. Nichols*, 93 Mass. 514, a maker of chemicals in themselves harmless who sold them, mislabelled, to a manufacturer, who, by mixing them with others, caused an explosion, was held not liable to one injured thereby.

inspection⁴⁷ and are intended to be used on the faith of their labels or their appearance of fitness for their only normal use; because, in a word, danger is immediately (and, in this sense, imminently) probable from carelessness in their preparation if dealt with by the purchaser in the way in which he may be expected, and is often intended, to deal with them, and is not merely possible, if he deal with them in some possible but not reasonably foreseeable manner.⁴⁸

On the score of a break in the chain of causation, the act of a purchaser of drugs, etc., in administering them to others is, if anything, less to be expected than that the purchaser of a boiler or threshing-machine will employ others to operate it, and if the defect be latent, there is no reason why he, any more than a purchaser of a drug, should refrain from any use of it for which on its face it appears suitable. If injury is as probable from carelessness in the one case as the other, and that injury, if anything, is usually less in extent where drugs, chemicals, and foods are sold, surely the makers of the latter have good reason to complain of a public policy which arbitrarily singles them out to bear a burden so onerous that public policy relieves all other manufacturers from it, even at the expense of those who use their product.⁴⁹

⁴⁷ *West v. Emanuel*, 198 Pa. 180, where it was held that a druggist was not liable for a failure to inspect a bottle of medicine sold by him in the original package.

⁴⁸ This is admirably brought out in the contrasted cases of *Wakefield's Admr v. Standard Oil Co.*, 102 Va. 824, and *Goodlander v. Oil Co.*, 63 Fed. 400. In the first case naphtha, a highly volatile and explosive substance, in the second crude petroleum, which is only inflammable if brought directly into contact with fire or subjected to intense heat when shipped in cars, having the same defect, a leaky valve. In the second case, no injury was probable unless the car was unloaded, as in fact it was by the consignee, who knew of the leak, so near a lighted furnace that the oil dripping from the leak would be ignited. It was held that since sufficient precautions had been taken to guard against ignition for ordinary risks of transportation, the company had fulfilled its legal obligations and was not answerable for injury caused by the careless conduct of the consignee. In the first case the injury was caused by the escape of naphtha in the course of unloading the car in the ordinary way, and the court held consignee's act in removing the cap was "not only one to be anticipated, but one which the company knew would occur, for it was necessary in order to unload the car in the ordinary way," and the company were bound to provide against danger incident to it, nor was it an intervening superseding cause.

⁴⁹ In *Davis v. Guarnieri*, 45 Ohio, 470, the liability of makers of drugs for negligence seems to be based on the requirements of public policy.

In fact, drugs, chemicals, explosives, and foodstuffs are not in their nature inherently or imminently dangerous. If negligently kept, if misused, if their true nature is not properly indicated, so rendering probable an innocent misuse, or if carelessly made or put on the market unlabelled or mislabelled,⁵⁰ they may become highly dangerous. But if a scaffold, a boiler, a threshing-machine, or any one of a hundred other articles is carelessly made and put on the market with nothing to indicate its unfitness for the use for which it is sold, it is equally inherently and imminently dangerous. Nor if the quantity of injury threatened be legally of importance, and it is submitted that in a civil action the wrongfulness of the defendant's acts are not measured by the extent of the damage threatened,⁵¹ the latter class usu-

"The public safety and security against the fatal consequences of negligence in keeping, handling, and disposing of such dangerous drugs is a consideration to which no dealer can shut his eyes. An imperative social duty demands" care on his part. Owen, C. J.

"In *Heizer v. Kingsland Co.*, 110 Mo. 605, the court appears to consider that the obligation of a vendor of drugs, etc., is confined to correctly labelling his product. "In these cases," says Black, J., "the articles (drugs and chemicals) were necessarily and inherently dangerous and they did not by their color or otherwise exhibit their dangerous character, and hence the duty on the part of the vendor to make known to the vendee their true nature. A threshing-machine is not in and of itself dangerous, and there is no necessity of putting a label on it. It speaks for itself and discloses its uses and purposes as plainly as does a handsaw or the many other implements and machines in daily use." But there is no warranty as to all the world that the goods sold are as their label represents them. The implied warranty of identity can avail only the purchaser. Negligence must be shown before one not party to the contract. The liability rests on a breach of a duty to take care in their preparation for the market, and that care of the highest character. *Brown v. Marshall*, 47 Mich. 476; *Allen v. S. S. Co.*, 132 N. Y. 91. That such substances are usually sold in original packages and that ordinary persons are not able by inspection to discover their true nature, no doubt imposes upon those who prepare and sell them the added duty of correctly labelling them, and the label actually put on, together with any directions as to use contained therein (as in *Blood Balm Co. v. Cooper*), will determine to what use they may be expected to be put, but the duty is not confined to careful labelling, it is to prepare them carefully so that they may be safely used for the purpose for which either their appearance or label indicates they are designed. The label and directions indicate their expectable use, the duty is to fit them therefor. While no label is needed to identify a boiler or threshing-machine as such, if no defect be patent its apparent good condition is a practical label of fitness for safe use, and it is the duty of the maker to make the article conform to its appearance.

⁵¹The extent of the injury, of course, affects the measure of dam-

ally threatens the greater injury. The injury threatened by a defective boiler, scaffold, or complicated machine if defective is infinitely greater than any that is liable to result from the sale by a barber of a hair wash;⁵² from the sale by a quack of a patent tonic,⁵³ or from the conduct of a caterer who supplies unwholesome food for a public banquet;⁵⁴ in all of which cases the parties injured have been allowed to recover.

It would appear that these particular articles have been separated from the rest by a misconception of the earlier cases. Instances of admitted liability naturally presented themselves first in these particular cases. Instead of perceiving that they were but the most usual and obvious instances of articles designed for a particular use for which, unless carefully prepared, they would be dangerously unfit, from negligence in the preparation of which injury is *immediately*⁵⁵ probable to the public in the ordinary course of events and is not merely possible *mediately* through the medium of some misuse or some other peculiar and so unforeseeable action by the purchaser, they were taken to be anomalous and arbitrary impositions of exceptional liability peculiar to the physical nature of the article. These cases were then grouped under a class of so-called ultra hazardous or inherently dangerous articles.

In the earliest American case, *Thomas v. Winchester*,⁵⁶ it was held that the druggist's "duty arose out of the nature of his business, and the danger to others from its mismanagement," and not from contract, and extended to all who would be as a natural result affected by his want of care therein. "The wrong was in putting the poison mislabelled into the hands of a retailer to be sold and afterwards used as extract of dandelion." The druggist was accordingly held liable for injuries received by such use, though the user stood in no

ages. The enormity of the injury threatened may cause the state to take cognizance of the act as an offence against its good order and to make it a misdemeanor, by statute or judicial recognition.

⁵² *George v. Skivington*, L. R. 5 Ex. 1.

⁵³ *Blood Balm Co. v. Cooper*, 83 Ga. 457.

⁵⁴ *Bishop v. Webber*, 139 Mass. 471.

⁵⁵ And in this sense of the word, "imminently."

⁵⁶ 6 N. Y. 497.

contractual relation to him. Now, the extraordinary thing is, that this has been thought a novel principle. It was because of the nature of his business, because unless properly carried on danger to such persons as the one injured was reasonably probable, that the defendant was liable. This liability was as old as the common law, as has been seen,⁵⁷ based on the obligation of "every artificer" to exercise his art right and truly, as he ought.⁵⁸ In *Longmeid v. Holliday*⁵⁹ Baron Parke expressly gives as an instance of liability extending beyond the limits of an existing contract the case of an apothecary furnishing improper drugs. It was not because he dealt in drugs, but because, dealing in drugs, his business was one which imperilled others than his immediate customers that he owed them the duty to exercise care in it.

In the case of *Devlin v. Smith*⁶⁰ the defendants, scaffold builders, having furnished a defectively constructed scaffold to a master painter, one of his employees was injured while upon it by its fall. It was held that the defendants were liable, the defect being such "as to render the article imminently dangerous," and "serious injury to the party using it a natural and probable consequence of its use." In the same case it was held that the master painter was not liable because no inspection he was competent to make would have discovered the insecurity of the scaffold.⁶¹ Thus the master

⁵⁷ *Supra*, page 293 *et seq.*

⁵⁸ Fitzherbert, *De novel natura brevum* (1537). The instance given by Ruggles, C. J., of non-liability, that of a smith for failing to properly shoe a horse, was scarcely happy, for as early as *Everard v. Hopkins*, 2 Buls. 332, they were admitted to be liable not on their contract alone, but to all injured by a misfeasance in their business. This case seems the one put in Fitzherbert.

⁵⁹ 6 Exch. 671, *supra*, page 307.

⁶⁰ 89 N. Y. 470.

⁶¹ Compare *Mulcahy v. Congregation*, 125 Mass. 487, where it was held that where a church had caused a scaffold to be erected by an independent contractor for the use of painters employed by contract with a master painter, they were liable to one who was injured by the fall of the scaffold, it having been improperly built by the contractor, on the ground that they had invited the painter to use it as a part of their premises. See *Bright v. Barnett*, 83 Wis., page 306, where the defendant, a contractor, furnished a defective scaffold for the use of the servants of a subcontractor and was held liable for injury to one of them.

painter's employment of the scaffold for the use of his employees was without either knowledge or means of knowledge of its condition. His act was then not a misuse, but the natural inevitable consequence of the defendant's act in furnishing a scaffold containing no discoverable defect.

In certain cases, one being the building of a defective carriage, Rapallo, J., said, "misfortune to third parties not parties to the contract would not be a natural consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life." He seems to have in mind cases where the defect is known, or at least patent to inspection, or where the thing made could only be a source of danger under exceptional circumstances. "Here," he says, "the defendant undertook to build a scaffold ninety feet in height for the express purpose of enabling the workmen to stand upon it. Any defect in its construction which would cause it to give way would naturally result in these men being precipitated from that great height. A stronger case where misfortune to third parties not parties to the contract would be a natural consequence of the builder's negligence could hardly be stated." Here a defect "imminently dangerous" evidently means one likely to injure in the normal course of events without some misuse or exceptional use of it by him to whom it is supplied, not a defect which threatened an injury great in its nature and extent.⁶²

*Loop v. Litchfield*⁶³ and *Losee v. Clute*⁶⁴ show that it is the probability of injury naturally resulting and not its extent which determines the liability of the creator of the

⁶² Yet in *Swann v. Jackson*, 55 N. Y. Supp. 545 (1889), the Supreme Court, while professing to follow *Devlin v. Smith*, held that since the scaffold erected was only six feet high, though built for the express purpose of the plaintiff standing on it, he could not recover from the defendant who had carelessly constructed it. It "could not be assumed that misfortune to third parties not parties to the contract would be the natural and necessary consequence of the imperfect construction of the scaffolding." Now a fall is equally probable from a defectively constructed scaffold whether six or ninety feet high, though the injury might be expected to be less in extent. Such a decision does not deal with the imminently but the eminently dangerous nature of the defect, a word used in *Burke v. De Castro*, 11 Hun. 355 (1877), a case decided before *Devlin v. Smith*.

⁶³ 42 N. Y. 411.

⁶⁴ 51 N. Y. 476.

defect. In *Loop v. Litchfield* a manufacturer had sold a defective cast-iron fly-wheel to a purchaser who bought with full notice of its condition, and who had used it for years with safety. The plaintiff was using the wheel for his own purposes, and there was evidence that he had taken it without the owner's permission, and even that he himself knew of its condition. It was, of course, held that he could not recover. Rapallo, J., in *Devlin v. Smith* says of this case that "it was decided on the ground that the wheel was not of itself a dangerous instrument and the injury was not the natural consequence of the defect or one reasonably to be expected, and the case of *Losce v. Clute* was decided on its authority." Here no such result could have been foreseen from the making and sale of a wheel known to the purchaser to be defective. With care it was safe for some use—in fact, it had for years been safely used. The injury resulted either from the purchaser's misconduct in lending it without warning or in the plaintiff's unwarranted assumption without inquiry or investigation that the wheel, which he had taken without permission, was perfect. The maker could not have anticipated that the wheel would be put to a use for which it was patently unfit. So in *Losce v. Clute* the maker of a defectively constructed boiler was held not to be liable to the engineer of the purchaser for the explosion of it while in the purchaser's possession and use. The court emphasized the purchaser's sole liability for the use to which it was put. But while this taken broadly might seem to be opposed to *Devlin v. Smith*, although it did not appear exactly that the purchaser knew the precise nature of the defect, there was evidence to show that he knew that the boiler was not in proper condition, and that he had given orders to reduce the pressure with the idea that so it might be safely used. In both cases the injury threatened, if any, was serious—in fact, in both death resulted. Evidently, then, the amount of injury which may result if an accident occur is not the test. In *Wyllie v. Palmer*⁶⁵ these two cases are cited for the propo-

⁶⁵ 137 N. Y. 248.

sition that a maker of dangerous articles,—as in that case fireworks,—“could not be made liable for an injury resulting from the negligent or improper use of the article by the purchaser or by third persons.”

The words “imminently dangerous” evidently relate to the probability of injury, and the inquiry is whether the normal expectable use of the article will probably injure some determinate person or class of persons if care be not taken in its preparation and construction, or whether no injury is possible save through some misuse of it or from some peculiar and unexpected use of it, it being fit and reasonably safe for certain uses with ordinary care.⁶⁶

In Massachusetts the precise question does not seem to have been decided, but in *Bishop v. Weber*⁶⁷ it was held that a caterer is liable to a guest of his employer on a duty arising from the relation of caterer to those whom he supplies with food. “The latter have the right to assume⁶⁸ that he will furnish provisions not unwholesome through any neglect of his. The furnishing of provisions which endanger human life and health stands clearly upon the same ground as the administering improper medicines, citing the case of *Pippin v. Shepard*.⁶⁹ The duty here, as there, is attendant upon the exercise of a trade which, if improperly exercised, will endanger those on whom it is practised.”⁷⁰

⁶⁶ In *Davies v. Pelham*, 65 N. Y. 573 (1892), *Devlin v. Smith* was followed, and it was held that the maker and vendor of a derrick was liable to a workman injured by its defective condition in view of the uses to which he knew it was not to be put. The case finally went in favor of the defendant because it appeared the plaintiff actually knew of the danger and voluntarily accepted the risk. *Devlin v. Smith* was also cited with approval in *Succny v. Rozell*, 31 N. Y. Misc. 54. Much that is said in *Bright v. Barnett*, 88 Wis. 289, would indicate that the leaning of the Wisconsin courts is towards this view. Nor is *Lieman v. Co.*, 90 Wis. 497, contra, though often so cited.

⁶⁷ 139 Mass. 411.

⁶⁸ The caterer not acting gratuitously but for reward, the guests are not to be taken to have voluntarily assumed the risk of the quality of the food furnished; had the caterer acted gratuitously, the guests would have been receiving a gift from him and would be bound to assume the risks attendant on the quality of the thing given, in the absence of fraud.

⁶⁹ 11 Price, 411, *supra*, page 295.

⁷⁰ At common law a victualler was bound to furnish to the public wholesome food. Such obligation did not depend on a warranty of quality expressed or implied in the sale and so restricted to the

It may be fairly said that it is not the peculiar physical nature of drugs, explosives, and foodstuffs which the Massachusetts courts regard as determining the manufacturer or vendor's liability, but probability of injury, if care be not taken, to those on whom the business is practised; those for whose use the article is designed and sold. So while in *Norton v. Sewell*⁷¹ an apothecary was held responsible for the death of the purchaser's servant by reason of the negligence of his clerk, who sold laudanum for rhubarb, in *Tozve v. Carter* and *Davilson v. Nichols*⁷² the vendors of explosives and chemicals were held not liable because the injury did not result from the normal use of the article sold, but from misuse or peculiar use by the purchaser or a third party.

In Pennsylvania, in *Haggerty v. Godley*⁷³ and *Carson v. Godley*,⁷⁴ it was held that an owner who, to save the expense of an architect, himself erected a building to lease to the government for heavy storage in bond, was liable for its improper construction to an employee of the government, and to one whose goods were stored in bond in the building, for injuries received to his person and their goods by its collapse. It appeared⁷⁵ that the government did not know of the defective condition of the premises, and thus that there was no conscious negligent use by them of it, though apparently their officers inspected the building and could by proper inspection as the building progressed have discovered the defects.

Expressions are used which indicate that the court above thought the landlord knew that his building was unfit for heavy storage, and some stress is laid in Judge Woodward's opinion in *Carson v. Godley* on this feature of the case, but this question was not alluded to by the trial-judge, who simply left to the jury "whether there was negligence in

parties thereto, but from the obligation to exercise his art rightly as he should. Y. B. 9 Henry VI-53, pl. 37. *Roswell v. Vaughan*, Cro. Jac. 166, 11 Harvard Law Review 9, note 3.

⁷¹ 106 Mass. 143.

⁷² *Supra*, note 46.

⁷³ 20 Pa. 387.

⁷⁴ 26 Pa. 111.

⁷⁵ But see, *contra*, dissenting opinion of Black, J., 2 Phila., 138.

the erection of the building either as to the design or execution," and charged that "if the defendant knew it was to be used for storage purposes he was bound to use reasonable care in preparing it for such use." It is difficult, therefore, to say whether these cases are authority even for the proposition that he who as owner erects a building for a special purpose is bound either to employ a competent architect or builder⁷⁸ or if he choose to erect them himself to take care to fit them for their intended purpose,⁷⁷ or whether he is only liable when he conceals a defective condition known to him and undiscoverable after completion by the lessee.

In *Curtin v. Somerset*⁷⁸ Paxson, C. J., leans to the former view, but bases his approval of the cases on the ground that the defendant was owner and lessor of the premises. Certainly the tendency has been to restrict their authority to the precise facts presented rather than to extend it.

In *Elkins v. McKean*,⁷⁹ while the article sold was coal oil, an explosive, and so would fall within Sanborn, J.'s, first exception, the court considered the vendor's actual knowledge of the defect in the oil sold essential to liability. It is doubtful whether in Pennsylvania any class of ultra dangerous substances is recognized—in fact, but for a dictum of Dean, J., in *Congregation v. Smith*,⁸⁰ it might be said that in no case could a manufacturer or contractor be liable to any third party after sale of his product or the acceptance of his work unless he has concealed a defect known to him but latent to the purchaser. In *Curtin v. Somerset* a contractor had put timbers, inferior in size and quality to those required by his contract, into the porch of a hotel. After it had been taken over by the owner and while crowded with guests, who were witnessing a display of fireworks, it fell, and the plaintiff, a guest, was injured. The defects were not observable after the work was completed, nor did the

⁷⁸ *Walden v. Finch*, 70 Pa. 460.

⁷⁷ See contra, *Searle v. Laverock*, L. R. 9 Q. B. 122.

⁷⁸ 140 Pa. 70.

⁷⁹ 79 Pa. 343.

⁸⁰ 163 Pa. 561, page 576.

owners know of their existence. It was held that the contractor was not liable, because the causal connection was broken by the hotel owner, a responsible human agency, adopting Dr. Wharton's statement⁸¹ as a correct statement of the law which Paxson, C. J., considered in accordance with public policy. Now in this case the defect, if it were a defect, was known to the contractor and was fraudulently concealed from the owner, and yet the only allusion made to this feature was a rebuke to the trial-judge for mentioning it in his charge. This case would, if pushed to its extreme limit, exclude liability even where the vendor or contractor by his fraudulent concealment had led the purchaser or owner into innocently imperilling human life and property, and throw around commercial dishonesty the protection of public policy. However, it may be said that while there was alleged fraudulent breach of contractual duty, it was not shown that the porch as constructed was insufficient to sustain the weight of any number of guests expected to be thereon under any ordinary circumstances; the fact that it fell under the weight of an extraordinary crowd is no evidence that it was insufficient for ordinary use. That the defendant should be liable for his fraudulent concealment to anyone but the owner, it was necessary to show not merely that he knew that the porch was not according to contract, but also that he knew or should have realized that guests would be imperilled thereby. There seems no doubt that where there is concealment of a defect, not merely known to exist, but known to be dangerous to third persons, the present tendency of the Pennsylvania courts seems to be towards holding the vendor liable to such persons.⁸²

In *Congregation v. Smith*⁸³ the defendant constructed a sewer under contract with the city, but so badly that some time after the city had accepted it the leakage from it undermined the plaintiff's foundations. It was held that they could not recover. But Dean, J., placed his decision on the ground that the city engineer had seen every day the mate-

⁸¹ *Supra*, page

⁸² See Dean, J., in *Palmore v. Morris Tasker Co.*, 182 Pa. 82.

⁸³ 163 Pa. 561.

rial put in and the character of the work. He said, "if the employer (the city) at the time he resumed possession from an independent contractor, had known or ought to know, or from a careful examination⁸⁴ could have known, that there was any defect, he is (alone) responsible for any injury caused to a third party by defective construction." If this statement of the law be followed, a contractor or maker will still remain liable after acceptance or sale for any latent undiscoverable defect which renders the structure or article dangerous to third parties if used for the purpose for which it is manifestly designed.⁸⁵

In the Minnesota case of *Shubert v. Clark Co.*,⁸⁶ which, together with *Devlin v. Smith*, Sanborn, J.,⁸⁷ considers ill

⁸⁴ Perhaps *Curtin v. Somerset* may be brought within this, because while the defect was hid, after the work was complete the hotel company might by inspection during progress of the work have detected it.

⁸⁵ In *Osten v. Morris Tasker Co.*, 42 L. I. 171, 17 Phila. Rep. 217, defendant contracted to build a gas-receiver fit to stand 600 pounds' pressure. The first day it was put in use it burst. Yerkes, J., said: "It is impossible to say, leaving the contract aside, and the plaintiff was no party to it, did not know of it, or rely upon it (observe the influence of Dr. Wharton), that the receiver was being used in a manner or for a purpose contemplated by the maker. Can there be negligence in fashioning an inert body of iron in such a manner that a subsequent possessor may so use it as to make it dangerous?" The plaintiff, of course, cannot show a contract to which he is not party as creative of rights in him or duties to him; his knowledge of it, his reliance on it, if he were not party to it, would not help him, *supra*, page 347. But since what he is asserting is that the defendant should, as a reasonable man, have known that, unless he acted carefully as manufacturer, the plaintiff's safety would be imperilled, it is the actual knowledge by the defendant of the use to which the body of iron would probably be put that is important. Now, there is no reason why the contract should not be admitted and effective to show this, just as in *Globe Co. v. Coughtry*, 56 N. Y., it was admitted to show that the defendant had retained control of the scaffolding as part of the premises, and in the many cases where contracts between one party to the suit and some other person are admitted to prove relevant facts and not as directly creative of rights and obligations between the parties to the suit.

⁸⁶ 49 Minn. 331.

⁸⁷ He considers *Shubert v. Clark Co.* sustainable only on the ground of fraudulent concealment of a defect known at the time of sale, and *Devlin v. Smith* "on the ground that the workmen were the real parties in interest in the contract, since Stevenson had expressly agreed to erect the scaffold for their use." Therefore, he thinks they might recover, as third parties suing on a contractual obligation assumed not to them or on consideration moving from them but for their benefit, as in *Paducah Lumber Co. v. Water Co.*, 89 Ky. 346. In Kentucky, however, third parties can always sue on contracts made expressly

decided, a lot of bad material had been made up knowingly into ladders which had been mixed with the rest of the stock. When the particular ladder was sold, neither the defendant nor his employee who made the sale knew that it was defective. Thus, while there was something more than negligence in manufacturing,—in fact, what might be termed a conscious misconduct therein,—there was no conscious concealment at the time of the sale. It was held that the plaintiff, a servant of the purchaser, injured while using the ladder, could recover against the maker.

Dickenson, J., after discussing the case elaborately on the assumption of knowledge and concealment of the defects at the time of delivery, says, "but the statement of the case shows that such was not the fact." The defects had been covered by paint, varnish, etc., although not applied to conceal them. "There was then no wrong (as vendor) in not disclosing defects neither known nor discoverable, and the defendant's liability reaches back to the time of manufacturing and putting into its stock for sale an article known to be dangerously defective, the defect being concealed, and not likely to be discovered either by any intermediate purchaser, standing between the maker and the person who might procure the ladder for use, or by the latter person. In this case the wrong and injury are more widely separated in time and order of events than where there is concealment at the time of sale, but this does not change the real relation between the parties." "He must at that time be taken to have anticipated that it would in the ordinary course of events eventually come into the hands of a purchaser either directly from the defendant or from some intermediate dealer for actual use and with the consequences that have actually resulted, . . . and that any such dealer would not discover the defect and that nothing would be likely to occur to avert the danger⁸⁸ to which the person who might use the ladder was subjected by the defendant's negligence."

for their benefit. In New York such right is by no means so generally recognized, certainly not sufficiently to cover this case. See also *Lampert v. Gas Light Co.*, 14 Mo. App. 376.

⁸⁸ Perhaps it would be more accurate to say that no interference by wrongful, because conscious, user of a defective thing was necessary to effectuate the injury.

Neither on the grounds of a break in the chain of causal connection nor of public policy can this case be successfully attacked. It is plain that the purchaser could not discover a defect so effectively though innocently concealed that the maker himself could not find it out when he came to sell, nor was such purchaser legally responsible to the plaintiff for any defect which he could not discover by an ordinary inspection; therefore the purchaser was neither a conscious nor responsible human agent; nor can even a wise and conservative public policy require immunity from the effects of a conscious use of dangerously defective material in the manufacture of appliances to whose strength workmen must trust their safety.

In the other American jurisdictions the general proposition laid down by Sanborn, J., in *Huset v. Co.*, together with the exceptions in regard to drugs, chemicals, and explosives, and in regard to concealment by the vendor of conditions rendering the article sold dangerous for use, may be fairly said to accurately state the attitude adopted by the courts therein.⁸⁹

The third exception stated by Sanborn, J., is, "where one sells and delivers an article known to be imminently dangerous to life and limb, without notice of its qualities." This relates to a quite distinct subject, to the duty of a vendor as such, and not to any duty owed by him as manufacturer or contractor.⁹⁰ Now, while *Langridge v. Levy*,⁹¹ an action on the case for deceit by false representations of the quality of a gun sold for the use of the plaintiff, the son of the purchaser, is cited, the exception does not rest upon principles identical with those governing the action of deceit.

It is not fraud, "but something like it,"⁹² that is the basis of liability. The wrong consists in delivering to another for

⁸⁹ See Appendix.

⁹⁰ See this subject fully discussed, pages 305-310. The rule as announced by Sanborn, J., is practically that in *Clark v. The Army and Navy Stores*, *supra*, page 305, and is accepted with practical unanimity by all jurisdictions throughout the United States. *Carter v. Harden*, 78 Me. 528; *contra*, see Appendix.

⁹¹ 2 M. and W. 519, *supra*, page 305.

⁹² Per Willes, J., in *Gaultrell v. Edgerton*, "such neglect," said Dickenson, J., in *Shubert v. Clark*, *supra*, "amounts to bad faith."

a particular use a thing known to be unfit for such use. This is an act of commission, a misfeasance. There is no duty to disclose the defect where no injury is probable if it be not made known, but there is an obligation not to consciously lead others into dangers of which they are unaware. In the action of deceit the liability rests on false *statements*, actually made, intended or likely to induce the plaintiff to act in some particular manner. To recover, it is not necessary to show that the defendant knew or ought to have known that the effect of the plaintiff's action in reliance on the statement would be injurious to him.⁹³ If the plaintiff's action was probable and the injury, though unexpected, resulted naturally therefrom, the defendant is liable.

In the cases under discussion no false statement, no active concealment, is necessary (though often present); the duty to disclose the true nature and condition of the article transferred arises because injury is probable unless warning be given. The act which is wrongful is the delivery of an article for a particular use for which he who furnishes knows, while the user does not, that it is unfit and dangerous. This is but one instance of the duty to refrain from action likely to injure others. As has been seen, it applies to one who invites or permits the presence of others on his land, though the permission is purely gratuitous.⁹⁴ It applies though the goods be delivered to the user under a contract with him⁹⁵ or in the absence of any contract, whether delivered in the course of the defendant's business and for gain, or gratuitously;⁹⁶ nor is it necessary that the article should be imminently dangerous to human life or limb; if dangerous to a property right of any sort,⁹⁷ or if any other recognized legal right be imperilled, the liability

⁹³ His intention may have been to benefit the plaintiff—in fact, benefit might even have been probable. However, one has a right to form one's own opinion, and not to be misled into action by false statement against one's will and judgment, and if injury result, the defendant's benevolent intentions will not absolve him from liability.

⁹⁴ See *supra*, pages 223 to 226.

⁹⁵ *Clarke v. Army and Navy Stores*, L. R., 1903, 1 K. B. 155, *supra*, page 305.

⁹⁶ *McCarthy v. Young*, 6 H. and N. 329, *supra*, page 309.

⁹⁷ *French v. Vining*, 102 Mass. 132.

for the consequent damage is complete.⁹⁸ It is here, as elsewhere, probability of injury which makes the delivery of the article without full disclosure a wrongful act.

In all of these cases the wrong consists in the sale, the delivery of the article; it is not the original negligence whereby the defect concealed arose. In *Lewis v. Terry*,⁹⁹ the maker of a folding bed was held liable to the user who had purchased from a retail dealer to whom the maker, knowing it to be defective, had sold it, Britt, J., saying: "When a seller represents an article as safe for the uses which it is designed to serve, when he knows it is dangerous because of concealed defects, he commits a wrong independent of his contract." This is quite different from the case of *Langridge v. Levy*. The particular plaintiff was not in contemplation as the person whom the vendor intended should use the bed, nor was any representation of safety made other than that implied in its sale for use as such. The case is much more nearly that put by Parke, B., in *Langridge v. Levy*, of a person not in contemplation at the time of sale, who does not know of the representations and to whom the gun might be sold or handed over.¹⁰⁰ The case was decided simply because a sale under such circumstances was a wrong to all who should be expected to use the bed. The imminence of danger to the user, the probability of injury to him, is the origin of the duty to refrain from such an act. The court said: "The intermediate vendor cannot break the chain of causation unless he knew of the defect when he furnished the bed to

⁹⁸ "It is well settled that one who delivers an article which he knows to be dangerous or noxious to another without notice of its nature and qualities is liable." Gray, J., *Downer v. Wellington Oil Co.*, 104 Mass. 63; also *Farrant v. Barnes*, 11 C. B. N. S. 553, where a shipper who had delivered to carrier a carboy of vitriol without notice was held liable to a servant of the carrier. See also *Cutter v. Hamlin*, 147 Mass. 471, where a landlord, who leased a house knowing that the drains were bad and that the previous tenant had died of diphtheria, was liable to both the tenant and his family for failing to disclose these facts to the lessee. See also *Miller v. Sharon*, 112 Mass. 477; *Sutherland v. Cowen*, 145 Mass. 363.

⁹⁹ 111 Cal. 39.

¹⁰⁰ In *Carter v. Harden*, 78 Me. 528, this very case arose, and the action being brought in deceit was held not to lie, a decision contrary to the overwhelming weight of English and American authority.

the ultimate vendee." Here is a denial of Wharton's idea, that the first vendee always forms a new responsible agency, breaking the causal connection, a recognition of the principle that normal conduct of a human being such as is to be expected to result from the actor's wrong is but an expectable agency effectuating the natural results thereof. Where the defendant is not the maker, but only the vendor, there can be no wrong unless in the sale itself.¹⁰¹ If there is, as would appear to be, a duty on a manufacturer for gain of goods dangerous for their normal use, unless carefully made "to exercise their art rightly as they should," and such goods are carelessly made, concealment is not necessary, there is a wrong already. If, then, the defect created by the maker's misconduct is latent, though unknown to both, the intermediate vendor could no more break the causal connection in the one case than the other; there is no reason to expect that the vendee will refrain from selling again or using it in any way for which a perfect article of the sort may be safely used.

As to one subject the English and American courts are at one. One who, under contract with another, has furnished information is not responsible to a third party who relies upon it, even though it were known that the very object of obtaining the information was to furnish a basis for the very action which the third party has taken in reliance upon it. Knowledge of the falsity of the information in such case is essential to recovery. *Lievre v. Gould*,¹⁰² *Bank v. Ward*,¹⁰³ *Gordon v. Livingston*,¹⁰⁴ *Kahl v. Love*,¹⁰⁵ and *Houseman v. Girard Bank*.¹⁰⁶

The analogies of the law of deceit and the high regard paid to freedom of speech in the absence of fraud have probably contributed largely to this result. Were the information gratuitously given and acted upon with knowledge that such was the case, all that one acting upon it could fairly

¹⁰¹ *Longmeid v. Holliday*, *Langridge v. Levy*, *Elkins v. McKean*, so in such case fraud or concealment is essential.

¹⁰² L. R., 1893, 1 Q. B. D. 491.

¹⁰³ 100 U. S. 195, though against a strong dissent of Waite, C. J., Swayne and Bradley, JJ.

¹⁰⁴ 12 Mo. App. 267.

¹⁰⁵ 37 N. Y. L. 8.

¹⁰⁶ 81 Pa. 255.

ask would be honest belief on the part of the informant.¹⁰⁷ But where the defendant makes a business of furnishing such information and professes special skill therein, it is submitted that he should answer to all who may be expected to rely on his competence for negligence in his business.

Perhaps it may be said that in such case no man has a right to act, without personal investigation, upon information not directly furnished to him and paid for by him. But here the defendant was paid to furnish him this very information, and the case would seem to be similar to the case of *Sheppard v. Pippin*,¹⁰⁸ and accountants would be the last to claim that their reports were usually so inaccurate that one who trusted them would have only his own folly to blame if injured thereby.

However, the law seems, whether because of the supposed analogies to the law of deceit or because the business of accountants, etc., who furnish information for the use of the public generally is a modern growth, firmly established that the business of furnishing information stands on a different plane from all other businesses, and that those engaging therein owe no duty to any save those who personally employ them.

APPENDIX.

In *Bank v. Ward*, 100 U. S. 195, while the precise point involved was, whether, in the absence of fraud, an attorney, employed by an alleged owner to examine his title, was liable to the purchaser who had bought in reliance on his certificate that it was good, the United States Supreme Court laid down in general terms the proposition that "where the wrongful act is not immediately dangerous to the lives of others (evidently here the court has in mind the sale of drugs, etc.) the negligent party, unless he is a public agent in the performance of some duty, is generally liable only to the party with whom he contracted and on the ground that negligence is a breach of the contract." Clifford, J. He says, however, that cases of "fraud and collusion constitute exceptions to that rule."

In *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, the Circuit Court of Appeals of the Third Circuit decided that where a husband had

¹⁰⁷ *Fish v. Kelly*, 17 C. B. N. S. 194. Here an attorney gave some information in regard to a client's deed to an outsider in answer to a "casual inquiry." Here, indeed, he was not paid to give such information, nor did he know that the outsider intended to act upon it. He certainly was not paid to furnish information for the outsider to act upon. This case is strikingly similar to *Kahl v. Love*, *supra*.

¹⁰⁸ 11 Price, 411, *supra*, page 295.

ordered a sidesaddle of special design and of the best quality of material and workmanship for his wife's use the maker was not liable for injuries received by the wife through defects in the saddle due to bad workmanship, and in *Standard Oil Co. v. Murray*, 57 C. C. A. 1, Judge Sanborn's statement of the law was accepted fully and crude petroleum was held not to be an inherently imminently dangerous substance.

In Georgia the general immunity of manufacturers after sale is broadly stated in many cases, though the precise point is not actually decided, *Cobb v. Co.*, 118 Ga. 480, dealing with the obligation of a subcontractor performing a contractual duty assumed by his employer; *Blood Balm Co. v. Cooper*, announcing the exceptional liability of the maker of a patent medicine to take care that it is fit to be taken in such doses as are prescribed on the label; *Smith v. Hardware Co.*, 100 Ga. 163, deciding a vendor of cartridges to be one dealing in ultra hazardous articles and liable for injuries received from ill-fitting cartridges sold by him, and *Woodward v. Miller*, 119 Ga. 618, deciding that a vendor who knowingly sells a defective buggy to a city for the use of its employees is liable to the latter for injuries received by them.

In Ohio, *Cheadle v. Burdick*, 26 Ohio, 393, actually decides only that a landlord is not liable to the customer of a tenant for the internal condition of the premises, but in the case of *Bailey v. Gas. Co.*, 4 Ohio Cir. Ct. R. 471, it was cited as authority for the proposition that a vendor or contractor after transfer of possession and control is only liable where there is concealment of a known defect of work, or where the article is "in its nature imminently dangerous, and not where it may merely become so by the manner in which it is constructed or performed," Haynes, J., and *Davis v. Guarnieri*, 45 Ohio, 470, places the obligation of makers and vendors of drugs, etc., upon the requirements of public policy based on the dangerous nature of the article.

In Indiana, in *Herzog v. Dougherty*, 145 Ind. 255, it was held that a builder was not liable to one injured upon the highway by the fall of a defectively constructed wall accepted by the owner years before, following verbatim Dr. Wharton's statement, *supra*, page 346, as law, and in *Binford v. Johnson*, 82 Ind. 426, and *Gartin v. Meredith*, 153 Ind. 16, one selling ammunition to children was held to be guilty of actionable negligence though not wilful wrong.

In Missouri, in the case of *Heizer v. Kingsland Co.*, 110 Mo. 605, the court fully adopted the rule of makers' immunity after sale and held a threshing-machine not to be in its nature inherently dangerous. In *Lampert v. Co.*, 14 Mo. App. 376, however, an exception was recognized based on Lord Abinger's dictum in *Winterbottom v. Wright* that "where a party becomes responsible to the public by undertaking a public duty, in the case in hand a duty to maintain the gas lamps of a city, he is liable though the injury may have arisen from the negligence of a servant or agent."

In Michigan Judge Cooley's opinion in *Necker v. Harvey*, 49 Mich.

517, is generally accepted as settling the law in favor of the maker's immunity after sale, but the point was not actually involved, for the elevator was still in the possession of its maker when the injury occurred and he was held liable. So, too, in the Wisconsin case of *Zuman v. Elevator Co.*, 90 Wis. 497, the elevator was in the maker's possession and control, but he was held not liable because the plaintiff was not upon the elevator but in a room some distance off—in a word, because he was outside the radius of any probable injurious effects of the defendant's conduct, and so no duty was owing to him. This case in no way supports Wharton's rule, though often cited for that purpose, and in *Bright v. Barnett*, 88 Wis. 299, a case in many ways similar to *Devlin v. Smith*, the court said the scaffold builder, a contractor, would be liable to a servant of a subcontractor whose duties took him thereon either on the ground of invitation to use it (on defendant's business?) or of imminence of danger if care were not taken, as in *Devlin v. Smith*. Imminent danger here evidently is used as in the New York cases in the sense of danger inherently probable in the ordinary course of events—if the structure be used for its manifest purpose.

While the point has not been definitely decided in New Jersey, the tendency of the courts as indicated by dicta in *Kahl v. Love*, 37 N. J. L. 8, and *Marvin v. Ward*, 46 N. J. L. 19, is towards the views expressed by Sanborn, J., in *Huset v. Co.*

In Maine much that is said in *Carter v. Harden*, 78 Me. 528, indicates that it is only where a deadly poison is mislabelled as a harmless drug or a false statement is knowingly made with *intent* that the plaintiff shall act upon it that the maker or vendor of a defective article is liable for injuries sustained by any other than the purchaser.

In South Dakota, in *Fish v. Kerlin-Gray Co.*, 99 N. W. Rep. 1092, there is a dictum to the effect that after the defective article "has been delivered to and accepted by the party who was operating the same and the party injured was a third party having no connection with the (maker) and to whom the (maker) owed no duty," he is not liable.

In Iowa, in *Ives v. Weldon*, 114 Ia. 476, it was held that under a section of the code providing that no gasoline should be sold unless so labelled, a child who was injured by the explosion of gasoline which she thought was petroleum and was using as fuel could recover against the dealer who sold it unmarked to her father, though he had left it within her reach. Compare *Towne v. Carter*, 103 Mass. 507.

In Maryland, in the case of the *State for use Hartlove v. Fox*, 79 Md. 514, the court, Boyd, J., after an exhaustive examination of the authorities hold that while the maker and vendor of an article are under no obligations assumed by contract or imposed by public policy to anyone but the purchaser unless the article is "necessarily dangerous" to those using it, one who knowingly sells a horse infected with glanders is liable for the death of a brother of the purchaser who attended

the horse. It is, perhaps, uncertain whether the word "necessarily dangerous" is intended to include only Judge Sanborn's specific so-called ultra hazardous substances, or any article which in its normal necessary use will be dangerous unless carefully constructed and prepared.

In Virginia the court, Buchanan, J., appears to lean towards the New York view, though the precise point was not involved. He quotes with apparent approval the statement in the American and English Enc., page 661: "Where there has been negligence in the construction or preparation of the article sold or supplied—that is, where, under the circumstances, injuries to the other contracting parties or to third parties might reasonably be expected as a result of defects or errors therein, the question of privity of contract seems wholly immaterial."

In West Virginia, in *Peters v. Johnson*, 50 W. Va. 645, while a vendor was held liable for selling poison as a harmless medicine, it was solely because of "the frightful dangers lurking in drugs, poisons, and medicines."

In Kentucky, in *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky. 340, the plaintiff was allowed to recover because its property was burnt owing to the insufficient supply of water which the defendant supplied under its contract with the city, but upon the ground that the contract was made by the city for the benefit of the citizens, Kentucky having adopted the principle that third parties may sue on contracts made for their benefit.

In Rhode Island, in *McCaffery v. Mossberg Co.*, 23 R. I. 381, the court, Stiness, C. J., says: "Where the cause of the injury is not in its nature imminently dangerous (and by this the court appears to mean not a drug, chemical, or explosive), where it does not depend on fraud, concealment, or implied invitation, and where the plaintiff is not in privity of contract with the defendant, an action of negligence will not lie." See *Slattery v. Colgate*, accord. 55 Atl. Rep. 639.

In California, in *Lewis v. Terry*, 111 Cal. 39, Britt, J., says: "The fact that a folding bed is not ordinarily" (*i. e.* if properly made) "a dangerous instrumentality is of no moment in this case. If mere non-feasance" (probably lack of inspection) "or perhaps misfeasance" (carelessness in manufacture) "was the extent of the wrong, that consideration would be important." The question appears thus left open whether the maker of a defective article, dangerous because of the defect, though, if properly made, safe for its normal natural use, is liable for the negligent conduct of his business causing the defect.

In Texas, in *Oil Co. v. Davis*, 24 Tex. Civ. App. 508, it is held that a vendor of articles inherently dangerous to human life is bound to notify the purchaser of the dangerous qualities of the article.

In Washington, in *Weiser v. Holzman*, 33 Wash. 87 (1903), a complaint alleging that the defendant had sold champagne cider, known by him to be so bottled as to be explosive, without giving notice to the purchaser of its true nature, the vendor was held liable to a third party injured by its explosion.

Francis H. Bohlen.