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Manufacturers' Liability to the Ultimate Consumer

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MANUFACTURERS' LIABILITY TO THE ULTIMATE CONSUMER

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The general rule in both this country and England is that a contractor, manufacturer, or vendor is not liable to a third party with whom he has no contract for defects in the article constructed, manufactured, or sold. This broad rule finds its authority in the famous case of *Winterbottom* v *Wright.*[1]

In this case the plaintiff alleged that the defendant had entered into a contract with the Postmaster-General to keep the carriages used in repair; that one Atkinson having notice of the said contract entered into a contract with the Postmaster-General to deliver mail using the said mail coaches, that plaintiff, an employee of Atkinson, with knowledge of these contracts was injured when a wheel of one of the coaches broke; that the injury was due to the defendant's failure to properly inspect. The English Court denied recovery The two reasons advanced by the judges were, first, that there was no duty owing from the defendant to the plaintiff, and second, that it was bad policy to allow recovery by any other than the contracting parties because it would cause too many suits.

Lord Abinger, C. B. in his opinion said "if the plaintiff can sue, every passenger, or even every person passing along the road, who is injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who enter into them, the most absurd and outrageous consequences, to which there can be no limit, would ensue"

In his opinion in this case Alderson B. said "if we were to hold that the plaintiff could sue in such a case, there is no point at which such action would stop. The only safe rule is to confine the right to recover to those who enter into the contract

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[1] 10 M. & W. 109 (1842).

if we go one step beyond that, there is no reason why we should not go fifty " Rolfe B. in his opinion said "the duty, therefore, is shown to have arisen solely from the contract, and the fallacy consists in the use of the word 'duty' If a duty to the Postmaster-General is meant, that is true, but if a duty to the plaintiff is intended (and in that sense the word is evidently used), there is none."

The courts have extended this rule far beyond the facts of this case. They now hold that any contractor, manufacturer, or vendor is only liable to those with whom he has a contract, for injuries caused due to some defect in the article constructed, manufactured or sold. The user who is injured by such an article cannot recover unless there is some privity of contract between him and the contractor, manufacturer, or vendor. To this rule there are a number of exceptions. The first is that involved in the manufacture and sale of food and drugs and announced in *Thomas* v. *Winchester*[2] In this case the manufacturer put a dandelion label on a bottle containing belladonna. This bottle through a retail druggist came to the hands of the plaintiff who suffered injury when she took the medicine. The court in allowing a recovery, stated the above rule but said that this was an exception to the general rule, because belladonna was a deadly poison. The court said, "death or great bodily harm of some person was the natural, and almost inevitable consequence of the sale of belladonna by means of the false label. The defendant's negligence put human life in eminent danger" The court went on to say that the defendant's duty arose because of the nature of his business. This exception to the general rule has been adopted almost unanimously by the American courts. The only question for the court to decide is whether or not the particular article under consideration is a food or a drug, and whether or not the manufacturer is negligent. Thus, the courts have held the manufacturer liable in cases involving the sale of laudanum labelled as tincture of rhubarb,[3] wrong directions were printed on a bottle of medicine,[4] saltpeter sold for epsom

[2] 6 N. Y. 397, 57 Am. Dec. 455 (1852).

[3] *Norton* v. *Sewell*, 106 Mass. 145 (1870).

[4] *Blood Balm Co.* v. *Cooper*, 83 Ga. 857, 10 S. E. 118 (1889).

salts,[5] poison mineral oil.[6] The courts have included food in the rule of *Thomas* v *Winchester* One holding herself out as a caterer is liable to one who eats unwholesome food, even though the injured did not pay for the food.[7] Foreign substance in ice cream, coco cola, and various other beverages have been the grounds for recovery [8] Articles of food such as flour,[9] pork and beans,[10] and meat[11] have been the subject of liability where such were not pure. In considering these food cases it is necessary for the court to determine whether or not the particular article

[5] *Porter* v. *Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S. E. 190 (1901).

[6] *Meshbesher* v. *Chamelene* Oil Mfg. Co., 107 Minn. 104, 119 N. W 428 (1909).

[7] *Bishop* v. *Weber*, 139 Mass. 411, 1 N. E. 154 (1885).

[8] *Minutilla* v. *Providence Ice Cream Co.*, 43 R. I. (——,) 144 Atl. 884, 63 A. S. R. 334 (1929). (Ice cream.)

Boyd v. *Coca Cola Bottling Works*, 132 Tenn. 23, 117 S. W. 80 (1914). (A cigar in a bottle of coca cola.)

Crigger v. *Coca Cola Bottling Works*, 132 Tenn. 545, 179 S. W 155 (1915), *Jackson Coca Cola Co.* v. *Chapman*, 106 Miss. 864, 64 So. 791 (1914). (Mice in bottle of coca cola.)

Coca Cola Bottling Works v. *Lyons*, 145 Miss. 876, 111 So. 305 (1927), *Atlanta Coca Cola Bottling Co.* v. *Ship*, 41 Ga. App. 705, 154 S. E. 385 (1930) *Perry* v. *Kelsford Coca Cola Bottling Co.*, 196 N. C. 690, 146 S. E. 805 (1929), *Rozumailski* v. *Philadelphia Coca Cola Bottling Co.*, 295 Penn. 114, 145 Atl. 700 (1929). (All cases involving glass in bottles of coca cola.)

Chenault v. *Huston Coca Cola Co.*, 151 Miss. 366, 118 So. 177 (1928), *Bufkin* v. *Grisham*, 157 Miss. 746, 128 So. 563 (1930), *Coca Cola Bottling Works* v. *McBride*, 180 Ark. 193, 20 S. W (2d) 862 (1929). (Unknown poisonous substance found in bottles of coca cola.)

Rainwatter v. *Hattisburg Coca Cola Co.*, 131 Miss. 315, 94 So. 444 (1925). (Flies in orange crush.)

Watson v. *Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152 (1905). (Glass in soda water.). *Birmingham Chero Cola Co.* v. *Clark*, 205 Ala. 678, 89 So. 64 (1921). (Foreign substance in a bottled drink.)

Nock v. *Coca Cola Bottling Works of Pittsburg, Pa.*, ————, 156 Atl. 537 (1931), *Coca Cola Bottling Co.* v. *Bennett*, 184 Ark. 329, 42 S. W (2d) 213 (1931). (Worms in bottles of coca cola.)

Culbertson v. *Coca Cola Bottling Co.*, 157 S. C. 352, 154 S. E. 424 (1930). (Insects in a bottle of coca cola.)

Atlanta Coca Cola Co. v. *Holbrook*, 40 Ga. App. 269, 149 S. E. 316 (1929). (A bottle cap in a bottle of coca cola.)

Dothan Chero Cola Bottling Works v. *Weeks*, 16 Ala. App. 639, 80 So. 734 (1918), and *Coca Cola Bottling Co.* v. *Shipp*, 70 Ga. 817, 154 S. E. 243 (1930), *Atlanta Coca Cola Co.* v. *Dean*, 43 Ga. App. 682, 160 S. E. 105 (1931).

[9] *Hertzler* v. *Manshun*, 228 Mich. 416, 200 N. W 155 (1924).

[10] *Davis* v. *Van Camp Packing Co.*, 189 Ia. 775, 176 N. W 382 (1920).

[11] *Drury* v. *Armour & Co.*, 140 Ark. 371, 216 S. W 40 (1919), *Tomlinson* v. *Armour & Co.*, 75 N. J. L. 748, 70 Atl. 348, 19 L. R. A. (N. S.) 923 (1907), *Cantam* v. *Swift & Co.*, 251 Pa. 52, 95 Atl. 931, L. R. A. 1917 B, 1272 (1915), *Haley* v. *Swift & Co.*, 152 Wis. 570, 140 N. W 292 (1913), *Ketterer* v. *Armour & Co.*, 200 Fed. 322 (1912), *Ketterer* v. *Armour & Co.*, 247 Fed. 921 (1917).

under consideration is an article of food. This question does not give much difficulty It was decided, however, that since chewing tobacco was not a food the plaintiff could not recover for injuries occasioned by biting a large bug imbedded in a plug of tobacco.[12] The Mississippi Court held that chewing tobacco was "intrinsically dangerous" since it was to be taken into the mouth and chewed, and therefore recovery allowed.[13] Where a manufacturer failed to properly neutralize the poisonous substance used in the manufacture of soap and a bar containing poison was sold by a retailer to the plaintiff who was injured by its use and recovered damages.[14] But where injury was caused by a needle hidden in a cake of soap recovery was denied.[15] It seems hard to see any basis for distinction between the two cases, and certainly the first case represents the sounder view

Various kinds of explosives not properly labelled or improperly manufactured form the ground for another line of decisions in which recovery has been allowed. Thus the court allowed recovery when, gasoline,[16] naphtha,[17] or higher explosive oil[19] was sold as kerosene, and where "champagne cider" was sold without notice of its explosive qualities and caused injury [20] Other injuries for which recovery has been allowed were caused by explosions of stain,[21] stove polish,[22] disinfectant[23] fluid used in dry cleaning,[24] gasoline shipped in defective drum,[25] scraps of film,[26] and proxoloid comb.[27]

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[12] *Lagget-Meyers Tobacco Co.* v. *Cannon*, 132 Tenn. 419, 178 S. W 1009, L. R. A. 1916 A, 940, Ann. Cas. 1917 A, 179 (1915).

[13] *Pillars* v. *R. J Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918).

[14] *Armstrong Packing Co.* v. *Clem*, 151 S. W 576 (Tex. 1912).

[15] *Hasbrouck* v. *Armour & Co.*, 139 Wis. 357, 121 N. W 157 (1909).

[16] *Kentucky Independent Oil Co.* v. *Schmitzler*, 208 Ky. 507, 271 S. W. 570 (1925).

[17] *Wellington* v. *Downer Oil Co.*, 104 Mass. 64 (1870).

[19] *Peterson* v. *Standard Oil Co.*, 55 Ore. 511, 106 Pac. 337 (1910).

[20] *Weizer* v. *Holzman*, 33 Wash. 87, 77 Pac. 797, 99 Am. St. Rep. 932 (1903).

[21] *Thornhill* v. *Carpenter*, 220 Mass. 593, 108 N. E. 474 (1914).

[22] *Clements* v. *Crosby and Co.*, 148 Mich. 293, 111 N. W 745, 10 L. R. A. (N. S.) 585, Ann. Cas. 265 (1907).

[23] *W T. Rawleigh Co.* v. *Schoultz*, 56 Fed. (2nd) 148.

[24] *La. Oil Refining Co.* v. *Reed* (1930), 38 Fed. (2nd) 159.

[25] *Moore* v. *Jefferson Distilling and Denaturing Co.*, 12 La. App. 405, 123 So. 384 (1929).

[26] *Guinen* v. *Famous Players—Lasky Corp.*, 167 N. E. 235 (Mass. 1929).

[27] *Farley* v. *Edward F Tower & Co.*, 271 Mass. 230, 171 N. E. 639 (1930).

Explosions of bottles caused either by a defect in the bottle or by overcharging the substance, have caused injuries for which recovery was granted.[28] Closely related to these cases are cases involving injuries caused by the explosion of a coffee urn,[29] and boiler tubes,[30] in which recovery was allowed.

Another important line of decisions are those involving defects in various kinds of machinery As to whether or not recovery will be allowed in these cases depends upon the kind of machinery and the nature of the defect involved. In *Huset* v. *J I. Case Threshing Machine Co.*[31] one of the leading cases on this phase of the subject, the court said. " . one who sells or delivers an article which is imminently dangerous to life or limb to another without notice of its qualities is liable to another person who suffers an injury therefrom which might have been reasonably anticipated, whether there was any contractual relations between the parties or not." In this case the defendant sold to plaintiff's employer a threshing machine. There was a large cylinder with a covering on which employees had to walk in the course of their duty This covering collapsed under the plaintiff causing him to come in contact with the cylinder and inflicting serious injury It was alleged that the collapse was caused by the defective construction of the covering. The court held that the above exception to the general rule governed the case and allowed recovery Either following this rule or governed by it, the courts have allowed recovery in a large group of miscellaneous cases.[32]

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[28] *Coca Cola Bottling Works* v. *Shelton*, 214 Ky. 218, 282 S. W 778 (1926) (a coca cola bottle) *Stolle* v. *Anheuser Busch*, 307 Mo. 520, 271 S. W. 497 (1925) (a bottle of budweiser). See notes on this phase of the subject in 8 A. L. R. 500 and 39 A. L. R. 1006, *Smith* v. *Peerless Glass Co.*, 251 N. Y. S. 708, 233 App. Div. 252 (1931). (Pop bottle.) Recovery was denied in *Stone* v. *Van Nay Ry. News Co., et al.*, 153 Ky. 240, 154 S. W. 1090 (1913). (A pop bottle exploded putting out the plaintiff's eye. The court held that it was not inherently dangerous.)

[29] *Statler* v. *A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063 (1909).

[30] *Marsh Wood Products Co.* v. *Babcock & Wilcox Co.*, 207 Wis. 209, 240 N. W 392 (1932).

[31] 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303 (1903).

[32] *Krohn* v. *Owens Co.*, 125 Minn. 33, 145 N. W. 626 (1914) (a threshing machine. Very similar to the Huset case). *Kuelling* v. *Roderick Lean Manufacturing Co.*, 183 N. Y. 78, 75 N. E. 1098 (1905) (a defective tongue in a farm roller). *Olds Motor Co.* v. *Shaffer*, 145

There is still another group of cases in which recovery is allowed. Sandborn, J. in *Huset* v *J I. Case Threshing Machine Co.*[33] states the rule as follows: "The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner." The premises do not need to be inherently dangerous to allow recovery here. As far as the writer has been able to discover, the first distinction between the manufactured product being on or off of the manufacturer's premises was made in *Conghtry* v *Globe Woolen Co.*[34] In this case the injury was caused by the collapse of a scaffold built by the defendant on his premises and being used by the injured's employer who was a construction contractor. The court allowing the injured employee recovery made this distinction in harmonizing the case with *Winterbottom* v *Wright.* This rule has been followed in many cases most of

Ky. 616, 140 S. W. 1047, Ann. Cas. 1913 B, 689, 37 L. R. A. (N. S.) 560 (1911) (a rumble seat insecurely fastened to the body of the car).

McPherson v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F, 669, Ann. Cas. 1916 C, 440 (1916). (A defective automobile wheel). *Johnson* v. *Cadillac Motor Co.*, 261 Fed. 878, 8 A. L. R. 1023 (1919). (A defective wheel on an automobile.)

Colbert v. *Holland Furnace Co.*, 333 Ill. 78, 164 N. E. 162, 60 A. L. R. 353 (1928). (A defective air shaft built in a heating system.)

Dahms v. *General Electric Co.*, 214 Calif. 733, 7 Pac. (2d) 1013 (1932). (A negligently repaired elevator.)

Payton's Admr v. *Childer's Elevator Co., et al.*, 228 Ky. 44, 14 S. W (2d) 208 (1929). (A crane with which to lift ice negligently constructed.)

Elder v. *Algoma Foundry and Machine Co.*, 200 Wis. 471, 227 N. W 944 (1929). (Defectively made sawing machine.)

Employer's Liability Assur Co. v. *Columbus*, 13 Fed. (2d) 128 (1926) (a defective chain); *Woodward* v. *Miller*, 119 Ga. 618, 46 S. E. 847, 100 Am. St. Rep. 188, 64 L. R. A. 932 (1903) (a defective spindle in the wheel of a buggy), *Heckel* v. *Ford Motor Co.*, 101 N. J. 385, 128 Atl. 242 (1925) (a defective pulley on a tractor), *Devlin* v. *Smith*, 89 N. Y. 470 (1882) (a negligently constructed painter's scaffold), *Schubert* v. *Clark*, 49 Minn. 331, 51 N. W 1103, 15 L. R. A. 818 (1892) (a defectively constructed step ladder, the defect being concealed by paint), *Lewis* v. *Terry*, 11 Calif. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146 (1896) (a defectively constructed folding bed), *Laughridge* v. *Levy*, 2 Mes. & W 519, 4 Mes. & W 337 (1857) (a defectively manufactured gun), *Ross* v. *Dunstall*, 63 Can. S. C. 393, 63 D. L. R. 63 (1921) (a defective gun), *Herman* v. *Markham Air Rifle Co*,. 258 Fed. 475 (1918) (a loaded air rifle). See also *Graham* v. *John R. Watts & Son*, 238 Ky. 96, 36 S. W. (2d) 859 (alfalfa seed sold as sweet clover).

[33] Supra note 31.

[34] 56 N. Y. 124, 15 Am. St. Rep. 387 (1874).

which involve scaffolds and structures of that kind on the defendant's premises.[35]

Briefly stated, recovery has been allowed in most cases where food, drugs, and beverages were involved, where one is exposed to high explosives, where machinery or other instruments that can be classified as "inherently dangerous" are in question, and in cases where one is invited on the premises of another to use a defective appliance.

This leaves a large number of cases where the manufacturer is alleged to have been negligent, and the ultimate consumer is injured but recovery denied because there was no privity of contracts.

It is interesting to note that while there is recovery for injury suffered because of poison in food for human consumption, this doctrine is not extended to include animal foods. Thus where poison hay and feed were sold and eaten by the plaintiff's horses which died, recovery was denied.[36] This same conclusion was reached in a case where chickens had died from eating a poisonous chicken feed.[37]

Other cases in which recovery has been denied are numerous and cover the largest variety of cases. The courts have denied recovery against the manufacturer for one reason or another for injuries caused by the following articles, a needle imbedded in a cake of soap,[38] a defective storage battery,[39] glass in a bottle

[35] *Heaven* v. *Pender*, L. R. 11 Q. B. D. 503 (1883) (staging necessary to paint a vessel), *Mowbray* v. *Merryweather*, L. R. 2 Q. B. D. 640 (1885) (a defective chain furnished by defendant to unload his vessel), *Marney* v. *Scott*, L. R. 1 Q. B. D. 986 (1899) (a defective ladder on a vessel), *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487 (1878) (a defectively constructed scaffolding to paint the interior of church), *Toomy* v. *Donovan*, 158 Mass. 232, 33 N. E. 396 (1893) (defective machinery), *Bright* v. *Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524 (1894) (defective staging in building).

[36] *Pease & Dwyer Co.* v. *Somers Planting Co.*, 130 Miss. 147, 93 So. 673 (1922) (Hay), *Royal Feed and Milling Co.* v. *Thorn*, 142 Miss. 92, 107 So. 282 (1926) (Feed).

[37] *Tompkins* v. *Quaker Oats Co.*, 239 Mass. 147, 131 N. E. 456 (1921). But see *Murphy* v. *Sioux Falls Serum Co.*, 44 S. Dak. 421, 184 N. W 252 (1921), holding that an allegation that the defendant negligently manufactured serum for vaccination of hogs which poisoned and killed the hogs stated a cause of action.

[38] *Hasbrouck* v. *Armour Co.*, 139 Wis. 357, 121 N. W 157 (1909). (No privity of contract.)

[39] *Turner* v. *Edison Storage Battery Co.*, 248 N. Y. 73, 161 N. E. 423 (1928). (Suit was based on breach of warranty.)

of milk,[40] flies in a bottle of beverage,[41] a nail in a piece of cake[42] a pin in a piece of bread,[43] a nail in a piece of bread,[44] spoiled cooked tongue,[45] mouse in coco cola,[46] explosion of a boiler sold to a third party,[47] defective iron furnished by the defendant for the construction of a building,[48] a negligently constructed bridge,[49] negligently remodeled building,[50] defectively built sewage system,[51] negligently constructed building,[52] a defective fly wheel,[53] explosion of a defective cylinder in a threshing machine,[54] poor grade of lubricating oil causing a glass tube to explode,[55] sulphide of antimony labelled as black oxide manganese,[56] explosion of a bottle of pop,[57] cement that would

[40] *Carlson* v. *Turner Centre System*, 263 Mass. 339, 161 N. E. 245 (1928). (Suit was on a breach of warranty.)

[41] *Grafico Bottling Co.* v. *Ennis*, 140 Miss. 502, 106 So. 97 (1925). (Suit was on breach of warranty.)

[42] *Chysky* v. *Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576 (1923). (Suit on breach of warranty.)

[43] *Pelletier* v. *Dupont*, 124 Me. 269, 128 Atl. 186 (1925). (Suit on breach of warranty.)

[44] *Newhall* v. *Ward Baking Co.*, 240 Mass. 434, 134 N. E. 625 (1922). (Judgment was reversed because the lower court allowed the plaintiff to recover on the ground of fraud and deceit. The court held that there was no fraud.)

[45] *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, 90 S. W 288 (1905). (Suit on breach of warranty.)

[46] *Crigger* v. *Coca Cola Bottling Works*, 132 Tenn. 545, 179 S. W 155 (1915). (Suit on breach of warranty.)

[47] *Losee* v. *Chute*, 51 N. Y. 494 (1873). (The boiler had been accepted, inspected, and used by the purchaser for a number of years.)

[48] *Ford* v. *Sturgis*, 14 Fed. (2d) 253 (1926). (No privity. The building had been accepted.)

[49] *Travis* v. *Rochester Bridge Co.*, 188 Ind. 79, 122 N. E. 1 (1918). (Act of accepting the bridge broke the chain of causation.)

[50] *Daugherty* v. *Herzog*, 145 Indiana 255, 44 N. E. 457 (1896). (No duty.)

[51] *First Presbyterian Church* v. *Smith*, 163 Pa. 561, 30 Atl. 279 (1894). (No duty.)

[52] *Curtin* v. *Somerset*, 140 Pa. 70, 21 Atl. 244 (1891). (The building had been accepted.)

[53] *Loop* v. *Litchfield*, 42 N. Y. 351 (1870). (The defect was pointed out to the purchaser.)

[54] *Heizer* v. *Kingsland & Douglas Mfg. Co.*, 110 Mo. 605, 19 S. W 630, 15 L. R. A. 821 (1892).

[55] *Berger* v. *Standard Oil Co.*, 126 Ky. 155, 103 S. W 345, 11 L. R. A. (N. S.) 238 (1907). (No privity.)

[56] *Davidson* v. *Nichols*, 11 Allen 514 (Mass., 1866). (The injury resulted from an explosion which was caused by mixing this substance with chlorate of potassia. The court held that the substance was not in itself dangerous but only so when mixed with potassia.)

[57] *Stone* v. *Van Noy Ry. News Co.*, 153 Ky. 240, 154 S. W 1092 (1913). (Article not intrinsically dangerous nor was it shown that the defendant knew of the defective condition of the bottle.)

not become firm,[58] sharp points of metal in a mattress,[59] fabric cement causing fabric to weaken,[60] a nail in a shoe,[61] a defective side saddle,[62] a carriage,[63] ball and socket in a machine,[64] a hook,[65] defective emery wheel,[66] a leaky lamp,[67] defective wheels,[68] a defective crane,[69] shelves in a store falling and injuring a customer,[70] a negligently hung chandelier[71] a defective valve in an oil car,[72] a defective rope on a derrick,[73] glass in a powdered substance known as Muresco used for interior decorating,[74] explosion of a water boiler,[75] the sight of a bug in a loaf of bread.[76] a needle lodged in the side of a box containing can-

[58] *Abercrumbie* v. *Union Portland Cement Co.*, 35 Idaho 231, 205 Pac. 1118 (1922). (No privity.)

[59] *Jaroniec* v. *C. O. Hasselbarth, Inc.*, 223 App. Div. 182, 228 N. Y. S. 302 (1928). (No privity. Not such an instrument as to be reasonably certain to imperil human life.)

[60] *Windram Mfg. Co.* v. *Boston Blacking Co.*, 239 Mass. 123, 131 N. E. 454 (1921). (No privity.)

[61] *Kerwin* v. *Chippewa Shoe Mfg. Co.* (1916), 163 Wis. 428, 157 N. W 1101 (1916). (No privity. Not inherently dangerous.)

[62] *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. 109 (1896). (No fraud and deceit. Not inherently dangerous.)

[63] *Bucket* v. *Studebaker Co.*, 126 Tenn. 467, 150 S. W 421 (1912). (No privity. Not inherently dangerous.)

[64] *Heindirk* v. *Louisville Elevator Co.*, 122 Ky. 675, 92 S. W. 608, 5 L. R. A. (N. S.) 1103 (1906). (Not inherently dangerous.)

[65] *McCaffrey* v. *Massberg & Granville Mfg. Co.*, 23 R. I. 381, 50 At. 651 (1901). (Not inherently dangerous. No privity.)

[66] *Lebourdias* v. *Verified Wheel Co.*, 194 Mass. 341, 80 N. E. 482 (1907). (Not inherently dangerous. Would subject one to too many suits.)

[67] *Longmeid* v. *Holiday*, 6 Exch. 761 (1851). (No privity of contracts. The lamp was sold to the injured's husband.)

[68] *J I. Case Plow Works* v. *Niles & S. Co.*, 90 Wis. 590, 63 N. W 1013 (1895). (Action based on breach of warranty.)

[69] *Blakemore* v. *Bristol & E. R. Co.*, 8 El. & Bl. 1035 (1858). (No duty owed by defendant to the plaintiff.)

[70] *Burdick* v. *Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767 (1875). (No duty owed by the defendant to the plaintiff.)

[71] *Collins* v. *Selden*, L. R. 3 C. P. 495 (1868). (No duty owed by the defendant to the plaintiff.)

[72] *Goodlander Mills Co.* v. *Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583 (1894). (No duty owed from the defendant to the plaintiff.)

[73] *Burke* v. *DeCastro & D. Sugar Refining Co.*, 11 Hun. 354 (1877). (No privity.)

[74] *Schfranek* v. *Benjamin Moore & Co.*, 54 F (2d) 76 (1931). (Plaintiff cut his finger on the glass while stirring the mixture. The court held that the injury was too remote.)

[75] *Giberti* v. *James Barrett Mfg. Co.*, 266 Mass. 70, 165 N. E. 19 (1929). (No privity. Not inherently dangerous.)

[76] *Legac* v. *Vietmeyer Bros.*, 7 N. J. Misc. R. 685, 147 At. 110 (1929). (It was seeing the bug that caused the illness and not eating it and the injury was not the proximate consequence of the wrong.)

ned goods injuring the plaintiffs hand as he opened it,[77] a cockroach in a loaf of bread[78] fly in a bottle of coca cola,[79] a dangerously built tractor,[80] a can of lime which exploded when being opened,[81] roman candles,[82] a brazing lamp[83] defective hoisting rope to an elevator.[84]

These are by no means all of the cases which have been litigated. Merely to give the citation to all such cases would be too burdensome.[85] For the purpose of this article, the writer desired only to give a representative group of cases in which recovery has been both allowed and denied.

A survey of these decisions will show that there is no uniformity in the holdings. In a given case the major part of the decision is devoted to deciding the nature of the article. Is it "inherently" or "imminently" dangerous to human life, health or limb? Impure food and drugs fall within this description. But when we start dealing with the miscellaneous group of articles each case must be handled as a unit—the main question being is it "inherently" or "imminently," or "intrinsically" dangerous to human life or limb. There is no test, no gauge, for deciding this question. Naturally the courts in different jurisdictions have reached all conclusions on the largest variety of articles. Such is the case. There is no consistency in the holdings. Thus, we see that while some courts follow *Winterbottom* v *Wright* and hold that the purchaser of a buggy cannot recover for in-

[77] *Speigel* v. *Libby, McNeill & Libby*, 244 N. Y. S. 654, 137 Misc. Rep. 698 (1930). (Injury too remote.)

[78] *Nichols* v. *Continental Baking Co.*, 34 Fed. (2d) 141 (1929). (Even though the plaintiff bit into the insect the court held that there was no evidence of negligence.)

[79] *Reese* v. *Durham Coca Cola Bottling Co.*, 197 N. C. 661, 150 S. E. 190 (1929). (Failed to prove that the fly was in the bottle).

[80] *Foster* v. *Ford Motor Co.*, 139 Wash. 341, 246 Pac. 954 (1926). (Manual of complete instructions was given out with the tractor which plaintiff did not follow.)

[81] *Kusick* v. *Thorndike & Hix*, 224 Mass. 413, 112 N. E. 1025 (1916). (The lime was only packed and not manufactured by the defendant. The court held that there was no evidence that he knew it was inherently dangerous.)

[82] *St. Louis Fireworks Co.* v. *Wilson*, 5 Tenn. C. C. A. 388 (1915). (No privity.)

[83] *Blacker* v. *Lake & Elliott*, 106 L. T. N. S. (Eng.) 533 (1912). (No privity.)

[84] *Barrett* v. *Singer Mfg. Co.*, 1 Sweeney 545 (N. Y.). (No privity.)

[85] For further cases on the general rule or any of the exceptions to it, see annotations in 17 A. L. R. 672, 39 A. L. R. 992, 63 A. L. R. 340.

juries sustained because of a defect in construction,[86] another court on the same facts has reached the opposite conclusion and allowed recovery on the ground that there was a false representation in selling the defective buggy.[87] The court did not base the action on fraud and deceit, but said it was very similar to an action for deceit. A threshing machine is an inherently dangerous machine when we are considering a defective covering over a cylinder,[88] but is not so when we are considering a defective cylinder which flew into pieces causing the death of employee.[89] A coffee urn[90] is an inherently dangerous instrument, but a hot water tank,[91] is not. A defectively built,[92] or repaired[93] elevator is inherently dangerous, but a defectively constructed bridge by which people must cross a stream is not.[94] A defective chain which must sustain great weight is inherently dangerous.[95] but a hook which is to hold a large drop press is not.[96] A defective rope on a derrick is not inherently dangerous,[98] but a defectively constructed crane or derrick is.[99] While a defective way of fastening a hoisting rope to an elevator makes the elevator inherently dangerous,[100] the rope itself, if defective, does not.[101] A needle imbedded in a cake of soap is not imminently dangerous,[102] but if the soap contains the wrong composition of a poisonous substance it is.[103] A defective boiler tube[104] comes in the exception but if the entire boiler is negligently constructed the general rule governs.[105] Chewing tobacco containing a foreign substance is not a food and therefore no recovery in Tennessee,[106] but it is inherently dangerous and there may be a

[86] Supra note 63.
[87] *Woodward* v. *Miller*, supra note 32.
[88] Supra note 33.
[89] Supra note 54.
[90] Supra note 29.
[91] Supra note 75.
[92] *Berg & Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1924).
[93] *Dahms* v. *General Elevator Co.*, supra note 32.
[94] Supra note 49.
[95] *Employer's Liability Assur Co.* v. *Columbus*, supra note 32.
[96] Supra note 65.
[98] Supra note 73.
[99] *Payton, Admr* v. *Childer's Electric Co.*, supra note 32.
[100] Supra note 92.
[101] Supra note 84.
[102] Supra note 38.
[103] Supra note 14.
[104] Supra note 30.
[105] Supra note 47.
[106] Supra note 12.

recovery in Mississippi.[107] A charged pop bottle which explodes is both inherently dangerous[108] and not so[109] in the same state.

It is plain from the cases above referred to that the courts are floundering about with the phrase "inherently dangerous" There seems to be no consistent or definite idea as to what is meant by it. The courts have been spending their time trying to decide whether or not an article is "imminently dangerous" where the real question should be "who was at fault."

We have seen that when the general rule was first announced, there were two reasons advanced to support it. The rule was deemed necessary by the court to protect the manufacturer from numerous suits and because there was no duty owing from the defendant to the plaintiff. Let us now look into these reasons and see if they have merit.

As to the charge that to allow recovery in such cases would subject the manufacturer to too many suits it is submitted that there is no merit in this contention. The ordinary rules of "proximate cause" and "foreseeability of harm" are adequate to protect one from innumerable suits. The ability of a reasonable and prudent man to foresee harm is the test of determining liability[110] All the authorities reach this conclusion. The only conflict is the analysis by which the conclusion is reached. One line of authorities treat the question of foreseeability of harm as part of the proof of negligence.[111] They hold that there is no negligence unless the actor could under the circumstances, have foreseen that harm to this person would naturally result from his act. The other authorities say that foreseeability of harm is an essential element to recovery but that the ability of the prudent man in the position of the actor to foresee harm is the test of whether or not the act

[107] Supra note 13.

[108] *Coca Cola Bottling Works* v. *Shelton*, supra note 28.

[109] Supra note 57.

[110] Seymour D. Thompson, Commentaries on the Law of Negligence (Bowen Merrill Co., 1901), p. 54 and 60 Francis H. Bohlen, Studies in the Law of Torts (Bobbs Merrill Co., 1926), p. 1. Thomas M. Cooley, A Treatise on the Law of Torts (Callaghan and Co., Throckmorton's Ed.), p. 60. Are Negligence and Proximate Cause Determined by the Same Test?—Texas Decision, Analyzed, Leon Green, 1 Tex. L. R. 243 (1922), *Milwaukee, etc., Ry. Co.* v. *Kellogg*, 44 U. S. 469 (1876).

[111] Bohlen op. cit., p. 15, Cooley op. cit., p. 57 et seq. *Palsgraff* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928).

was the proximate cause of the injury [112] For the purposes of this article the author does not care to discuss the relative merits of the two theories. It is immaterial in so far as we are here concerned whether the ability to foresee harm is an element in proving negligence, or the test of showing proximate cause. The important point is that in order to hold one liable for his act it must be shown that he could have foreseen injury to this person. Professor Bohlen says, "he, the wrongdoer, owes a duty of care to those only whom the normal man should foresee that his lack of care might injure."[113] Again this same author says "Even though the act be wrongful as a misdemeanor against the commonwealth, or as threatening injury to a third party, it is not negligent as to the plaintiff unless it could and should have been foreseen as likely to injure the plaintiff himself."[114] Thompson says "The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby "[115] Under either theory the liability of the wrongdoer is limited to injuries caused by his act which a man of reasonable prudence could and should have foreseen. This is true whether we make forseeability essential to the proof of negligence or make it the test of proximate cause. That this doctrine protects the manufacturer from innumerable suits, there can be no doubt. It allows recovery only to those to whom injury could have been foreseen by a prudent man. Cases of manufacturers and vendors would be limited to those persons who would naturally and ordinarily fall victim to the wrong. This would certainly give to the wrongdoer much more protection than was announced in *Winterbottom* v. *Wright* by Lord Abinger C. B. who said. "there is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even every person passing along the road who was injured by the upsetting of the coach might bring a similar action." This statement certainly is not accurate. As we have seen the wrongdoer's act might have constituted negligence

[112] Thompson op. cit., p. 60, quoting from *Milwaukee, etc., Ry. Co.* v. *Kellogg*, supra note 110, and citing other authorities.

[113] Bohlen op. cit., p. 6.

[114] Bohlen op. cit., p. 15.

[115] Thompson op. cit., p. 60.

in so far as the driver of the coach is concerned but not be negligent towards a pedestrian on the highway, or, as others would say it might not be the proximate cause of the injury to the pedestrian. In this case Alderson B. said "The only safe rule is to confine the right to recover to those who enter into the contract. if we go one step beyond that, there is no reason why we should not go fifty" But there is a very definite reason why a court could go one step beyond this rule and still not go fifty The court apparently failed to give any consideration to the question of proximate cause and forseeability of harm. The plaintiff could be liable for whatever injury a reasonable and prudent man could have foreseen and still not be liable to the entire world.

The second reason given by the court to justify the conclusion in *Winterbottom* v *Wright* was that the defendant owed no duty to the plaintiff. It is true that there was no contractual duty here. It is also true, in this particular case, that the duty was alleged to exist because of the contract between the defendant and the Postmaster-General. This particular case might be justified on the ground that the plaintiff's allegation was so specific on this point that it prevented him from proving or relying on any common law duty that might exist. The particular form of the petition in that case is quite often overlooked. There is also the proposition that in *Winterbottom* v. *Wright* the wrong consisted of failing to act while in most of the cases here under consideration the wrong consists of some active misconduct. We say in negligence cases that in order to hold the defendant liable for an alleged wrongful act it must be shown that the defendant has been guilty of some breach of duty owing from the defendant to the plaintiff.[116] What do we mean by "duty" as used in these cases? Of course, this duty may arise out of a contract. It may also exist because of the relation of the parties. What must that relationship be?

Brett, M. R. in *Heaven* v *Pender*[117] stated this duty to be as follows: "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not

[116] Cooley op. cit., p. 615.
[117] Supra note 35.

use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger''

Mr. Justice Cardozo says "The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty "[118] Again in the same case he says "The risk reasonably to be perceived defines the duty to be obeyed''

Professor Bohlen says "There exists a general duty upon every man to refrain from acts, whether wilful or careless, probably injurious to others who should be expected to be within reach of their effects."[119] This brings us right back to the question of foreseeability of harm. There can be no negligence unless there is a breach of duty[120] A reasonable person, when in a position to foresee that a contemplated act will cause harm to an individual, is under a duty to that individual to refrain from doing the act. In fact, and certainly in tort cases, most duties arise because of the relation of the parties and not by contract.

The question to be decided in these cases should be not whether or not the article is "inherently dangerous" The manufacturer has made a product, there is admittedly a defect in it, the defect could have been discovered by a reasonable examination, it is sold and through the jobber and retailer comes to the hands of the user who is injured because of the defect. With the facts admitted the next important question is when the manufacturer wrongfully left the defect in the article could and should an ordinary and prudent man placed in his position have foreseen that injury would result to the purchaser and user as a probable consequence of his act? The nature of the article, its location, and the purpose for which it is to be used are items that should be considered in answering the question. No one would contend that a pin in a cake of soap[121] would be as likely to result in harm as a deadly poison labelled as a mild medicine.[122] The mislabelled medicine is almost certain to result in serious injury,

[118] Cardozo J. in *Palsgroff* v. *Long Island R. Co.*, supra note 111.
[119] Bohlen op. cit., p. 61.
[120] Bohlen op. cit., p. 7, quoting from *Smith* v. *R. R. Co.*, L. R. 6 C. P., 14, 21 (1870), *Palsgroff* v. *Long Island R.*, supra note 111, Thompson op. cit., p. 4.
[121] Supra note 15.
[122] Supra note 2.

while it is possible that the pin will be discovered before it causes harm. But simply because it is possible to discover the defect and avoid harm is no reason for denying recovery The question is not whether one is more likely to cause harm than the other. The question in either case is whether or not such harm could have been foreseen as a natural and probable result of the act, there exists a duty to use care.

Diseased meat[123] is almost certain to cause harm to someone, so is a poisonous bug securely packed away in a plug of chewing tobacco.[124] It cannot be said that there is a duty to use care in the case of the meat and not in the case of the tobacco. If there is a duty in the one case there is duty in the other.

This duty arises in the case of food sold for human consumption but not if it is sold for animal consumption.[125] It is submitted that the duty exists in both cases. It is just as easy to foresee injury to a horse eating poison hay as it is to foresee harm to a man eating poison meat. Harm is just as likely in one case as the other. If any difference it is more likely in the case of the horse because of man's ability to discover impurities.

Even in cases where damages are inevitable the courts have either denied recovery or sought other grounds on which to base it.[126] In *Graham* v *John R. Watts and Son*,[127] the defendant, a packer, and wholesaler of seed, by mistake put sweet clover seed in a sack labelled alfalfa. The seeds were sold to a retailer, who in turn sold them to the plaintiff, who sowed them to his injury It was shown that the two types of seeds are so similar that it would take an expert in seeds to tell them apart. Sweet clover seed not being inherently dangerous, the counsel for the plaintiff based the action on fraud and deceit. The court allowed recovery on this ground saying that this case involved something more than "mere negligence" The result reached in the case was the proper one. But the case was based on the wrong ground. It should have been based on negligence. After

[123] See cases cited supra note 11.
[124] Supra note 12.
[125] Supra note 36.
[126] See *Kuelling* v. *Roderick Lean Mfg. Co.*, *Olds Motor Co.* v. *Shaffer;* and *Schubert* v. *Clark*, all cited supra note 32 basing recovery on implied knowledge of the manufacturer of the defect. See also *Woodward* v. *Miller*, and *Graham* v. *John R. Watts & Son*, cited supra note 32 basing recovery on fraud and deceit.
[127] Supra note 32.

a careful reading of the case I am not so sure but that the plaintiff would have recovered had he based his action on negligence.

Admitting a duty to use care is owed from the manufacturer to the ultimate consumer, can these cases be justified on the ground of public policy? Is the rule sound from an economic standpoint? This question has already been partially answered.

We have seen that to recover against any defendant the plaintiff must show the defendant did not conduct himself as an ordinary and prudent man would have under the circumstances, that his conduct constituted a violation of a duty to plaintiff—that is that a reasonable man in the position of the defendant could have foreseen harm to the plaintiff, and that the act was the proximate and not the remote cause of the injury If we spread that much protection around one who is admittedly at fault, does public policy demand more? We are protecting him beyond the realm of forseeability of harm. We are not holding him for results that he could not contemplate. But when we have done this have we not gone far enough? Are we not putting too much of a premium on carelessness?

This old general rule is further condemned today by the ordinary business practices of this country The manufacturer makes the product. He then turns it over to the jobber or wholesaler who in turn passes it on to the retailer who sells it to the user. The user is the person who suffers the injury He rarely ever buys from the manufacturer. Then a contract between the manufacturer and the user is the rarest exception. This results in a situation in which the injured person cannot recover damages. On the other hand, the wholesaler or jobber, or in some cases the retailer, is the party who has the contract with the manufacturer. But he is rarely ever injured. He could recover damages if he suffered injury, but he suffers none. It is possible then for the one who never gets injured to recover if he should get injured, but not possible to grant recovery to the one who always suffers injury This is neither good law, nor good sense.

The manufacturer gets paid well for his product. In many cases it is nationally advertised. The manufacturer's stamp sells the product. The user, in many cases cares not from whom

he purchases. His concern is in who made the article. The manufacturer is the only one who has an opportunity to adequately inspect. In most cases he is the only one who is qualified to inspect. He is the only one from whom an inspection is expected. If there is a duty on the part of another to inspect and he does so negligently, that brings up the question of intervening cause which the writer does not care to discuss here. But in the great majority of cases it does not come up at all.

In cases where the manufacturer has knowledge of the defect he is liable to the user regardless of contract. The soundness of this rule cannot be doubted. The courts have gone even further than this and have implied knowledge on the part of the manufacturer.[128] In *Olds Motor Works* v *Shaffer*,[129] the court said. "We think the evidence that the construction of the rear seat was unsafe and dangerous was sufficient to bring notice of the defect home to the maker." It is just as reasonable to presume notice in one case as another. The only material consideration here is that in some cases because of paint used or because of the particular way in which two pieces of material are put together it might be impossible for the user to discover the defect. It is submitted that this doctrine of presuming knowledge is just another way to avoid a harsh and unjust rule of law. This rule of limiting recovery to the party to the contract is purely arbitrary It is based neither on logic, justice, nor public policy Our present system of carrying on business makes the rule still more unfair.

CONCLUSION

In *Winterbottom* v. *Wright* the English court was confronted with a petition alleging a failure on the part of the defendant to repair a carriage, that defendant was bound by contract to repair the carriage, and that his failure constituted a breach of duty to the plaintiff resulting in injury to him. It will be noticed that the defendant in that case was not a manufacturer; committed no act but simply failed to do something. Also it will be noted that the petition alleged the breach of contract as constituting the wrong. This doctrine was expanded to include all

[128] Supra note 126.
[129] Supra note 32.

acts of negligence committed by a manufacturer which resulted in injury to a user other than the immediate purchaser from the manufacturer. As a practical matter the injury never occurs to the immediate vendee of the manufacturer. Because of our business practice the manufacturer always sells to a wholesaler, jobber, or retailer, who in turn sells to the consumer. The consumer, is in the overwhelming majority of cases the one who suffers the injury The harshness of the rule was at once realized in *Thomas* v *Winchester* when poison was mislabeled and sold. We then invented the "dangerous instrument" doctrine. This doctrine has been expanded to cover the widest range of subjects. There is no consistency in the decisions of the courts in holding what constitutes an inherently dangerous instrument. Harsh and unfair decisions result from cases in which the manufacturer was unquestionably at fault. There is no test of, or any way to tell when an instrument is inherently dangerous. It is unnecessary to inquire into this question, since the ordinary rules of determining liability in negligence cases are adequate to protect the manufacturer. One should be held responsible for any injury which is the natural and probable result of his wrongful act and which could have been foreseen by a reasonable and prudent man in his position.