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TORT LIABILITY OF MANUFACTURERS
AND VENDORS

BY LESTER W. FEEZER*

The title page of Corpus Juris quotes a judicial utterance which is being made real in the life of the law in this country in cases involving the duty of manufacturers, vendors, and contractors to persons not in privity with them but who are damaged as a result of defects in their products. The quotation referred to is as follows.

"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."  

Hardly any field of the law is in a greater state of growth and flux than the law of tort, and in this changing, developing field of tort law there is perhaps no portion which has of late so well illustrated this capacity of the common law for growth, as the portion which deals with the topic which it is proposed to discuss here. Granting all that ought to be granted in favor of the proverbial and necessary conservatism of the law there is room for growth in the law to enable it to take the account which in justice it ought of the demands of persons who have suffered personal injury or other loss under the circumstances mentioned in the first sentence.

It seems to be rather generally understood that a court of last resort in ruling on a question of law must be guided by sev-

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eral principles of relatively equal urgency. The court must have for its objects: first, to do justice between the parties litigant; second, to establish rules which will work well as general rules; third, to be so guided by the precedents of prior decisions that persons who are likely to, or who do, become involved in similar situations in the future may be assured with some certainty of the legal consequences of their conduct or status. It is submitted that, applying these postulates to the type of cases herein under consideration, the present tendency towards extending liability, even if carried to the logical limit hereinafter suggested, does no violence to any of them. If, as suggested by Judge Cardozo in the New York court of appeals, "we take the liability of defendants in such cases out of the realm of contract and warranty and put it where it belongs, in the law"—we shall still be able to satisfy the "reasonable conservative" that the spirit at least of stare decisis is preserved.

The classic case with which any discussion of this topic must begin is Winterbottom v. Wright, decided in England in the Court of Exchequer in 1842. In this case the declaration stated that the defendant had a contract with the postmaster-general to supply coaches for carrying the mails over a certain route under which he undertook to keep the coaches in a proper state of repair for this purpose. The plaintiff was a driver in the employ of another person who had a separate contract with the postmaster-general to furnish horses and drivers and operate the coach. The plaintiff further declared that he relied on the

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2McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440. The facts of this case are succinctly stated by Judge Cardozo in the first sentences of his opinion as follows: "The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and the inspection was omitted. There is no claim that the defendant knew of the defect and wilfully concealed it."

Judgment for the plaintiff as given in the supreme court and affirmed by the appellate division (160 App. Div. 55, 155 N. Y. S. 462) was affirmed. "The question to be determined," said Judge Cardozo, "is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser."

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defendant's contract to provide a safe coach and that the defendant in fact provided a coach having certain latent defects of which plaintiff did not know, and which broke down, causing plaintiff to be thrown and injured.

The decision of the case was in favor of the defendant, the court holding that the declaration was bad in substance. Although the action was brought in the form of an action on the case the plaintiff relied on the contract between the defendant and the postmaster-general and it was held that he could not recover as the defendant under the contract owed the duty of keeping the coach safe to the postmaster-general only and the plaintiff was not privy to that contract. Although the case was therefore decided, and doubtless correctly decided, on the pleadings, the opinions contained language which in time came to be followed as authority for a rule that one who is injured by a defective chattel due to the negligence of the manufacturer, vendor, contractor, or other person supplying it, cannot recover, where the person so injured is not in privity of contract with the one who supplied it and who was guilty of the negligence resulting in the injury.

Suppose that not only Winterbottom v. Wright, but all its bastard offspring by way of exceptions are discarded, and that the courts have adopted the rule that, where all the causal factors are established, a manufacturer is liable to one who is injured by his negligently prepared product. This surely does not vio-

4"The case came up on demurrer to the plaintiff's declaration, which alleged his sole right to recover, his knowledge of and reliance upon this contract to which he was obviously not a party. But this was overlooked and certain dicta of Baron Alderson and Lord Abinger were seized upon to torture the case into an authority for the doctrine that when work is done under a contract or goods are made and sold the liability for negligence in performance or manufacture is restricted to those who are parties to the contract or sale." F. H. Bohlen, 35 Harv. L. Rev. 633-660. This is also pointed out by Brett, M. R. in Heaven v. Pender, (1889) L. R. 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. R. 357. See also 32 Harv. L. Rev. 89.


This rule might perhaps better be stated as follows: "A manufacturer is liable to anyone who suffers a personal or property injury due to his product while such product is being used for the purpose for which it was intended, provided the proximate cause of the injury is a defect or condition of the product due to the negligent or other legally wrong-
late the first postulate because it does do justice between the parties. Baron Alderson in his opinion in Winterbottom v. Wright admitted that the result involved hardship for the plaintiff, but refused to let that interfere with his conception of what reason and precedent requires. He says, "if we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop." This reasoning has of course been quoted with approval in many courts since, even in cases which refused to stop at the beginning, as Baron Alderson evidently thought proper. Even now those jurisdictions which theoretically still adhere to the general rule of non-liability without privity of contract, because of their desire to do justice, are still finding new exceptions to it. These exceptions are chiefly by way of holding more and more things to be imminently dangerous to human life. Still other exceptions are based upon the theory that the offending chattel, although perhaps not intrinsically dangerous to human life, nor so even because of a defect, is nevertheless so because of the maker's prior, accompanying or subsequent conduct.

For collections of cases in which various things are held dangerous to life and health in this connection see the following: 4 A. L. R. 1090, 13 A. L. R. 1170, 17 A. L. R. 672, 29 Cyc. 478-486; notes 17 Harv. L. Rev. 274 and 22 Col. L. Rev. 680. A considerable number of cases are cited in the footnotes in 1 Bohlen, Cases on Torts 505, Cases illustrating things not treated as dangerous to life in this connection, 1 Bohlen, Cases on Torts 500.
This is indeed the general rule as to food and drugs which are mislabeled or contain impurities or are otherwise unfit for the purpose for which they are by their labels or their natural appearance obviously intended. Some of the cases seem almost to go beyond the conception of due care under the circumstances in preparing and inspection of the product prior to putting it on the market, and hold the defendant practically liable at peril. See Catani v. Swift & Co., (1915) 251 Pa. 52, 95 Atl. 931.
The second postulate can be as well applied to the one result in these cases as to the other. The rule that defendant manufacturers shall be held liable for the injuries done by their "negligently defective products" is quite as good a general rule as the contrary, in the sense that it is just as easily applicable. Whether it works as well, from the standpoint of making reasonable, consistent law is of course another question. It is the purpose later to show that the body of law which has risen upon the foundation of Winterbottom v. Wright is inconsistent with the development of conceptions of liability in certain more or less analogous situations. As already noted, much of the language in the opinions in Winterbottom v. Wright was directed to showing what a bad general rule it would establish to hold the defendant liable in that case. As decided, the loss rests where it falls. The result of holding for the plaintiff would be to shift the risk of loss, through injuries so caused, from the individual to the manufacturer and thus, through increased cost of production, effect its ultimate distribution upon society as consumers. A popular modern term for this is to call it paternalistic. But the objections of Barons Alderson and Abinger and of those who fear this sort of paternalism are founded upon conceptions acquired in an

contra to this latter proposition see 29 Cyc. 482, note 6, cases cited.

The inconsistency of excluding foods, drugs, etc, which turn out to be dangerous because impure or mislabeled, from the operation of the general rule of Winterbottom v. Wright, (1842) 10 Mees. & W. 109, 11 L. J. Exch. 415, is discussed by Prof. Bohlen, Affirmative Obligations in the Law of Torts, 53 U. of Pa. L. Rev. 360, who points out that they are not inherently dangerous but only become so when impure or mislabeled.


Because plaintiff is impliedly invited to use the article:
(a) On the defendant's premises; the leading case is Devlin v. Smith, (1882) 89 N. Y. 470; other cases cited 29 Cyc. 486, note 14.

See pages infra, also notes 20 to 25 infra.
age less mechanical, less industrial, and less "organized" than the one in which we are now living. The pressure of public demand has brought much legislation intended to establish so-called paternalistic substitutes for the previously existing rules of law. The opinions of certain members of the Supreme Court of the United States in recent years have taught us a great deal about the social and economic necessity of some of this kind of paternalism.\textsuperscript{10} It has been said that the "fellow-servant rule" would not have come into the law in this country except for the fact that Lemuel Shaw was born on Cape Cod in Barnstable County and being familiar with no more complicated industrial process than that of two men at the opposite ends of a cross-cut saw, could see no reason why all fellow servants could not look out for each other's careless acts.\textsuperscript{11} Legal, as well as scientific,

\textsuperscript{10}Dissenting opinion of Taft, C. J. and Brandeis, J. in Adkins v. Children's Hospital, (1923) 261 U. S. 525, 67 L. Ed. 785, 43 Sup. Ct. 394. This is the famous "Minimum Wage Case" which, according to Taft, C. J. has the effect of overruling Muller v. Oregon, (1908) 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324, and reestablishes the doctrine of Lochner v. New York, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539. In the latter case see dissenting opinion of Holmes, J. See also Bunting v. Oregon, (1917) 243 U. S. 426, 61 L. Ed. 830, 37 Sup. Ct. 139.

A case note, 1 Wis. L. Rev. 433, dealing with the precise point the present writer is endeavoring to make, says: "The tendency of the courts is more and more to extend the exceptions to the rule of a manufacturer's non-liability in tort to include an ever increasing field in which recovery may be permitted. This tendency is explained in part by the apparent injustice of adhering too strictly to the letter of these exceptions and confining them to the limited field in which they originated. The courts are no doubt also influenced in their decisions by the fact that these rules originated at a time when industrial development had not reached the stage of concentration of wealth in the hands of manufacturers that it has today. By extending the liability of manufacturers there is a more equitable distribution of loss, for, instead of the individual consumer or user having to stand his own burdensome loss, his loss is indirectly distributed throughout the industry."

\textsuperscript{11}Farwell v. Boston & Worcester R.R. Co., (1842) 4 Metc. (Mass.) 49. "Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them, for an injury received by him in consequence of the carelessness of another while both are engaged in the same service." (headnote)

Here as in Winterbottom v. Wright, (1842) 10 Mee. & W. 109, 11 L. J. Exch. 415, talking about contract and ruling out the idea of tort, to inestimable mischief as the learned reader will, it is believed, concede. At page 60 Shaw, C. J., says, "The master is not exempt from liability, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself —and he is not liable in tort because the person suffering does not stand
economic, sociological and political concepts of the relations between men, causes, and events must inevitably change with changing conditions. Time was, when the medical profession considered communicable disease a visitation of providence. As well might the court in McPherson v. Buick Motor Co., have called the defective automobile a visitation of providence in this day, as to have denied the plaintiff recovery because of lack of privity of contract. But, said Judge Cardozo in holding the defendant liable:

"We have put aside the notion that the duty to safeguard life and limb when the consequence of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law." 12

The third postulate is that the court must not be so inconsistent that men will be uncertain what legal operation their conduct may have from day to day. But that was just the situation until the case of McPherson v. Buick Motor Co., because it was more or less uncertain from day to day what new and additional things the courts would hold to be "imminently dangerous to
human life." In his recently published "The Growth of the Law" Judge Cardozo, without entirely answering himself asks this question: "What however was the posture of affairs before the Buick Case had been determined? Was there any law on the subject?"

Now have not most courts recognized, at least since 1883, that:

"Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger?" 14

Even before this definition of negligence in Heaven v. Pender, the courts had begun to lay down exceptions to Winterbottom v. Wright and in spite of the perseverance of the general rule of non-liability the bar has not been discouraged. Exception after exception has become as well recognized as the general rule and some of the more recent cases seem to forecast that day when the old rule will be abandoned altogether. This final step can hardly be greater than some of those which have already been taken.

Departures from this rule have been regarded as exceptions and at first these exceptions were strictly confined to cases involving the essential facts upon which such exceptions were based. It is only in some of the comparatively recent cases, 15 and in the

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13 Cardozo, Growth of the Law, being a series of lectures delivered by Judge Cardozo at the Yale Law School in 1923.
suggestions of legal writers and reviewers\textsuperscript{16} that one finds the frank recognition that the true test of liability for a "negligently defective product" to the user thereof rests directly upon the broad theory of "omission of due care under the circumstances." The reason for the tardy recognition of this truth is without doubt to be accounted for in the historically late development of the idea of negligence and the very recent full appreciation of its "reach and power."\textsuperscript{17}

That \textit{Winterbottom v. Wright}, as it has been interpreted, represents a hiatus in the smooth and logical development of the idea of negligence as a basis of tort liability, is brought out by Professor F. H. Bohlen in his article on "Landlord and Tenant."\textsuperscript{18} Professor Bohlen is dealing with the liability of a landlord for negligently making repairs in such a manner that the tenant or someone using the premises in his right is injured. He maintains that the result in \textit{Gill v. Middleton},\textsuperscript{19} involving this situation, was correct, and points out that the liability which the court imposes

\begin{footnotesize}

\textsuperscript{16}Thayer E. R., Liability Without Fault, 29 Harv. L. Rev. 801.
\textsuperscript{17}1835 Harv. L. Rev. 633.
\textsuperscript{18}Thayer E. R., Liability Without Fault, 29 Harv. L. Rev. 801.
\textsuperscript{19}(1870) 105 Mass. 477.
\end{footnotesize}
in that case (the undertaking being gratuitous) was essentially a tort liability. Bohlen says in this connection:

"The liability now under discussion is at least on the surface closely analogous to two liabilities enforced by actions of tort which are either universally or generally limited to those with whom the defendant directly deals: (1) the liability for misrepresentation as enforced in the action of deceit, and (2) the liability of a manufacturer of a dangerously defective product."

The analogy between deceit and the liability of the landlord as discussed by Professor Bohlen is essentially similar to that between the deceitful representation and the act of the manufacturer who puts out a defective product. He says: "It is submitted that the principles of the action of deceit should not be extended beyond its own particular field," 20 and again two pages farther on, "Since warranties did not run with the goods bought in reliance on them, it was almost inevitable that it should be held that the right to recover upon a fraudulent misstatement did not pass to one who succeeds to rights acquired in reliance thereon," and on the same page this: "So too the limitation of liability in deceit to those to whom the statement is made and whom the maker intends to act upon it, followed almost inevitably from the close analogy of deceit to actions on warranties." 21

20 35 Harv. L. Rev. 654.
21 As to this analogy to warranty see also Prof. Williston's article on Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415 in which he says: "It is common enough in our law to find that several parts of it which have grown up with little regard to each other, have, nevertheless, logical intimate connection, and the doctrines laid down in one set of cases are hardly reconcilable with those established in others."

If we wish to trace these analogous doctrines back far enough in the search for a common source, we may perhaps find the first error in the early history of assumpsit. The horse doctor was liable on his undertaking because of the public nature of his calling and although his customer has no covenant upon which to base an action he can bring an action of "case" and is permitted thus to recover in an action which sounds in tort. Horse Doctor's Case, (1440) 19 Hen. IV 49, 5. But if a carpenter fail entirely to erect a building as per his promise there is no remedy because an assumpsit cannot be shown, his calling (unlike the horse doctor's) not being of a public nature.

"From very early times, prior to the development of assumpsit, a vendor was not liable to the vendee for any defect of title or quality in the chattel sold unless he had either given an express warranty or was under a public duty from the nature of his calling to sell articles of a certain quality. Stuart v. Wilkins, (1778) 3 Doug. 18, is said to have been the first instance of an assumpsit upon a vendor's warranty." Ames, History of Assumpsit, 8 Harv. L. Rev. 1-8. In short privity of contract was by the time of the case cited by Ames, sufficient to raise an implied warranty. The present transition to a recognition of the tort nature of vendors' and manufacturers' liability for defective products is a logical sequence
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Where the plaintiff is allowed recovery in actions involving the rule drawn from *Winterbottom v. Wright* the result is usually reached by referring the case to one of the exceptions, although there are cases which allow the plaintiff to recover by saying that he, as a user of the article, was within the contemplation of the defendant when he sold the thing. Some of these later cases have apparently treated the plaintiff's right as resting on a sort of implied warranty. So many are the cases which say the plaintiff was "impliedly invited" by the defendant to use the article, because of the defendant's knowledge of the existence of the plaintiff, either as an individual or even as merely one of a class for whose use the article was intended, that they may perhaps be regarded as one of the established exceptions to *Winterbottom v. Wright.*

Indeed where the dangerous thing is to be used on the defendant's real-estate and was made or put there by the defendant for that use, there is a very respectable body of authority which seems to hold this circumstance enough to take the case quite outside the scope of the *Winterbottom v. Wright* rule. In this situation we

and that contention finds historical justification in the fact that the duty where privity of contract does exist, was first enforced in the absence of an express promise, through a tort action of trespass on the case, (although to be sure limited to cases of public callings). 

22Langridge v. Levy, (1837) 2 Mees. & W. 519. 23See Chysky v. Drake Bros., (1920) 192 App. Div. 186, 182 N. Y. S 459. An action by a plaintiff whose mouth was injured by a wire nail concealed in a piece of cake made by defendants. The plaintiff did not buy it directly from defendants, however. The court held that the implied warranty to the retailer inured to the plaintiff who can recover either for breach of warranty or for negligence. The case is discussed in a note, 20 Col. L. Rev. 924, which points out that no negligence was alleged or proved, thus making the result depend upon the warranty "running" to the subsequent retail vendee—a result contra to the great majority, if not all of the cases discussing this point. 

24Langridge v. Levy, (1837) 2 Mees. & W. 519. was argued by the plaintiff's counsel in *Winterbottom v. Wright* as calling for the application of the idea of running warranty but Baron Alderson distinguished it, saying that Langridge v. Levy turned on the question of fraud in the defendant in deliberately making a false statement with the intent of having it acted on and the plaintiff being the person who from his knowledge must have been foreseen or foreseeable to him as the party likely to be damaged. 

25This is the second of the exceptions as stated in Huset v. Case Threshing Mach. Co., (1903) 120 Fed. 865, 57 C. C. A. 237, 51 L. R. A. 303. This doctrine will serve as a basis for some cases not otherwise explainable in jurisdictions recognizing *Winterbottom v. Wright* as laying down the general rule. For example, Heaven v. Pender could be explained on this ground as possible in the same jurisdiction with *Winterbottom v. Wright*, although as pointed out the language of the court in Heaven v. Pender is much broader. See note 26 infra. In this connection see also Devlin v. Smith, (1882) 89 N. Y. 470; Conners v. Great North-
are of course approaching very close to *Gill v. Middleton*, or the
plaintiff may in such case be regarded as an invitee on real-
estate, which of course puts the case in quite a different category
so far as both authority for and theory of allowing recovery are
concerned.\(^{26}\)

The most frequently quoted summary of the *Winterbottom v. Wright* exceptions is probably that found in *Huset v. Case Threshing Machine Co.*\(^{27}\) In this case Sanborn, J. stated the
general rule and following exceptions:

"The first is that an act of negligence of a manufacturer or
vendor which is imminently dangerous to the life or health of
mankind, and which is committed in the preparation or sale of
an article intended to preserve, destroy, or affect human life is
actionable by third persons who suffer from the negligence.\(^{28}\)

\(^{26}\)See language of Brett, M. R. in *Heaven v. Pender* which would
seem to put the liability of the owner of real estate on the basis of pure
negligence. The writer of a note 2 Col. L. Rev. 105 after discussing
*Schubert v. Clark Co.*, (1892) 49 Minn. 331, 51 N. W. 1103, 32 A. S. R.
559, 15 L. R. A. 818; *George v. Skivington*, (1869) L. R. 5 Ex. 1 (the
hair restorer case) and *Teal v. American Mining Co.*, (1901) 84 Minn. 320,
87 N. W. 837, says by way of pointing out that these cases can hardly be
reconciled with the exceptions to the rule of the *Winterbottom Case*:
"But it can hardly be said that a defective stepladder is more dangerous
to human life than was the defective stage-coach in *Winterbottom v.
Wright*." This note expresses the view that the above cases must be put
upon the theory of Brett, M. R. in *Heaven v. Pender*, (1889) L. R. 11
Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. R. (N.S.) 357, where he says,
"Where in omitting to perform a contract, in whole or in part, one also
omits to use ordinary care to avoid injury to third persons, who, as he
could with a slight degree of care foresee, would be exposed to risk by
his negligence, he should be liable to such persons for injuries which
are the proximate result of such negligence.

Notwithstanding the language used in *Heaven v. Pender*, it cannot
be said that the English courts have abandoned the views expressed in
*Winterbottom v. Wright* for the broader test of "care according to the
circumstances." In *Earl v. Lubbock*, [1905] 1 K. B. 253, 1 Ann. Cas. 753,
the court of appeal approved the general rule laid down in the *Winterbot-
mem Elevator Co.*, (1904) 90 App. Div. 311, 85 N. Y. S. 644; *Elliott v. Hall,
(1885) L. R. 15 Q. B. D. 315, 54 L. J. Q. B. 5-8; *Swan v. Jackson,
(1889) 55 Hun 194, 7 N. Y. S. 821; *Hayes v. Philadelphia, etc., Coal Co.,
(1890) 150 Mass. 457, 23 N. E. 225.

\(^{27}\)This statement of the exception so well recognized does not bring
out fully the distinction which has been taken between things imminently
dangerous because inherently so, viz., intrinsically, in their natural state
and those which become so by reason of their defects. This distinction
has become important in some jurisdictions at least. See notes 30 and 31
and accompanying text.
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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 third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated whether there were any contractual relations between the parties or not."

This then is the chart by which the courts have endeavored to steer in determining the limits of manufacturers' and vendors' liability for "negligently defective products." With only these three fixed points, the field was mapped on too large a scale and it has inevitably resulted that there is much confusion in the cases. Rather naturally not all jurisdictions have agreed as to what is imminently dangerous. Foods, drugs, weapons, and explosives are pretty generally conceded to fall in this class and machinery has more recently been regarded as at least potentially so. New York reports are especially prolific in cases bearing upon this problem. In the earlier New York cases machinery was regarded as not imminently dangerous, because not inherently so, but this rule was later abandoned in New York as well as in many other jurisdictions.

29 "So numerous are the exceptions to the general rule in favor of foods, drugs and articles imminently dangerous to human life and so numerous and varied are the opinions as to what is imminently dangerous, that the exceptions might be said to be the rule." 32 Harv. L. Rev. 89, note to Pillars v. Reynolds Tobacco Co., (1918) 117 Miss. 490, 78 So. 365, holding manufacturer liable to consumer who contracted ptomaine poisoning from foreign substance in chewing tobacco. See also 29 Harv. L. Rev. 866, note on McPherson v. Buick Motor Co., commenting on the extent to which the exception had been carried in New York prior to the Buick Case.


31 Kahner v. Otis Elevator Co., (1904) 96 App. Div. 169, 89 N. Y. S. 185. The court said in this case: "This is undoubtedly an extension of the rule but it has its support in authority," citing Devlin v. Smith, (1882) 89 N. Y. 480.

To the same effect are later New York cases including Statler v. Ray, (1908) 125 App. Div. 69, 109 N. Y. S. 172, affirmed on this point 195 N. Y. 478, 88 N. E. 1063. In this case a steam coffee urn exploded injuring the plaintiff who was president of the hotel company which had purchased it. The hotel company had purchased it of a jobber and not directly from the manufacturer. The court of appeals said: "This leaves on this branch of the case simply the question whether a manufacturer and vendor of such an inherently dangerous appliance as this may be made liable to a third party on the theory of the plaintiff (viz., that the defendant, knowing the use for which it was intended, was chargeable with knowledge of the defective and unsafe condition) and we think that this question must be regarded as settled in the plaintiff's favor."
states and it came to be admitted that "although the thing is not inherently dangerous, if the defendant's negligence makes it dangerous, that is enough to fix liability upon him." 32

Of course where the defendant knows of the dangerously defective nature of his product, as in Langridge v. Levy, referred to on page 22, and sells it in that condition, the important question is not whether the danger is one inhering in the product in its natural state or merely arising out of the defect, but, rather, whether the defendant informed the purchaser of this condition of the product. One may sell defective products to a purchaser who buys with full knowledge, but where the manufacturer or vendor who puts out the product conceals this fact the user who is injured in consequence, even though he be not in privity, will be permitted to recover. Some of the cases show an inclination to assimilate this situation to deceit. Whether the court does this or merely treats the case as an exception to Winterbottom v. Wright is immaterial as far as the plaintiff's right to recover is concerned. At any rate the rule is well established in favor of the plaintiff in such cases. 33

Likewise, Torgeson v. Schultz, (1908) 192 N. Y. 156, 84 N. E. 956. Plaintiff having no contract relation with defendant was permitted to recover for injury caused by the bursting of a siphon bottle filled and sold by defendant.

32 A case note 17 Harv. L. Rev. 274 on the case of Skinn v. Reuter, (1903) 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 106 A. S. R. 384 says: "As the law is, the only question open is, 'what articles are dangerous to life?'" The note quoted was prepared at that stage in the development of the New York Law represented by Kuelling v. Roderick Lean Co., (1904) 88 App. Div. 309, 84 N. Y. S. 622. The New York rule at that time fixed as the test of what was imminently dangerous, the nature of the article in its ordinary state, and the Michigan case noted determined the imminently dangerous character of the offending article by reference to its defective state. As already stated New York adopted this broader test in Kahner v. Otis Elevator Co. (1904) 96 App. Div. 169, 89 N. Y. S. 185, and has reiterated it in the Buick Case and other more recent decisions.

It is further suggested in the case note referred to that the Michigan test, viz., the nature of the article in its defective state is the better one for the following reasons: First, because it is more accurate; the seller is held liable because his negligence endangers the public and this depends on what the article actually is, not on what it would be if perfect; second, it is more convenient. It greatly reduces the difficulty of deciding what articles are dangerous; third, it is more just, because it tends to broaden the scope of the existing rule which in any event is too narrowly construed.

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Today, not only have legal authors, unhampered by precedent, put aside all exceptions as the test of liability in cases of the sort under consideration, but cases have been decided and opinions written, at least a few of them, saying that a manufacturer whose negligence is responsible for a defective product shall be liable to a consumer or user injured in consequence, not because of a more or less arbitrary test of the thing's dangerousness to life bringing it within an exception to an odious rule, but because he was negligent in the performance of a duty imposed by the law.

The purpose of this article may be served by some reference to another phase of negligence or what at any rate might perhaps more properly be so treated than in the anomalous way it has been treated. The posthumous article by the late Dean E. R. Thayer of the Harvard Law School, entitled "Liability Without Fault," suggests an analogy of the present inquiry to another aspect of the law of tort in which the fundamental principle of negligence law is being gradually applied to the working out of a more symmetrical pattern of duties and liabilities. Dean Thayer says:

"That law (negligence) is very modern—so modern that even the great judges who sat in Rylands v. Fletcher can have had but an imperfect sense of its reach and power."

This article proceeds to point out that the emphasis of the modern law of negligence is more and more upon the conception of due care according to the circumstances, a doctrine which has had high judicial sanction in clear and lucid English, at least since Heaven v. Pender; "and," Thayer adds, "if the theory of negligence is sufficient to carry the case to the jury, the plaintiff's remaining difficulties—again looking at the matter in its practical aspect—are not likely to be serious."

The situation involved in Rylands v. Fletcher is not so different from that involved in the relation between manufacturers and the ultimate users of their "negligently defective products" as might at first appear to be the case. Nor is the gap in their

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203 App. Div. 443, 197 N. Y. S. 98. See note 40 infra, quoting opinion in this case.

Older cases on this point, 29 Cyc. 482 note 6, show especially the negative application of this rule.

34 29 Harv. L. Rev. 801.

35 (1868) L. R. 3 H. L. 330.
legal effect so great as the language of the opinions in *Rylands v. Fletcher* on the one hand and *Winterbottom v. Wright* on the other, would suggest. In a sense we have in these two decisions the opposite poles of law: absolute liability in the one and no liability in the other. These propositions are laid down as rules of law on the basis of facts so similar that both could be left to a jury on substantially the same instructions with a very reasonable probability of substantial justice being done. Indeed it seems not absurd to suppose that, if these two cases had not arisen until the present time, and the general field of negligence had developed in other directions as it has, these cases perhaps would have been left to the jury with such instructions as to proximate cause as are customarily given in the particular jurisdiction. The reader is heartily referred to the above-mentioned article by Dean Thayer for a convincing presentation of the all-around practicableness of applying a broad conception of negligence with a goodly range of jury discretion in dealing with cases of this sort.

Looking at the two cases in this frame of mind, *Winterbottom v. Wright* and *Rylands v. Fletcher* are readily comparable. *Rylands v. Fletcher* is the case of a defendant who lets something dangerous escape from his land. Without considering the question whether he knew, or at least ought to have known of the defective bottom of his reservoir, he is held liable at peril to persons damaged by the operation of that dangerous thing after it has left his land and his control. Why is this so? Just because the thing was dangerous? Because, simply by reason of the fact that he had it, he is just as culpable as if negligent, or perhaps more so, because it was a potentially dangerous thing. He may have known that it was dangerous under the circumstances, and he may not have known this. In *Rylands v. Fletcher*, as the decision is written, there is the suggestion of negligence on the defendant’s part in not knowing this, but upon the theory of the decision this is immaterial and he is liable although he may not have known of the danger until after the damage was done. As Thayer points out, the law of negligence had not been developed to the point where the judges could see a basis for its application.

Does negligence consist in failure to know whether the dangerous force is safely confined or not? Is it not common knowledge that, if not safely confined, a large body of water is a dan-
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gerous force? Why does not due care under the circumstances, (viz., the circumstance of having collected a large body of water) demand that the defendant shall know (not think) that all reasonable precautions (and only reasonable ones) have been taken to assure that it is safely confined? If this is correct, then in Rylands v. Fletcher, there was evidence to go to the jury on the issue of negligence, viz., there was evidence tending to indicate that the defendant had not fully performed his duty of due care. But the court not recognizing that duty (of knowing whether the force was safely confined) and feeling that here was nevertheless a sort of culpability, in having gathered up all this water so that it amounted to a dangerous force, the defendant was treated as having done something for which he must be liable at peril. In short the court, not finding a satisfactory basis for charging the defendant with fault held him liable without fault.

In the cases following the general rule of Winterbottom v. Wright we have a defendant who has not let, but who has put out of his control something dangerous. Not by its escape, but by his contractual act this defendant has surrendered his control of the force or thing in question. As was also the case in Rylands v. Fletcher someone is damaged. In both cases the person injured is not contractually a party to the act by which the defendant loses control of the force or thing. In this latter class of cases the defendant is held not liable and in the last analysis for the very reason which lead the judges in Fletcher v. Rylands to invent the absolute liability rule in that case, namely, because a duty to use due care was not recognized in the premises of the case. It is submitted that the duty in both cases is the same, namely that of knowing that the thing or force is safe, in the sense of being free from defects which would make it dangerous and which due care on the part of the defendant could have prevented.

Rylands v. Fletcher was too severe on the defendant and could not be applied without violating the first of the three postulates referred to in the opening paragraphs of this paper. Hence, by exceptions and by limitations its doctrine has been cut down to an extent which will permit its application in harmony with the first postulate and at the same time without doing too great violence to postulates two and three.

On the other hand, Winterbottom v. Wright founded a rule
of law too lenient with defendants and so a doctrine of liability has been built up piecemeal by exceptions in order to do the manifest justice which a strict adherence to the language used in the opinions in Winterbottom v. Wright made impossible.

Reference has already been made to the distinction which has been drawn between things imminently dangerous (i.e., inherently, in their natural state) and those which are so only because defective. It is of course around this latter group that most of the more recent legal battles have been waged. These are the struggles out of which has come our more modern rule as stated in the New York case of McPherson v. Buick Motor Co.\(^3\)

Certain things have by the sheer weight of numbers of decisions become recognized as inherently dangerous. The defendant's duty here is to be sure that both the vendee and subsequent users are given notice or the means of knowledge of the dangerous character of the thing.\(^3\) Some other things are perfectly safe if they are pure and are what they purport to be (viz., not mislabelled) yet are treated as being of a class so susceptible to dangerous qualities affecting life and health that manufacturers are practically at peril to avoid these dangerous qualities. Foods, drugs, beverages, and other things to be similarly used, such as chewing gum and tobacco, are regarded as potentially so imminently dangerous that many cases apply the rule of res ipsa loquitur as against makers or dealers where such products prove to be impure and thereby cause injury to the person. That is to say, the user who is injured by unwholesome food preparations, mislabelled drugs, or impure beverages is required only to prove the fact of his injury and its causal connection with the product. It is then incumbent upon the maker or dealer to negative any negligence on his part in preparation or inspection if he can.\(^3\)


\(^{37}\) Note 33 supra.

\(^{38}\) Res ipsa loquitur is probably not consciously applied in many of the cases but see Payne v. Rome Coca-Cola Bottling Co., (1912) 10 Ga. App. 762, 73 S. E. 1087.

The most recent case involving this concept is probably De Groat v. Ward Baking Co., (N.J. 1925) 130 Atl. 540, in which it was held that presence of part of a broken electric light bulb imbedded in a loaf of bread justifies a finding of negligence. The question was, however, left to the jury in that case. Ouare whether a directed verdict for plaintiff on the ground of negligence would not have been affirmed.

It is suggested that this doctrine has perhaps unconsciously influenced many of the decisions involving impurities in foods, drugs, and other things intended for human consumption.
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As to things not inherently dangerous but so only because of their defective condition, the earlier rule, if we omit the cases involving foods, drugs and the like, was that the defendant must know of the defect. The newer tendency however is to hold that liability may be based on the knowledge that the thing, if defective, will be dangerous. This of course is so in such cases as McPherson v. Buick Motor Co., and other recent cases which really put the liability on the ground of negligence without reference to the old rule and its exceptions. In short there is a duty, when the thing is dangerous or, if defective, likely to be so, to know that it is not defective, and it is the negligence in not performing this duty which is made the basis of liability.

This classification is subject of further subdivision as between those cases where the defect is patent and those where it is latent. The tendency of recent cases is to hold that the defendant must know of patent defects in articles which, while they are not intrinsically dangerous, are rendered so by these patent defects. To say that the manufacturer must know of latent defects would be practically equivalent to holding him liable at peril for all defects whether there was negligence or not. He is not treated as an insurer. However there is an intermediate situation to be considered. Can a manufacturer who has purchased materials or parts going into his completed product, escape

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39"Patent" is here used in a sense which is perhaps incorrect. What is meant is that a patent defect is one which could be discovered by due care in the way of inspection during the process of manufacture and assembling of an article. A latent defect in this sense is one not thus discoverable. For example, see Osheroff v. Rhodes-Burford Co., (1924) 203 Ky. 408, 262 S. W. 583. A porch-swing hook broke after seven months' use apparently because of crystallization of the metal. There was evidence tending at least to show that this was due to excessive vibration which would not have occurred if it had been screwed all the way into the supporting wood. In any event, if the crystallization did exist when the retailer sold the article it was not susceptible to discovery by inspection. Held, no liability without privity of contract.

This distinction is also spoken of in some cases in another connection. Where a maker sells a completed product having a defect not patent upon reasonable inspection he is liable to one who may come in contact with the article and suffer injury in consequence of its use in the ordinary way in which it was intended to be used. "Patent" as used in this sense of course means, discoverable in the course of such inspection as the article can and will reasonably be subjected to by the purchaser in its completed, "ready to use," condition. A latent thing in this sense, viz, not discoverable by such inspection as the buyer could give it, might be patent in determining the duty of the manufacturer who has the parts of this completed thing before they are put together and to whom they are reasonably discoverable at that stage.

See note 45 infra.
liability on the ground that he has used due care in that he
has purchased such parts from a reputable manufacturer thereof?
In this connection we may fairly say: if the manufacturer is
liable for injuries due to patent defects, then it is his duty to
make a reasonably careful inspection of the product and of the
things he puts into it, in order that he may discover such defects
as are discoverable (patent). Having this responsibility, can a
manufacturer, by purchasing parts from other manufacturers
and assembling them into his completed product, delegate his
responsibility to an independent contractor in the form of a parts
maker or material man? In McPherson v. Buick Motor Co.,
Judge Cardozo plainly says he cannot. Later decisions in New
York affirm, if indeed they do not go farther in fixing the respon-
sibility of inspection inalienably upon the manufacturer of the
completed product.40 On the other hand it has been properly
pointed out in a recent case involving impurities in tobacco that
this responsibility, while it does rest on the maker, is not shared
by the distributor.41

In the proposition of the Buick Case, it seems to the writer
we find the common objective point of the trails of the law,
the one leading from Rylands v. Fletcher, in which by a pre-
cipitous leap the correct result was probably reached on the facts,
the other, originating in the case of Winterbottom v. Wright and
by a devious and winding way of exceptions, approaches the same
legal proposition but finally reaches it only, when, as in McPherson
v. Buick Motor Co., the old rule and its reasoning were both cast
aside and the new reasoning adopted as the entire basis of the deci-
sion. Furthermore, this case establishes a rule consistent with
Gill v. Middleton.42

Two points remain in which the law is yet unsettled or un-
finished by the strict authority of the Buick Case.

First: To whom does this duty on the part of a manu-
facturer or vendor extend? Second: For what kind of damage

98, it is said by Hubbs J: "It would be strange if a defendant could place
in a completed machine to be used in an extremely hazardous business,
an unusual foreign substance which would have the effect of making the
machine an engine of destruction and fail to give the purchaser notice or
warning of the presence of such foreign substance and then escape liability
upon the ground that the purchaser was also liable for negligence, because
it failed to inspect and remove the foreign substance."

41Pillars v. Reynolds Tobacco Co. (1918) 117 Miss. 490, 78 So. 365.
42(1870) 105 Mass. 477. See note 19.
may recovery be had? If a jurisdiction has abandoned the whole idea of privity as affecting liability in such cases and put it on the basis of negligence, does the remoteness of the connection between the defendant and the party injured make any difference so long as the plaintiff can trace his injury to the defendant's negligence, and does it make any difference if the damage the plaintiff is seeking to recover for is not personal injury but property damage?

The following illustrations will perhaps serve to bring out the various phases of these problems, both as to parties entitled to recover and as to the nature of the damage or injury compensable on this theory:

1. (a) May a plaintiff whose person is injured by a defective chattel which he himself owns, recover from the manufacturer?

The answer here is yes. This is the point covered by the Buick Case.

(b) May a plaintiff whose property is injured by a defective article which he himself owns, recover from the manufacturer?

Unless there is some reason for distinguishing between personal and property damage in the application of this rule, the answer here also would be yes. We are dealing with the same duty and the same defect but a different damage. Suppose, to follow as closely as possible the analogy of the facts in the Buick Case, that the owner of the car was transporting his valuable and fragile china when the wheel collapsed. A New York case would permit him to recover. 43

It should be noted that we are still thinking of a thing which if defective will be dangerous to life, and the duty is that recognized in the Buick Case to use this high degree of care and to perform it towards persons subsequently affected by the product because danger to human life is involved. A later consideration will be, the nature of the duty when the defective thing is, because defective, dangerous to property only.

2. (a) May a plaintiff whose person is injured by a defective chattel, owned by another but in use by him as licensee or invitee of the owner, recover? Example: Plaintiff is using an automobile loaned to him by the owner when the wheel collapses as in the Buick Case.

Here again it is submitted that he should be permitted to recover from the manufacturer and such seems to be the result in a recent Wisconsin case.\textsuperscript{44}

(b) May the plaintiff whose \textit{property} is injured by a defective chattel being used by him under the right of the owner, recover from the maker? Example: Plaintiff has borrowed the automobile and his property which he is transporting in it is smashed by the collapse of the wheel.

Again the answer should be yes if the thing is dangerous to human life on account of its defective condition, although no case precisely in point under this classification has come to the writer's attention.

3. (a) May a plaintiff whose \textit{person} is injured by a chattel belonging to and in use by a stranger, recover from the manufacturer? In this case the party plaintiff has no connection with the defective chattel whatever but is injured in consequence of the defect merely because he happens to be in its presence when the defect "erupts."

Example: The plaintiff is passing nearby when the automobile wheel collapses and this causes it to swerve and strike the plaintiff.\textsuperscript{45}

It is perhaps not as easy to answer this case in the affirmative because we are at least approaching the debatable ground of whether the defendant's negligence is the proximate cause of the plaintiff's injury. Perhaps in some jurisdictions this would be regarded as too remote. While it is not the purpose of this paper to become in any way involved in the problem of proximate cause it is the writer's feeling that the above facts are at least sufficient to take the question of causal relation to the jury. If proximate cause is established in a case of this class, the answer here also

\textsuperscript{44}Coakley v. Prentiss Wabers Stove Co., (1923) 182 Wis. 94, 195 N. W. 388, a gasoline camp stove exploded while being operated by the mother-in-law of the purchaser and injured her.

\textsuperscript{45}Hutchins v. Maunder, (1920) 37 T. L. R. 72. Defendant bought a twelve year old car. His servant inspected it and started driving it home. There was a latent defect in the steering gear. The car swerved and plaintiff was injured. There was a fact-finding of no negligence on the part of defendant's servant in inspecting or driving the car. Held plaintiff can recover. See note on this case 34 Harv. L. Rev. 564 in which it is said that while the case attempts to distinguish between "defective" and "sound" cars it does in effect extend absolute liability to all accidents in the nature of internal breaking occurring during the operation of the car. This case does not involve the liability of manufacturers as vendors but is cited chiefly because of its extension of liability to a case where the defendant could not discover the defect by any reasonable inspection. It goes beyond the field of negligence however, and imposes liability at peril as per Fletcher v. Rylands, (1866) L. R. 1 Ex. 265.
should be "yes." Two New York cases may be mentioned in this connection; although in both cases the plaintiff's connection was closer than that of the mere passer by, he was not actually using the thing. In Sider v. General Electric Co.,\(^{46}\) he was present in the electric tower in his capacity as an employee of the company owning the transformer when the current was turned on and the short circuit occurred. In this case the decedent's representative was permitted to recover from the maker of the apparatus. In Staller v. Ray Mfg. Co.,\(^{47}\) the plaintiff was the president of the corporation owning the defective steam coffee urn and was standing by as a spectator when it exploded and injured him. In this case the court said the manufacturer would be liable to any one in the presence of the apparatus.

3. (b) May a plaintiff whose property is injured by a defective chattel, belonging to and used by a stranger and behaving in such manner and place as to damage the plaintiff's property, recover therefor from the manufacturer?

Example: The collapsing automobile wheel throws the car against and it damages the plaintiff's car which is lawfully parked nearby. Or perhaps the wheel comes off and rolls through the front window of one plaintiff's building breaking glass and other fixtures and injures the goods displayed in the window by a second plaintiff who is the tenant of the premises.

Here again, the cause not being too remote, it is believed that the damage to this property is a proper item of recovery against the manufacturer.

Thus far we have been thinking of the above suggested situations as arising in connection with a "negligently defective product" which in that condition may endanger human life or health. What about a chattel defective in such a way as to be capable of endangering property or other economic interests but not the person? There are many cases denying recovery for property damages occasioned by defective chattels to persons not in privity with the defendant. In some of these cases it has been stated that this is because the thing causing the damage was not "imminently dangerous to human life and health." There are two recent Massachusetts cases involving this point.\(^{48}\) Massachusetts has consistently denied liability of manufacturers, ven-
dors and the like to persons not in privity of contract with them, unless the facts bring the case clearly within one of the well recognized exceptions to the old general rule: An interesting group of cases on this point may be called the soap cases. If a needle is found in a cake of soap after the user's hand has been torn by it, the maker of the soap is not liable, nor where an excess of alkaline in the soap affects the skins of persons upon whom it is used, a barber cannot recover for the loss of patronage resulting. The damage might be regarded as too remote in this case but the court laid great stress on the want of privity of contract. On the other hand recovery has been allowed against vendors of livestock for property damage where plaintiffs not in privity are able to show that the defendant knew of the defect. These cases do represent the conscious or unconscious application of principles not involved in the cases depending on the relation of manufacturer to ultimate consumer and resting on negligence.

It already has been suggested that, given the other elements of liability on the part of a manufacturer, it is immaterial whether the damage is personal or otherwise. The writer has however found one case which has clearly met and discussed this point, holding that the nature of the damage is immaterial. This is the case of Quackenbush v. Ford Motor Co., in which the plaintiff had purchased a Ford touring car, second hand, from the original retail purchaser who bought it of a dealer. The dealer himself was not the mere agent of the Ford Motor Company, but had purchased the car outright from the manufacturer. Due to defectively assembled brakebands and inferior material, the car got


52 Skinn v. Reuter, see note 32 supra.

out of control and went over a bank. The plaintiff, who was the owner, was not injured but the car was. It was held that the plaintiff could recover from the maker, for the damage to the car. This case was decided in the appellate division of the New York supreme court and in its opinion the court said:

"This question [submitted by the defendant] concedes the proposition that a manufacturer in sending out an inherently dangerous machine would be liable to one suffering personal injury but seems to draw a distinction between the duties of the manufacturer in reference to injuries to the machine itself. We think there is no well founded ground for such distinction."

The opinion in this case makes the following points:

1. A modern automobile properly constructed is not inherently dangerous.

2. When it is defective so as to make it unfit normally to respond to the operations of careful driving it becomes inherently unsafe and a menace to the public.

3. The appellant admits liability to the plaintiff for personal injury.

4. The manufacturer's liability depends not upon the results of the accident, but upon the fact that his failure properly to construct the car resulted in the accident.

5. In such cases the negligence is based upon the failure to perform a duty owed to all persons in whose presence the machine is used.

Still we have no answer to this question: If the thing was not dangerous to human life or health, even in its defective state, but only to property and did in fact do such injury to property as might be likely to result from such defect, will the manufacturer then be liable to a person not in privity of contract with him?

Another case in which it is said that a manufacturer may be liable for property damage resulting from a defective product is that of Murphy v. Sioux Falls Serum Co.54 In this case the plaintiff employed a veterinarian to immunize his hogs against cholera. The veterinarian used for this purpose material manufactured and sold to the veterinarian by the defendant. The hogs acquired another disease from which some of them died. The defendant was sued on the theory that the injury to the hogs was due to impurities in the serum which got in as a result of

negligence in the process of manufacture. Judgment was given for the plaintiff below; the supreme court held that the plaintiff had stated a cause of action but sent the case back for a new trial on other grounds; viz., as to error in the exclusion of certain evidence tending to show that the cause of the loss was not defendant's negligence but the faulty technique of the veterinarian in administering the serum.

Unfortunately the court in rendering this decision stated none of its reasons for reaching the result it did. It seems doubtful whether the question as to any distinction between personal and property damage was brought to the court's attention. The case was tried and decided in the court below, and was treated in the appeal briefs, as one involving the *Winterbottom v. Wright* and *McPherson v. Buick Motor Co.*, principles. The court cites no authorities on these points in its opinion. There is however one thing in the record of this case which is of some interest in connection with the present inquiry. The trial judge in his order denying a new trial took occasion to include a memorandum of his opinion on this question of law. He said:

"Confessedly one of the ingredients of this medicine was poison. It is the conviction of the court in such case or where the medicine or commodity is an explosive or something highly dangerous to life or property, the law imposes a duty of care on the druggist or manufacturer commensurate with the general danger in such case, and, if from want of care anyone is injured, whether it was the original purchaser or not, he can maintain an action."

And again:

"It impresses the court that plaintiff . . . could have argued that defendant did not show it was free from negligence as to this consignment and, having manufactured it, defendant presumptively, and not the plaintiff, knew its contents. In fact it is held the druggist or manufacturer is bound to know the properties when it vends a medicine."

It will be noted that this trial court makes no distinction between things dangerous to human life or health, and those dangerous merely to property. Now in any case the plaintiff should be required to show when he sues the manufacturer of a defective product that—if the damage resulted from its use—it was *being used* for the purpose for which it was intended. Otherwise not even a person who was in privity of contract has any cause of action. Following this line of thought, no one is going
to say that if hog-cholera serum is being used for the purpose for which it was intended it involves danger to human life or health. The only exception, to the necessity that the thing shall be used for the purpose for which it was intended, is the case of the mislabelled thing and there it must be used for the purpose for which its label indicated or suggested it might be used.

Hence, on its facts and in the absence of any limiting language in the supreme court opinion, the case of *Murphy v. Sioux Falls Serum Co.*, may be regarded as indicating that where a "negligently defective product" likely to cause property damage only, does in fact cause property damage the manufacturer is liable to one not in privity of contract with him who suffers loss in consequence.

Query, would Judge Cardozo go this far? From his general language, relative to taking the *Buick Case* out of the field of contract and warranty and putting it in the law, one might fairly suppose that he would. But it is to be remembered that the *Buick Case* and also the *Quackenbush Case* did involve an agency, which, in its defective state, was potentially dangerous to human life. Judge Cardozo clearly emphasized that circumstance in his opinion and referred to it again in his Yale lectures ("The Growth of the Law," already referred to. The writer cannot but regret that he did not in the process of reasoning through the *Buick Case*, point the way for us in dealing with the last mentioned situation of articles not dangerous to humans and actually causing only property damage. True, the law holds in the highest regard those interests which involve human life, but, if cases of this sort do really rest on the modern conception of "negligence," is not the property interest of the plaintiff sufficient to justify the courts in permitting him to recover for his losses proximately caused by the defendant in this manner?