In the House of Lords

(FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND)

MRS MAY M'ALISTER OR DONOGHUE *(PAUPER)* - *Appellant*

DAVID STEVENSON - - - - - - - *Respondent*

PETITION AND APPEAL

THE APPELLANT'S CASE

THE RESPONDENT'S CASE

APPENDIX

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Agents for Appellant

NIVEN, MACNIVEN & CO., *Solicitors*
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Lloyd's Buildings
Leadenhall Street
LONDON, E.C. 3
Agents for Respondent

Allow.

(4) Lord Thankerton.

Allow.

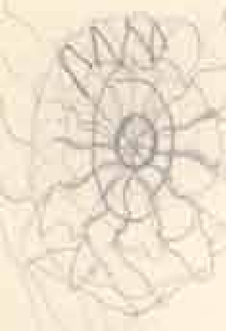
(5) Lord Macmillan.

No presumption of negligence here

No res ipsa loquitur

The House & in the Courts below.

(1.) Lord Buckmaster. / read by Lord Tomlin



Eng. Law alone –

dangerous things.

Langridge v. Levy.

Longmeid v. Holliday.

Blacker v. Lake & Elliot.

Heaven v. Pender.

Le Lievre v. Gould

Earl v. Lubbock.

Bates v. Batey & Co.

Thomas v. Winchester

Mullen v. Barr

Mazetti v. Armour (?)

Antonelli agst. Appellant.

No specialty in food.

Mullen v. Barr

Dismiss.

Dismiss

"move accordingly"

(2.) Lord Atkin

Who is my neighbour?

Le Lievre v. Gould. Immediate consumption.

Allow.

No action agst. Retailer.

Dangerous in themselves – unnatural & dangerous distinction.

(3) Lord Tomlin

Dismiss.

agrees with Lord Buckmaster

Lord Buckmaster

Res Ipsa loquitur.

3rd G. v Stevenston

Dom. Nat. Gas

T. v Lochgelly

Mullen.

Lord Hewart 474:

Lord Buckmaster.

Food.

1. Narrate circumstances under which claim is brought.

2. There being no relation of contract between the parties the question for determination is whether under the circumstances averred the defender owed any duty to the pursuer, breach of which with injury resulting would give rise to a claim of damages. Mullen v. Barr 1929 S.C. 461.

3. There are at any rate two admitted exceptions to the law that a man who puts a product on the market has no duty to any one except to the person with whom he contracts ——

(a) Unless the article he sells is per se dangerous, and (b) where he supplies an article which he knows to be dangerous and conceals that knowledge from the buyer — fraud.

Heaven v Pender 1882-3 11 Q.B.D. 503. 517 and.

Earl v Lubbock 1905 1 K.B. 253, 258.

Blacker v Lake & Elliot 1912 106 L.T. 533.

Bates v Batey & Co. 1913 3 K.B. 351.

Mullen v Barr 1929 S.C. 461

Dom. Nat. Gas Co. v Collins 1909 A.C. 640.

From Lang's Appeal.

4/

PETITION AND APPEAL

APPELLANT'S CASE

RESPONDENT'S CASE

APPENDIX

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Heaven v Pender 1882-3 11 Q.B.D. 503. 517 and.
Earl v Lubbock 1905 1 K.B. 253, 258.
Blacker v Lake & Elliot 1912 106 L.T. 533.
Bates v Batey & Co. 1913 3 K.B. 351.
Mullen v Barr 1929 S.C. 461
Dom. Nat. Gas Co. v Collins 1909 a.c. 640.

4/

4. Are these the only exceptions? The last case points to the fact that there may be ——

Dom. Natural Gas Co. v Collins 1909 AC 640. 646.

5. It is the view taken in George v Skivington 1869 L.R. 5 Ex. 1, and also in the judgment of the M.R. in Heaven v Pender 11 Q.B.D. 503, 510 and it has the support of the dissenting judgment in Mullen 477 v of the L.O. in the present case.

6. It is said by Hamilton J. in Blacker's case that George v Skivington has been disapproved, but it is referred to by Lord Atkinson in Cavalier v Pope 1906 AC 428. at 433 top without any disapproval.

7. Averments here relied on ——
(a) Manufacture for sale to the public indiscriminately.
(b) Sale in a dark bottle.
(c) Tabs put on bottle to show that it hasn't been tampered with.
(d) Impossibility of inspection by Retailer or Customer.

8. A bottle of ginger beer is not dangerous, but a bottle of ginger beer with a snail in it is.
Weld Blundell v Stephens 1920 AC 956 at 985 ff

9. If any duty, relevancy not challenged.
10. Read judgments.

11/12/31 ..

Dixon.

Levy. v Lampitze.

Warranty.

Lord Buckmaster.

False & fraudulent misrepresentation

Rule

Off. G.b. in way he did

Provided he use his g.b.

In the House of Lords

From the Second Division of the Court of Session in Scotland

MRS MAY M'ALISTER OR DONOGHUE, residing care of M'Alister, 49 Kent Street, off London Road, Glasgow ..... } *Appellant*

DAVID STEVENSON, Aerated-Water Manufacturer, 8 Glen Lane, Paisley..... } *Respondent*

PETITION AND APPEAL

CHAPMAN, WATSON & CO., LAW PRINTERS, 21 HANOVER STREET, EDINBURGH

PETITION AND APPEAL

TO THE

RIGHT HONOURABLE THE HOUSE OF LORDS

The Humble Petition and Appeal

OF

MRS MAY M'ALISTER OR DONOGHUE, residing care of M'Alister, 49 Kent Street, off London Road, Glasgow.

Your Petitioner humbly prays that the matter of the Interlocutor set forth in the Schedule hereto may be reviewed before His Majesty the King in His Court of Parliament, and that the said Interlocutor may be REVERSED, VARIED, or ALTERED, or that the Petitioner may have such other relief in the premises as to His Majesty the King in His Court of Parliament may seem meet; and that DAVID STEVENSON, mentioned in the Schedule to the Appeal, may be ordered to lodge such Printed Case as he may be advised, and the circumstances of the Cause may require, in answer to this Appeal; and that service of such Order on the Solicitors in the Cause of the said Respondent may be deemed good service.

GEO. MORTON.
W. R. MILLIGAN.

SCHEDULE referred to in the foregoing Petition

FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND

IN A CERTAIN CAUSE WHEREIN

MRS MAY M'ALISTER OR DONOGHUE, residing care of M'Alister, 49 Kent Street, off London Road, Glasgow, was *Pursuer and Appellant;*

AND

DAVID STEVENSON, Aerated-Water Manufacturer, 8 Glen Lane, Paisley, was *Defender and Respondent.*

A THE Interlocutor of the Second Division of the Court of Session in Scotland, dated 13th November 1930, appealed from, is in the words following:—

B *'Edinburgh, 13th November 1930.—The Lords having 'considered the Reclaiming Note for the Defender against 'the Interlocutor of Lord Moncrieff, dated 27th June 1930, 'and having heard Counsel for the Parties, Recall the said 'Interlocutor: Dismiss the action; and decern: Find the*

'Pursuer liable to the Defender in expenses in the action; A
'and remit the Account, when lodged, to the Auditor 'to tax, and to report.

'ROBERT MUNRO, I.P.D.'

We humbly conceive this to be a proper Case to be heard B before your Lordships by way of Appeal.

GEO. MORTON.
W. R. MILLIGAN.

Not Reported.

In the House of Lords

[Negligence — Whether duty owed to person injured—Duty of manufacturer of article to ultimate consumer —Bottle of ginger-beer bought from retailer — Bottle containing dead snail—Consumer injured by drinking contents—Liability of manufacturer to consumer

From the Second Division of the Court of Session in Scotland

MRS MAY M'ALISTER OR DONOGHUE, formerly residing care of M'Alister, 49 Kent Street, off London Road, Glasgow, and now residing at 101 Maitland Street, Cowcaddens, Glasgow *(PAUPER)*..... — *Appellant*

DAVID STEVENSON, Aerated-Water Manufacturer, 8 Glen Lane, Paisley..... — *Respondent*

THE APPELLANT'S CASE

CHAPMAN, WATSON & CO., LAW PRINTERS, 21 HANOVER STREET, EDINBURGH

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THE APPELLANT'S CASE

Appellant's Case

THIS is an Appeal against an Interlocutor of the Second Division of the Court of Session in Scotland, dated 13th November 1930, pronounced after Hearing before their Lordships in an action brought by Mrs. May M'Alister or Donoghue, formerly residing care of M'Alister, 49 Kent Street, off London Road, Glasgow, and now residing at 101 Maitland Street, Cowcaddens, Glasgow, the Appellant; against David Stevenson, Aerated-Water Manufacturer, 8 Glen Lane, Paisley, the Respondent; to recover damages for shock and sickness sustained by the Appellant in consequence of her drinking the contents of a bottle of ginger-beer, manufactured by the Respondent, which contained a snail in a state of decomposition. The action was raised in the Court of Session in Scotland.

The Closed Record in the said action, as amended by the pursuer, in the Court of Session is as follows:—

RECORD.
(AS AMENDED)

Record (As Amended)

1.—SUMMONS.

Summons No. 1 of Pro.

GEORGE THE FIFTH, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, Mrs MAY M'ALISTER or DONOGHUE, residing care of M'Alister, 49 Kent Street, of London Road, Glasgow,—*Pursuer;* against DAVID STEVENSON, Aerated-Water

Record (As Amended)

Summons

A Manufacturer, 8 Glen Lane, Paisley,—*Defender*; in terms of the Condescendence and Note of Pleas in Law hereunto annexed: Therefore the defender Ought and Should be Decerned and Ordained, by decree of the Lords of our Council and Session, to make payment to the pursuer of the sum of £500 sterling, with interest thereon at the rate of £5 per centum per annum B from the date of the decree to follow hereon; together with the sum of £50 sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged.—OUR WILL IS HEREFORE, &c.

C *Summons signeted at Edinburgh, 9th April* 1929.

L. M. MACKENZIE, *W.S.*
HERBERT MACPHERSON, *Solicitor.*

Condescendence and Answers No. 1 of Pro. D

2.—CONDESCENDENCE for PURSUER,

AND

No. 5 of Pro. E ANSWERS thereto for DEFENDER.

COND. I. The pursuer is employed as a shop assistant, and resides at 49 Kent Street, off London Road, Glasgow. The defender is an aerated-water manufacturer, and carries on business at Glen Lane, Paisley.

F *Ans.* 1. The description of the defender is admitted. *Quoad ultra* not known and not admitted.

COND. II. At or about 8.50 p.m. on or about 26th August 1928, the pursuer was in the shop occupied by Francis Minchella, G and known as Wellmeadow Café, at Wellmeadow Place, Paisley, with a friend. The said friend ordered for the pursuer ice-cream, and ginger-beer suitable to be used with the ice-cream as an iced drink. Her friend, acting as aforesaid, was

supplied by the said Mr Minchella with a bottle of ginger- A beer manufactured by the defender for sale to members of the public. The said bottle was made of dark opaque glass, and the pursuer and her friend had no reason to suspect that the said bottle contained anything else than the aerated-water. The said Mr Minchella poured some of the said ginger-beer from the bottle into a tumbler containing the ice-cream. The pursuer then B drank some of the contents of the tumbler. Her friend then lifted the said ginger-beer bottle and was pouring out the remainder of the contents into the said tumbler when a snail, which had been, unknown to the pursuer, her friend, or the said Mr Minchella, in the bottle, and was in a state of decomposition, floated out of the said bottle. In consequence of the C nauseating sight of the snail in said circumstances, and of the noxious condition of the said snail-tainted ginger-beer consumed by her, the pursuer sustained the shock and illness hereinafter condescended on. The said Mr Minchella also sold to the pursuer's friend a pear and ice. The averments in answer, so far as not coinciding herewith, are denied. { The said ginger- D beer bottle was fitted with a metal-cap over its mouth. On the side of the said bottle there was pasted a label containing, *inter alia*, the name and address of the defender, who was the manufacturer. It was from this label that the pursuer's said friend got the name and address of the defender. } Amendment 17th June 1930

E

Ans. 2. Denied that any bottle of ginger-beer manufactured by the defender contained a snail. *Quoad ultra* not known and not admitted. Any illness which the pursuer suffered was not due to her having partaken of the contents of a bottle of ginger-beer manufactured and sent out from the defender's factory. Explained that F Answer 23rd June 1930 the defender has never issued bottles answering the description given by the pursuer.

COND. III. The shock and illness suffered by the pursuer were due to the fault of the defender. The said ginger-beer was manufactured by the defender and his servants to be sold G as an article of drink to members of the public (including the pursuer). It was, accordingly, the duty of the defender to exercise the greatest care in order that snails would not get

System of Working

System of Inspection

into the said bottle, render the said ginger-beer dangerous and harmful, and be sold with the said ginger-beer. Further, it was the duty of the defender to provide a system of working his business that was safe, and would not allow snails to get into his ginger-beer bottles (including the said bottle). Such a system is usual and customary, and is necessary in the manufacture of a drink like ginger-beer to be used for human consumption. In these duties the defender culpably failed, and pursuer's illness and shock were the direct result of his said failure in duty. The pursuer believes and avers that the defender's system of working his business was defective, in respect that his ginger-beer bottles were washed and allowed to stand in places to which it was obvious that snails had freedom of access from outside the defender's premises, and in which, indeed, snails and the slimy trails of snails were frequently found. Further, it was the duty of the defender to provide an efficient system of inspection of said bottles before the ginger-beer was filled into them, and before they were sealed. In this duty also the defender culpably failed, and so caused the said accident. The defender well knew, or ought to have known, of the frequent presence of snails in those parts of his premises where the ginger-beer bottles were washed and dried, and further, ought to have known of the danger of small animals (including snails) getting into his ginger-beer bottles. The pursuer believes and avers that the said snail, in going into the said bottle, left on its path a slimy trail, which should have been obvious to anyone inspecting the said bottle before the ginger-beer was put into it. In any event, the said trail of the snail should easily have been discovered on the bottle before the bottle was sealed, and a proper (or indeed any) inspection would have revealed the presence of the said trail and the said snail, and the said bottle of ginger-beer with the snail in it would not have been placed for sale in the said shop. Further, the defender well knew, or in any event ought to have known, that small animals like mice or snails left in aerated-water (including ginger-beer), and decomposing there, render aerated-water exceedingly dangerous and harmful to persons drinking the contaminated aerated-water. Accordingly, it was his obvious duty to provide clear ginger-beer bottles, so as to

Sale of Food & Drugs Act 1875

facilitate the said system of inspection. In this duty also the defender culpably failed, and the said accident was the direct result of his said failure in duty. If the defender and his said servants had carried out their said duties the pursuer would not have suffered the said shock and illness. The averments in answer are denied.

Ans. 3. Denied. Explained that the system employed at the defender's factory is the best known in the trade, and no bottle of ginger-beer has ever passed out therefrom containing a snail. The defender exercised every care in the carrying out of that system, and every stage of the processes are and have been properly executed by the defender's servants.

COND. IV. The pursuer suffered severe shock and a prolonged illness in consequence of the said fault of the defender and his servants. She suffered from sickness and nausea which persisted. Her condition became worse, and on 29th August 1928 she had to consult a doctor. She was then suffering from gastro-enteritis induced by the said snail-infected ginger-beer. Even while under medical attention she still became worse, and on 16th September 1928 had to receive emergency treatment at the Glasgow Royal Infirmary. She vomited repeatedly, and suffered from acute pain in the stomach, and from mental depression. She was rendered unfit for her employment. She has lost wages and incurred expense as the result of her said illness. The sum sued for is a reasonable estimate of the loss, injury and damage she has sustained as condescended on. The averments in answer are denied. Prior to the incident condescended on, the pursuer suffered from no stomach trouble.

Ans. 4. Not known and not admitted. Explained that the alleged injuries are grossly exaggerated. Explained further that any illness suffered by the pursuer on and after 26th August 1928 was due to the bad condition of her own health at the time.]

COND. V. The defender has been called on, but has refused, to make reparation to the pursuer for the loss, injury and

damage she has sustained as condescended on. The present action has, accordingly, been rendered necessary.

Ans. 5. Admitted that the defender has been called on, but has refused, to make reparation to the pursuer. *Quoad ultra* denied.

Pleas in Law for Pursuer. No. 1 of Pro.

3.—PLEAS IN LAW for PURSUER.

1. The pursuer having sustained loss, injury and damage through the fault of the defender, is entitled to reparation therefor from the defender.

2. The sum sued for being reasonable, decree should be pronounced as concluded for.

In respect whereof,

HERBERT MACPHERSON, *Solicitor*,
22 Rutland Square, Edinburgh.

Pleas in Law for Defender. No. 5 of Pro.

4.—PLEAS IN LAW for DEFENDER.

1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the Summons, the action should be dismissed.

2. The pursuer's averments, so far as material, being unfounded in fact, the defender should be assoilzied.

3. The pursuer not having suffered any injury through the fault of the defender, he should be assoilzied.

4. In any event the sum sued for is excessive.

In respect whereof,

J. L. CLYDE.

INTERLOCUTORS AND PROCEDURE.

The Open Record in the cause having been duly printed and lodged by the pursuer the cause appeared in Lord Moncrieff's Adjustment Roll of 21st May 1929, when the Lord Ordinary pronounced the following Interlocutor:—

21st May 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde.—The Lord Ordinary continues the adjustment of the Record till Wednesday 5th June 1929.

ALEX. MONCRIEFF.

On 5th June 1929 the pursuer lodged a Minute of Amendment (No. 7 of process), when the Lord Ordinary pronounced the following Interlocutor:—

5th June 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* .—The Lord Ordinary allows the Record to be amended in terms of Minute for the pursuer, No. 7 of process: Appoints the Record, as amended, to be served, along with a notice in the form contained in Appendix, C.A.S., B, 1., 5, upon Francis Minchella, Wellmeadow Cafe, Wellmeadow Place, Paisley; and allows him to lodge Defences, if so advised, within ten days after such service: Continues the adjustment of Record till Tuesday 25th June curt.

ALEX. MONCRIEFF.

On 24th June 1929 Francis Minchella, upon whom the Open Record, as amended, was served, lodged Answers (No. 8 of process) to pursuer's Condescendence.

Thereafter the Lord Ordinary pronounced the following Interlocutors:—

25th June 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde.—The Lord Ordinary continues the adjustment of the Record till Tuesday the 9th day of July 1929.

ALEX. MONCRIEFF.

9*th July* 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde, Cameron.—The Lord Ordinary further continues the adjustment of Record till 16th inst. ALEX. MONCRIEFF.

16*th July* 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde—*Alt.* Cameron.—The Lord Ordinary closes the Record on the Summons (as amended) and Defences, Nos. 1, 5 and 8 of process; and, on the motion of Counsel, appoints the cause to be put to the Procedure Roll.

ALEX. MONCRIEFF.

On 14th October 1929 the pursuer lodged the Closed Record (No. 9 of process.)

On 18th October 1929 the Lord Ordinary, after hearing parties in a discussion in the Procedure Roll, continued the cause in order that the pursuer might have an opportunity of re-considering her position.

On 6th November 1929 the pursuer lodged a Minute of Amendment (No. 10 of process) craving the leave of the Court to abandon the action against the said Francis Minchella. Whereupon the Lord Ordinary pronounced the following Interlocutor:—

Minchella let out.

19*th November* 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde—*Alt.* Cameron.—The Lord Ordinary allows the Minute of Amendment, No. 10 of process, to be received and seen, and in respect the pursuer has, by said Minute, abandoned the action against Francis Minchella, the defender second called, appoints the second defender to give in an Account of Expenses; and remits the same, when lodged, to the Auditor to tax, and report. ALEX. MONCRIEFF.

On 20th November 1929, the Lord Ordinary heard Counsel for the parties on the pursuer's said Minute of Amendment (No. 10 of process), and thereafter pronounced the following Interlocutors:—

20*th November* 1929.—LORD MONCRIEFF.—*Act.* Morton, K.C.—*Alt.* Normand, K.C. et Clyde.—The Lord Ordinary

having heard Counsel on the question of the proposed amendment, Makes avizandum. ALEX. MONCRIEFF.

27*th November* 1929.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde.—The Lord Ordinary having considered the cause, Opens up the Record; allows the same to be amended in terms of the pursuers Minute of Amendment. No. 10 of process; and the Amendments having been made, of new Closes the Record: Finds the pursuer liable to the first defender in his expenses since the Interlocutor dated 5th June 1929, excluding *in hoc statu* the expenses attendant on the adjustment of the Record; allows an Account to be lodged, and remits the same to the Auditor to tax, and report: Appoints the pursuer to re-print the Record.

ALEX. MONCRIEFF.

Thereafter the Lord Ordinary pronounced the following Interlocutors:—

66 1.5

12*th December* 1929.—LORD MONCRIEFF.—*Act.* Cameron.—The Lord Ordinary approves of the Auditor's Report on the Account of Expenses for defender Francis Minchella, No. 11 of process; and decerns against the pursuer for payment to the said defender of the sum of Sixty-six pounds, one shilling and five pence sterling, being the taxed amount thereof. ALEX. MONCRIEFF.

+ 9 interest etc. £79.9.4.

42.4.10

17*th December* 1929.—LORD MONCRIEFF.—*Act.* Clyde.—The Lord Ordinary approves of the Auditor's Report on the Account of Expenses for the defender David Stevenson, No. 13 of process; and decerns against the pursuer for payment to said defender of the sum of Forty-two pounds, four shillings and ten pence, being the taxed amount of said expenses. ALEX. MONCRIEFF.

now £46.17.7

20*th December* 1929.—LORD MONCRIEFF.—*Act.* Cameron.—The Lord Ordinary, in respect that pursuer has failed to pay to the defender Francis Minchella the amount of his taxed expenses, assoilzies said defender from the conclusions of the Summons; and decerns.

ALEX. MONCRIEFF.

21*st February* 1930.—LORD MONCRIEFF.—*Act.* Gibson.—The Lord Ordinary restores the cause to the Procedure Roll.

ALEX. MONCRIEFF.

On 7th March 1930 the pursuer lodged the Closed Record, as amended (No. 14 of process).

The cause was thereafter heard in the Procedure Roll when the Lord Ordinary pronounced the following Interlocutor:—

28*th May* 1930.—LORD MONCRIEFF.—*Act.* Morton et Gibson—*Alt.* Normand et Clyde.—The Lord Ordinary having heard Counsel in the Procedure Roll, Makes avizandum.

ALEX. MONCRIEFF.

On 17th June 1930 the pursuer lodged a Minute of Amendment (No. 15 of process) in the following terms:—

GIBSON for the pursuer craved leave of the Court to amend the Closed Record (No. 14 of Process) as follows, viz., by adding to the end of Condescendence II the following:—'The said ginger-beer bottle was fitted with a metal cap 'over its mouth. On the side of the bottle there was 'pasted a label containing, *inter alia*, the name and address 'of the defender, who was the manufacturer. It was from 'this label that the pursuer's said friend got the name and 'address of the defender';

when the Lord Ordinary pronounced the following Interlocutor.

17*th June* 1930.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde.—The Lord Ordinary allows the Minute of Amendment for pursuer, tendered at the Bar, to be received, and marked No. 15 of process; allows the defender to answer the same within six days.

ALEX. MONCRIEFF.

On 23rd June 1930 the Respondent lodged Answers (No. 16 of process) to said Minute in the following terms:—

CLYDE for the defender craved and hereby craves leave of the Court to answer the Minute of Amendment for the pursuer (No. 15 of process) as follows, viz.:—by adding at the end of Answer 2 the following:—'Explained that the 'defender has never issued bottles answering the description given by the pursuer.'

Thereafter the Lord Ordinary pronounced the following Interlocutor:—

24*th June* 1930.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde.—The Lord Ordinary opens up the Record; allows the same to be amended in terms of Minute for pursuer and Answers for defender, Nos. 15 and 16 of process, and the same having been done, of new Closes the Record, and makes avizandum.

ALEX. MONCRIEFF.

The Lord Ordinary thereafter pronounced the following Interlocutor:—

27*th June* 1930.—LORD MONCRIEFF.—*Act.* Gibson—*Alt.* Clyde.—The Lord Ordinary having considered the cause, Repels the first Plea in Law for the defender: Allows the parties a proof of their averments, and to the pursuer a conjunct probation—the proof to proceed on a day to be fixed: Finds the pursuer entitled to the expenses of the discussion in the Procedure Roll, so far as not already dealt with in the Interlocutor of 27th November 1929;

allows an Account thereof to be lodged, and remits the same to the Auditor to tax, and report.

Alex. Moncrieff.

The Lord Ordinary issued therewith a Note which is printed in the Appendix hereto.

Appendix—Page 3

On 3rd July 1930 the defender boxed and lodged a Reclaiming Note to the Second Division of the Court of Session against the Lord Ordinary's Interlocutor of 27th June 1930.

On 4th July 1930 the Second Division pronounced the following Interlocutor:—

Edinburgh, 4th July 1930.—The Lords appoint the cause to be put to the Summar Roll.

Robert Munro, *I.P.D.*

Parties having been heard on the Reclaiming Note before their Lordships of the Second Division on 12th and 13th November 1930 their Lordships on 13th November 1930 pronounced the following Interlocutor:—

'*Edinburgh, 13th November 1930.—The Lords having considered the Reclaiming Note for the defender against the Interlocutor of Lord Moncrieff, dated 27th June 1930, and heard Counsel for the parties, recall the said Interlocutor: Dismiss the Action; and decern: Find the pursuer liable to the defender in expenses in the action and remit the Account, when lodged, to the Auditor to tax, and to report.*

'*Robert Munro, I.P.D.*'

The Opinions delivered by their Lordships of the Second Division of the Court of Session who heard the Debate are printed in the Appendix.

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The appellant having been advised that the said Interlocutor dated 13th November 1930 is erroneous and contrary to law

appeals against the same to your Lordships' Right Honourable House, and in support of her Appeal she respectfully submits the following Statement and Reasons:—

SUPPLEMENTARY STATEMENT.

In this case the Appellant, who is a shop assistant, seeks to recover damages from the Respondent, who is a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the Respondent, and which it transpired contained the decomposed remains of a snail. The said bottle of ginger-beer was purchased for the Appellant by a friend in the Wellmeadow Café, Paisley, which was occupied by Francis Minchella. The bottle was made of dark opaque glass, and the Appellant had no reason to suspect that it contained anything but pure ginger-beer. The said Francis Minchella poured some of the ginger-beer out into a tumbler, and the Appellant drank some of the contents of the tumbler. Her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle. As a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, the Appellant suffered from shock and severe gastroenteritis.

The Appellant avers that the ginger-beer was manufactured by the Respondent to be sold as a drink to the public (including the Appellant). It was bottled by the Respondent and labelled by him with a label bearing his name; the bottles were thereafter sealed with a metal cap by the Respondent.

5 A.

5 D-E.

It is, too, common knowledge that manufacturers such as the Respondent invite by advertisement and otherwise members of the public to purchase their products

Clarke v Army & Navy Co-op. 1903 1 K.B. 150
White & Steadman 1913 3 K.B. 340
Weld Blundell 1920 AC 956.

SUPPLEMENTARY STATEMENT

A On the above averments their Lordships of the Second Division of the Court of Session (Lord Hunter dissenting) have held, reversing the judgment of the Lord Ordinary, that the Appellant has failed to state a relevant case, and have accordingly dismissed the action.

Mullen v. Barr & Co., Ltd., 1929 S.C. 461

B In reaching this conclusion their Lordships, adhering to the opinions which they expressed in a previous case, which on the question of relevancy was indistinguishable from the present, proceeded on the general principle that a third party may not found upon the breach of a contract to which he is not a party, and that in the circumstances there is no relevant averment of liability *ex delicto*. Admittedly exceptions are found where the things sold by a manufacturer are *per se* dangerous, and also where a fraudulent misrepresentation as to the character of the article has been made by the manufacturer.

Parry v. Smith, 1879 4 C.P.D. 325

Langridge v. Levy, 1837 2 M. & W. 519; 4 M. & W. 337

George v. Skivington, 1869 L.R. 5 Ex. 1

Thomas v. Winchester, 1852 57 Amer. Dec. 455

Heaven v. Pender, 1883 11 Q.B.D. 503

Dominion Natural Gas Co. v. Collins, 1909 A.C. 640, 646

C The Appellant humbly maintains that the duty owed by a manufacturer to members of the public who purchase his goods through a retailer is not capable of so strict a limitation. She contends that where anyone performs an operation, such as the manufacture of an article, a relationship of duty independent of contract may in certain circumstances arise, the extent of such duty in every case depending on the particular circumstances of the case.

D She maintains that in the present case the Respondent owed her a duty to take reasonable care that ginger-beer which he manufactured, bottled, labelled and sealed, and invited her to buy, did not contain substances likely to cause her injury. The argument for the existence of such a duty is strengthened by the fact that the Respondent so regulated his business that his products were put on the market under conditions which made it impossible for the retailer to interfere in any way with the contents of his bottles, or for the retailer or purchaser to examine their contents. The fact that the article sold was intended for human consumption, and was therefore capable

Couldn't inspect

of human Consumption

SUPPLEMENTARY STATEMENT

A of causing fatal, or at least serious, injury if care was not taken in its manufacture, is also a ground for maintaining that a duty of care was imposed on the manufacturer. Provided such a duty exists, the relevancy of the Appellant's averments of a breach of said duty is not challenged.

B On the whole matter the Appellant respectfully submits that the judgment of their Lordships of the Second Division of the Court of Session ought to be reversed, and that for the following among other

REASONS.

C REASONS

1. Because the facts and circumstances averred by the Appellant in her Condescendence disclose a relevant cause of action and entitle her to D have her case remitted to proof.

2. Because the parties being at variance concerning the facts of the case the same should be E remitted to probation;

and

3. Because the Interlocutor appealed from is F erroneous in point of law.

GEO. MORTON.
W. R. MILLIGAN.

RESPONDENT'S CASE

APPENDIX

In the House of Lords.

(FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.)

Mrs MAY M'ALISTER or DONOGHUE, residing late care of M'Alister, 49 Kent Street, off London Road, Glasgow, and now residing at 101 Maitland Street, Cowcaddens, Glasgow (*Pauper*), } *Appellant;*

DAVID STEVENSON, Aerated Water Manufacturer, 8 Glen Lane, Paisley, } *Respondent.*

The Respondent's Case.

Hugh Paton & Sons, Ltd., Printers, Edinburgh.

THE RESPONDENT'S CASE.

In this case the Appellant, who is described as a shop assistant, seeks to recover from the Respondent, who is an aerated water manufacturer, on the ground of his alleged negligence, £500 as damages for the injurious effects alleged to have been produced upon her by the presence of a snail in a bottle of ginger beer said to have been manufactured by the Respondent and ordered for the Appellant in a shop in Paisley by a friend of the Appellant, and of which the Appellant had drunk a small quantity before the snail floated out of the bottle.

The Appellant's action, as originally begun, was directed against the Respondent alone, but before the Record had been closed the Appellant moved for and obtained leave to add as a defender Francis Minchella, in whose shop the ginger beer was bought, and who was sued on the ground of breach of contract.

The Record was, thereafter, closed and a discussion took place in the Procedure Roll before Lord Moncrieff, Ordinary. At the end of this discussion the Appellant asked for, and was granted, time to consider her position.

As the result of that consideration the Appellant, after some wavering of opinion, finally decided to drop the action as against Mr Minchella and to proceed with it as against the Respondent, and the action now stands as an action against the Respondent alone. The averments of the Appellant, as they now are, retain, however, traces of the metamorphoses through which the action has passed.

on delict.

The Respondent (who also denies that any bottle of ginger beer ever left his factory containing a snail) maintains that the averments of the Appellant are irrelevant, and it is this question of relevancy which arises in this Appeal.

Mullen v. *A. G. Barr & Co. Ltd.; M'Gowan* v. *Barr & Co.* 1929 S.C. 461.

In two previous cases, which were concerned with a mouse in a bottle of ginger beer and are indistinguishable in essentials from the present case, three of their Lordships of the Second Division of the Court of Session—the Lord Justice Clerk, Lord Ormidale, and Lord Anderson—after a full review of the authorities, expressed the view that no duty was owed by the manufacturer to the the ultimate consumer of his goods, and that, accordingly, the pursuers in these cases—who were the consumers—had not stated any relevant case against the defenders, the manufacturers. Two of their Lordships, Lord Ormidale and Lord Anderson, made this view a ground of Judgment, although they were also in favour of the manufacturers on the facts, which had, in these cases, been established by proof. The Lord Justice Clerk, however, while taking the same view of the law as his two brothers, limited his actual decision to a decision in favour of the manufacturers on the facts. Lord Hunter dissented from the Judgment of the Court both on the law and on the facts.

In the present case the learned Lord Ordinary, availing himself of the circumstance that the actual decision of the majority of the Second Division in the mouse cases was on the facts, has sustained the relevancy in an elaborate Opinion which seems to show—if this may be said without disrespect—a disinclination on his Lordship's part to acquiesce in the law as it had been declared, rather than any real misapprehension regarding it. And the Opinion further involves the view that the law of Scotland in this matter is different from the law of England—an unfortunate position of matters if it existed.

Appendix, p. 3.

This judgment of the Lord Ordinary was reversed by their Lordships of the Second Division on a Reclaiming Note for the Respondent, and the action was dismissed as irrelevant. Three of their Lordships followed the view of the law expressed by them in the mouse cases as above explained, and Lord Hunter, while recognising that the question was really concluded by the views expressed by the other three Judges in the mouse cases, formally repeated the dissent which he had expressed in these cases.

Appendix, p. 21.

Appendix, p. 23.

The present Appeal is taken against the decision of the Second Division, but the Respondent respectfully submits that the view of the law taken by the majority of their Lordships of that Division is well founded and should be affirmed.

There is no doubt that the Respondent owes *ex contractu* a duty to each of the retailers to whom he sells his goods, who in turn owe, also *ex contractu*, a duty to each of their respective customers, a failure in which in either case would properly found an action of damages for breach of contract at the instance of the one contracting party against the other.

Grey v Hoff 1903 1 K.B. 610. Beer from beerhouse. Bristol Trams 1910 2 K.B. 831. Fiat' Lonies. Morelli 1928 2 K.B. 636. Bottle bursting.

Lord Hunter and Lord Moncrieff doubt it in present circumstances. Mullen 1934 Append. 19 G.

But the Appellant's case requires that the Respondent should, apart altogether from contract, and in addition to the duty to his various retailers above referred to, owe, to anyone whomsoever into whose hands his wares may at any time, and under any circumstances, come, a duty which entitles them to bring an action against him direct. The Respondent humbly submits that it has been settled by a long course of authorities that he has no such duty.

Before adverting to these authorities, however, it may be observed that such a duty, if it existed, would impose a very severe hardship upon traders such as the Respondent, who manufacture for sale to retailers. For this duty would be owed not only to persons with whom these traders deal and

who acquire their products from them in circumstances which the traders can trace and verify; but it would also be owed to persons of whom the traders know nothing, and who receive the goods under circumstances of which the traders are entirely ignorant, and after adventures which they cannot trace. And it would, on the one hand, involve a person in the position of the Respondent in liability independent of, and perhaps contrary to, the terms and conditions on which he had sold his goods; and would, on the other hand, confer a right upon the ultimate purchaser independent of, and perhaps contrary to, the terms and conditions on which he had purchased the goods.

The present case presents a typical instance of the kind of situation which may arise. The action was raised in April 1929 in respect of an incident which is said to have taken place in August 1928. The incident is alleged to have consisted in the consumption by the Appellant of ginger beer, originally manufactured by the Respondent and purchased for her by a third party from a Mr Minchella, in which there was found a dead snail. In such circumstances it must obviously be difficult for the Respondent to meet a case founded on negligence. It is not possible in ordinary circumstances to trace a bottle from the factory to the ultimate consumer and to investigate the vicissitudes which it may have undergone from first to last. Yet such an investigation would clearly be relevant and material for the consideration of the question whether the snail entered the bottle by reason of the Respondent's negligence. These difficulties emphasise that it would be both inexpedient and inequitable to impose upon persons in the position of the Respondent the duty contended for by the Appellant, a duty, which, if it were to be affirmed, would be affirmed now for the first time. For the Appellant has not cited any case where such a duty has hitherto been affirmed in similar circumstances.

The Respondent, on the other hand, respectfully submits that it is now firmly established both in English and Scottish law that in the ordinary case (which this is) the supplier or manufacturer of an article is under no duty to anyone with whom he is not in contractual relation. As was said by Baron Parke in *Longmeid* v. *Holliday*: 'It would be going much too 'far to say that so much care is required in the ordinary 'intercourse of life between one individual and another that 'if a machine not in its nature dangerous but which might 'become so by a latent defect entirely unknown, although 'discoverable by the exercise of ordinary care, should be lent 'or given by one person, even by the manufacturer, to another, 'the former should be answerable to the latter for the sub-'sequent damage accruing by the use of it.' This general principle has been consistently and uniformly applied both in Scotland and in England for very many years, and excludes the view now contended for by the Appellant.

To this general rule, however, there are two well-recognised exceptions. In the first place, if the manufacturer is dealing in articles *per se* dangerous, such as firearms or poisons, he is bound to give warning of this fact to the public generally, and, as a manufacturer of such an article owes to the public a duty of care, he will be liable for negligence. In the second place, though the article be not *per se* dangerous, if the manufacturer knows it to be in a dangerous condition but, none the less, launches it on the world in that condition without warning, he is liable for resulting injuries, on the ground that the possession of the knowledge of danger imposes upon him a duty not limited to the person to whom he sells the article. He is, in effect, committing a fraud on the public, and any member of the public so defrauded has a remedy against him.

The Appellant in the present case cannot allege and does not aver that either of these exceptions applies to the present

1851, 6 Ex. 761, at 767-8.

Winterbottom v. *Wright*, 1842, 10 M. & W. 109: *Campbell* v. *A. & D. Morrison*, 1892, 19 R. 282: *Caledonian Rail. Co.* v. *Warwick*, 1897, 25 R. H.L. 1: 1898, A.C. 216: *Kemp & Dougall* v. *Darngavil Coal Co., Ltd.*, 1909, S.C. 1314: *Cameron* v. *Young*, 1908, S.C., H.L. 7: *Cavalier* v. *Pope*, 1906, A.C. 428: *Earl* v. *Lubbock*, 1905, 1 K.B. 253: *Blacker* v. *Lake & Elliot Ltd.*, 1912, 106 L.T. 533: *Bates* v. *Batey & Co., Ltd.*, 1913, 3 K.B. 351: *Mullen* v. *Barr & Co. Ltd.*, 1929 S.C. 461:

Thomas v. *Winchester*, 6 N.Y. 397: 57 Am. Dec. 455: *Farrant* v. *Barnes* 1862, 11 C.B.N.S. 553: *Parry* v. *Smith*, 1879, L.R. 4 C.P.D. 325: *Levy* v. *Langridge* 1838, 4 M. & W. 337: *Dominion Natural Gas Co. Ltd.*, v. *Collins & Perkins*, 1909 A.C. 640

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1929 S.C. 461 at 469.

But see Weld-Blundell v. Stevens 1920 A.C.

A case. As to the first exception, ginger beer is obviously not *per se* dangerous. It is impossible, as the Lord Justice Clerk said in *Mullen* v. *Barr & Co.*, to assimilate the position of a dealer in gelignite with the position of a dealer in ginger beer. And there would be scant logical justification for holding that B ginger beer containing a snail, the sight of which may cause a merely temporary sickness in one consumer is, *per se* dangerous, while a patent lamp with a defect which may cause an explosion injuring half a dozen people is held not to be *per se* dangerous. As to the second exception, it is not, and cannot C be, alleged that the Respondent knew of the presence of the snail in the bottle in question and committed a fraud on the public in launching such a mixture on the world.

The general rule, therefore, which negatives the existence of any duty by the Respondent towards the Appellant, applies, D it is submitted, in the present case, as the majority of their Lordships of the Second Division have held.

The opinion of the learned Lord Ordinary to the contrary runs counter to the consistent body of authority both in E Scotland and in England above referred to, and appears to deny both the general principle and its exceptions, at any rate so far as Scotland is concerned. Such a distinction between the law of Scotland and the law of England respectfully appears to the Respondent to be consonant neither with F reason nor with the cases decided in the two countries. There seems no justification for a distinction between the two systems in a department of law far removed from the specialties of either; and, apart from the Lord Ordinary's opinion in this case, there is no hint in the decided cases of the existence G of such a distinction. In general, it may be affirmed that there is no distinction between the law of Scotland and the law of England as to the persons who owe a duty or as to the persons to whom the duty is owed. The specialties which differentiate the two systems of law in the domain of negligence

? Jus ac Polemus

lie altogether apart from the question whether a duty is owed A by one person to another, and it is respectfully submitted that the creation of new specialties is a thing to be avoided, and that in any event the present appeal provides no adequate ground in equity for establishing legal distinctions not hitherto understood to exist. B

Moreover, in the latest Scottish case before your Lordship's House in which where this department of the law was touched upon, Lord Dunedin definitely affirms one of the exceptions from the general rule noted above as distinguish- C ing the case then under consideration from another earlier Scottish case. For his Lordship says: 'The one point of 'difference (between the two cases) is this—in the present 'case the use to which the chattel was being put was ob- 'viously dangerous . . . in the *Caledonian* case there was no 'obvious danger in allowing the wagon to be taken off their D 'own line on to another for transit into a siding.' In view of this observation it seems difficult to affirm the Lord Ordinary's view that the two systems are governed by different principles, or that the propositions noted above are not as accurate in Scotland as they would be in England. E

Oliver and Others v. *Saddler & Co.* 1929 S.C.(H.L.) 94 at 104.

The Lord Ordinary also founds strongly upon certain criticisms in *Salmond on Torts* upon the line of authorities p. 482. relied on by the Respondent, and uses these criticisms as a basis for doubting the validity of these decisions. The F ground of that learned author's criticisms of these cases, and the ground upon which he professes to find them 'unsatisfactory' and 'inconsistent' depends, however, upon a distinction which he seeks to make between nonfeasance and p. 484. misfeasance—a distinction which forms no part of the decision G in any of them, and which, it is humbly submitted, in no way impairs their authority. Indeed it only enables the learned author to justify some of the decisions upon grounds upon p. 487. which the cases were neither argued nor decided, and to con-

1869 L.R. 5, Ex. 1.

Cavalier v. *Pope*, 1905 2 K.B. 757 per M.R. at p. 761; 1906 A.C. 428 per Lord Atkinson at p. 433: *Blacker* v. *Lake & Elliot Ltd.*, 1912 106 L.T. 533 per Lush J. at p. 541.

Blacker v. *Lake & Elliot, Ltd.*, 1912, 106 L.T. 533 per *Hamilton, J.*, at p. 537: *Beven on Negligence*, p. 49: *Clerk & Lindsell on Torts*, p. 430.

1929 S.C. 461.

57 Am. Dec. 455.

pp. 456-8. 1842, 10 M. & W. 109

clude that the case of *George* v. *Skivington* is to be preferred to many of the other cases.

George v. *Skivington*, however, is not a decision from which the present Appellant can glean any assistance. The case has more than once been interpreted as one in which the Court held that a general duty was owed by the defendant on the ground that he knew the hairwash he had manufactured to be dangerous, but none the less sold it. He was in effect, as the averments in the case were construed, guilty of a fraud on the public. In that view the case fits in with the other decided cases, and is of no assistance to the present Appellant. If the case was not decided on that ground, but laid down the proposition that a duty was owed by a manufacturer of an article to the public generally, then, it is humbly submitted, the case was wrongly decided, and the frequent disrespect into which it has fallen is well merited.

Lord Hunter, who, as already indicated, in this case formally repeated the dissent from the opinion of the majority of their Lordships of the Second Division which he had taken in the case of *Mullen* v. *Barr & Co.*, seems to base his judgment on the view that the two exceptions to the general rule above specified are not exhaustive and that the present case falls into a third exception from that rule, which third exception, however, his Lordship does not explain, and which, indeed, it seems difficult to define.

The authorities which Lord Hunter quotes as justifying such a contention, however, in the Respondent's view not only fall short of it, but definitely run counter to it. His Lordship refers to *Thomas* v. *Winchester* as an instance of such a third exception. That case, however, was expressly treated by the American courts as a case of a negligent mistake of a dealer in a thing *per se* dangerous, and upon that ground was distinguished from *Winterbottom* v. *Wright*. So far from

justifying a third exception, therefore, *Thomas* v. *Winchester* confirms the existence of the two exceptions from a recognised general rule. And it was just for that reason that Lord Dunedin quoted *Thomas* v. *Winchester* in the Dominion Natural Gas Co. case, which was also a case of an article dangerous *per se*. Lord Dunedin, accordingly, it is submitted, was definitely affirming the proposition for which the Respondent of this case contends, and his Lordship's observations in that case are respectfully adopted by the Respondent.

57 Am. Dec. 455. 1909, A.C. 640 at 646.

The main authority upon which Lord Hunter bases his dissenting opinion, however, was the often quoted *dictum* of Brett, M.R. in *Heaven* v. *Pender*. This *dictum*, however, was not concurred in by the majority of the Court in that case; it was expressly repudiated as being valid in a case such as the present, by the learned Master of the Rolls himself in *Le Lievre* v. *Gould*; and it was rejected by the Court in *Earl* v. *Lubbock*, and the case of *Winterbottom* v. *Wright* followed in place of it. Moreover, the *dictum* in question receives scant support from modern authorities. It cannot therefore, it is submitted, afford the Appellant any assistance in the present case.

1882, 9 Q.B.D. 302. 1883, 11 Q.B.D. 503. 1893, 1 Q.B. 491 at p. 497. 1905, 1 K.B. 253. 1842, 10 M. & W. 109.

On the whole matter, accordingly, the Respondent humbly submits that the majority of their Lordships of the Second Division in their Opinions in the mouse cases and in this case have rightly interpreted the law and have arrived at the correct conclusion in this case, and that the Appeal should be dismissed, for, among others, the following

[REASONS

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A

REASONS.

1. Because in the circumstances averred by the Appellant no duty was owed to her by the Respondent, and, accordingly, no relevant case has been stated by the Appellant against the Respondent

B

2. Because a contractual relationship between the Appellant and the Respondent is necessary to render the Respondent liable to the Appellant, and no such relationship is averred by the Appellant.

C

D

3. Because the Interlocutor appealed against is well founded in law.

W. G. NORMAND.

J. L. CLYDE.

In the House of Lords

From the Second Division of the Court of Session in Scotland

MRS MAY M'ALISTER OR DONOGHUE, residing formerly care of M'Alister, 49 Kent Street, off London Road, Glasgow, and now residing at 101 Maitland Street, Cowcaddens, Glasgow *(PAUPER)*..... } *Appellant*

DAVID STEVENSON, Aerated-Water Manufacturer, 8 Glen Lane, Paisley..... } *Respondent*

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CHAPMAN, WATSON & CO., LAW PRINTERS, 21 HANOVER STREET, EDINBURGH

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Appendix

OPINIONS OF JUDGES.

Opinions

1.—OPINION OF LORD MONCRIEFF, delivered when giving Judgment on 27th June 1930.

Lord Moncrieff

On 26th August 1928 the pursuer was served in a café in Paisley with, *inter alia*, a bottle of ginger-beer. The ginger-beer was supplied to her on an order which was given on her behalf by a third party, but the defender made no point upon this in his argument. The bottle containing the ginger-beer was made of dark opaque glass, and the pursuer observed nothing which made her suspicious of the contents. After she had drunk some of the ginger-beer and was pouring the rest of it into the glass the body of a snail in a state of decomposition emerged from the bottle. The pursuer was shocked at the sight, and, after suffering from sickness and nausea, contracted gastroenteritis, which she avers to have been induced by the infected ginger-beer which she had swallowed. For these injuries she claims to be entitled to reparation.

In her action, as amended, the pursuer has called as sole defender the manufacturer of the infected ginger-beer. She makes averments against this defender of various acts of negligence in manufacture for which she charges him with responsibility. She charges him, *inter alia*, with failure to provide system of working his business which included the

customary and necessary safeguards. He is stated to have failed to exercise proper care over the bottles destined to be filled with ginger-beer, and to have further failed to provide an efficient system of inspection of the bottles after they had been filled, and before they had been sealed. The defender did not challenge the relevancy, if only they had been stated at the instance of a party having a right to complain, of these averments of fault or of resulting loss or damage. He maintained as his sole ground of defence upon relevancy that, as a proposition of law, he could not in his position be charged by one occupying the position of the pursuer, with a duty of avoiding negligence and of exercising care in the manufacture of the goods. He supported his first Plea in Law only by arguing as a general proposition that, in the case of the manufacture of goods (unless in the case of 'dangerous goods') distributed for subsequent sale by retail traders, the duty of diligence did not extend (unless in that one particular case) so as to be owing from the manufacturer to the eventual purchaser of the goods. If I found myself entitled to arrive at my decision upon general principles and without reference to authority, I would not have regarded this question of law as presenting any exceptional difficulty.

See 19 D.

In order to found a claim for reparation, the course of juridical reasoning requires the presence of three principal elements—(*First*) A general duty owing by the wrongdoer to qualified sufferers of which the wrongdoer is in breach; (*Second*) A relation between the wrongdoer and the sufferer which brings the latter within the consideration of the discharge of the duty. I do not think I require, although I would prefer, to rely on the authority of the classic but disputed passage in the Opinion of the Master of the Rolls in *Heaven* v. *Pender*, 11 Q.B.D. 503, at 509, in order to affirm that such a relation (whatever may be its consequence) is complete,

(1) General Duty

(2) Relationship

and is at least a relevant juridical fact, in every case in which the sufferer, within a reasonable anticipation, may be found to be within the outlook of a danger resulting from failure to discharge the duty. The comments on the proposition enunciated in that passage have been directed to question the general existence of a duty rather than to dispute the fact of a relation. See (for example) *Heaven* v. *Pender*, cited *supra*, per Cotton and Bowen, L.JJ., p. 516. I prefer the Opinion of Lord Esher himself in *Le Lievre & Dennes* v. *Gould*, 1893, 1 Q.B.D. 491, who held that *Heaven* v. *Pender* 'had no applica-'tion to that case,' to the Opinion of Collins, M.R., in *Earl* v. *Lubbock*, 1905, 1 K.B. 253, in so far as it expressed the view that the pronouncement in *Heaven* v. *Pender* had subsequently been 'qualified and explained' by its author. (*Third and finally*) A causal connection between the breach of the duty and any resulting injury which links the injury to the wrong as its proximate cause. Upon this analysis, if it be a proper one, I am of opinion that the duty (and it may be also the proximity of cause and effect) is dependent on the quality of the accompanying danger, while the relation is dependent only on the outlook or prospect of incidence of the danger, and is not dependent on its quality.

(3) Causal Connection

Relationship depends on out look or prospect.

Duty depends on quality of danger.

In the absence of a danger there can be no duty or breach of duty, and accordingly no negligence. The duty in any particular case will thus be applied by the facts with no less assertive influence than it will be enjoined by law, and will vary with the circumstances of each particular case in which it falls to be affirmed. A duty to inspect material, in the interests of the safety of those who may have occasion to handle it, will not, in my opinion, be affirmed unless there is ground for a reasonable apprehension that, in default of such inspection, the use of the material may be attended with danger. The element of danger must accordingly be present; but the function of

this element will be to impose a duty and not to originate or conclude a relation. I do not doubt, nor was it disputed by Counsel for the defender, that, in a question with persons alleging a proper interest, a duty to make inspection as required attached to the defender as a manufacturer of fluids to be used as beverages. I am unhesitatingly of opinion that those who deal with the production of food or produce fluids for beverage purposes ought not to be heard to plead ignorance of the active danger which will be associated with their products, as a consequence of any imperfect observation of cleanliness at any stage in the course of the process of manufacture. The danger of infection is such as is or should be known in every domestic kitchen and still room. Tainted food when offered for sale is, in my opinion, amongst the most subtly potent of 'dangerous 'goods,' and to deal in or prepare such food is highly relevant to infer a duty. I fail to see why the fact that the danger has been introduced by an act of negligence and does not advertise itself, should release the negligent manufacturer from a duty, or afford him a supplementary defence.

Source of the Danger

Whether such products should or should not be classed as 'dangerous goods,' I am, in any event, of opinion that it is a wrongful act to sell, in order that others may purchase and consume, articles which have been exposed through negligence to a practical risk of contracting a dangerous taint. More especially in cases in which the articles are distributed in sealed bottles, I regard this wrong as having been committed by the manufacturers against the destined sufferer, being none other than the consumer, for whose use the product was in fact prepared. Although he has no title upon contract, unless indeed in such a case the retailer be regarded as the manufacturer's agent for distribution, a litigant so qualified appears to me to be entitled to found upon a breach of the direct duty towards himself with which the manufacturer falls to be

charged in law; being nothing more exacting than a duty of taking all reasonable precautions to ensure that an ostensible food be not replaced by a latent and actual poison. I may add that I would be prepared to find an additional link to complete the relation between manufacturer and consumer, upon proof of the fact as now averred that the filled and sealed bottles were issued under labels bearing the name of the defender. The issue of such a label would, in my opinion, offer a direct invitation to the consumer to rely on any particular reputation which is claimed by the manufacturer; as well as afford a general advertisement that all proper diligence in preparation, or at least such diligence as would satisfy a competitive standard, had been observed. This averment is, however, denied, but need not in my opinion be accepted or rejected before answer on the relevancy. I would regard the fact, if proved, as going no further than to afford supplementary material to support my judgment.

I understood Counsel for the defender to challenge only the generality of the application of these propositions, and only by this road to challenge the soundness of the propositions themselves. It was conceded, on the one hand, that in the presence of a danger antecedent and unrelated to the negligence although in a possible if remote relation with the event, the propositions would apply. In the absence of such a danger on the other hand, the surviving negligence would cease to furnish a cause of action. The argument, proceeding as it did on a distinction which I do not find easy to place under any recognised chapter of Scottish juridical thinking, may be summarised (or rather, perhaps, may be expanded) as follows: A public interest not having been infringed, it was maintained that, apart from fraudulent or misleading representation, and subject to a single exception in one particular set of circumstances, a manufacturer of goods had no duty to avoid

A negligence or employ safeguards in the interest of such purchasers of his goods as should have made no direct contract with him. The single exception applied in the case of dangerous goods. I confess that I fail to understand upon what principle this particular concession was made.

B There are beyond question special duties which attach to those who release from control or maintain the control of instruments of danger. Under the doctrine of *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, such instruments may not with impunity be enlarged so as to invade an area of safety.
C A manufacturer who distributes his product on the implied invitation of an eventual purchaser does not trespass against this rule of law. Again, I have no difficulty in recognising that a failure on the part of the seller to give warning of a danger, if known to him and not apparent, may involve a breach of a
D special and particular duty. In the case of *Levy* v. *Langridge*, 4 M. & W. 337, a seller of dangerous goods was found liable to a party other than the purchaser on the ground of fraudulent representation which had resulted in injury. Such a decison
E appears to have no connection with the question now at issue. See also *Blacker* v. *Lake & Elliot, Limited*, 106 L.T. 533, p. Lush, J., at p.540. It may be that in the case of instruments of danger there are also other special duties which attach and apply. Indeed it has been determined that those who install dangerous
F appliances within the premises of others, at least so long as they control them there, are answerable for any want of proper diligence in their installation or control. But I heard no argument to explain a requirement of special diligence in the preparation of such articles before they are transferred or released,
G which would not apply with even added force to articles which are only made dangerous as the result of want of diligence. The suggested distinction appears to be founded on some misunderstanding of the view that those who handle dangerous

articles may not at their pleasure limit their relations with their A fellows. No doubt danger makes a special and a wide companionship, but this in my opinion is a consequence of the communication and not of the preparation of the danger. A dangerous article does not alter in character, while it may alter in quality, because it has been prepared with negligence. Negligence B would rather appear first to become significant in this connection when it introduces a danger in association with articles which ought to be safe. I was afforded no exposition of a principle upon which a danger inherent in the goods themselves which was independent of, and not associated with, any danger C attending their transfer, should impose upon a party handling but not yet transferring them a special and particular obligation. A cause of action founded on such an obligation would none the less be founded directly on negligence, and not on the dangerous quality of the goods. If the cause of action springs D from negligence and not from danger, I fail to see how the presence or absence of an antecedent danger can be relevant. To regard danger *per se* as relevant to confer a special cause of action would appear to me to misuse that element of danger in all affairs of negligence with which I have already dealt; trans- E lating this element of danger, to which I have assigned the part of a *causa sine qua non* in originating a duty, so as to operate independently towards completing a relation or conditioning a proximate cause. Nevertheless the distinction appears to have been recognised as an existing one in some few among the F many cases to which I was referred.

Turning now to these authorities, I agree with the opinion expressed by Lord Sumner when giving judgment as Hamilton, J., in the Divisional Court in the case of *Blacker* v. *Lake & Elliot, Limited*, 106 L.T. 633, in finding little direct assistance on G this question from cases such as the *Dominion Natural Gas Company, Limited.* v. *Collins & Perkins*, 1909 A.C. 640. In that

case the defendent was found liable to a workman employed in premises within which he had introduced, by faulty installation of a machine, a permanent element of danger establishing a continuing act of negligence. In respect of this negligence, in contrast with the immunity which might have been claimed by a proprietor of the heritable structure, the defendant was found to be in a relation with the occupants or inmates of the premises which conferred upon these latter a cause of action; some unexplained distinction (which I venture to regard as salutary in this branch of its application) being apparently open between such real and personal delinquents. (See *Cameron* v. *Young*, 1908 S.C. H.L. 7). The particular machine with which that case was concerned was an appliance for the supply of gas. Such a machine being ostensibly an instrument of danger, this element was referred to by Lord Dunedin as simplifying the problem with which the Tribunal had to deal. I see no reason, however, to question the propriety of a similar judgment, although the appliance which had been installed should have been *innocuae utilitatis*. The injury followed from the permanent misplacing of an escape pipe, and not from any danger associated with the machine itself or the use of the machine. If a steam-pipe had been fitted by the defender as part of the installation of an ordinary domestic bath, and a bather who had not been a party to the contract had been injured by an escape of steam, I find no reason in the observations of Lord Dunedin to suppose that a cause of action would have been refused to him. The case itself, however, affords a relevant illustration of the recognition of a relation inferring a liability which springs from tort and not from contract.

Especially if he had been invited to try this particular type of bath.

The defender relied on a group of cases of which the *Caledonian Railway Company* v. *Warwick*, 25 R. (H.L.) 1, may be taken as an example. In that case a railway wagon, the property of one railway company, was handed over by that company on reaching its destination, to another railway company. There was averred to be a defect in the brake of the wagon at the moment of transfer which would have been discovered if a proper inspection had been made. The railway company which had received delivery of the wagon, with the knowledge and toleration of the first company, subjected the wagon to a further short period of haulage. In the course of this haulage one of the servants of this latter company sustained personal injuries. It was decided that the servant of the company which had undertaken this second and separate operation, had no right of action against the company which owned the wagon. Any duty of inspection relative to the second period of haulage had arisen after the owners of the wagon had parted with control and had become released from responsibility; any duty of inspection which for this journey ought to have been made, was the duty of those who used and not of those who owned the wagon. The decision appears to me to be a typical illustration of the limitation of liability to make reparation as conditioned by proximate cause. I cannot regard the decision under which the owners of the wagon were released from responsibility, as having proceeded on the view that the haulage operation during which the pursuer sustained injury was not associated with danger. If danger had not been present so as to impose a duty of inspection, the relevancy of the averments against the controlling railway company would not have been assumed. If one may trust experience both within and beyond Courts of Law, the toll of life which is taken in shunting operations, more especially when detached wagons are moved without the control of engine power, is little less serious than the toll which is taken during the discharge of cargo. With respect I accordingly prefer the explanation of the decision of the subsequent case of *Oliver* v. *Saddler & Company*, 1929 S.C. (H.L.) 94, which was given by those of the Noble and

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Lord Moncrieff

Learned Lords who founded the liability of the respondents upon a special assumption of responsibility for the safety of the rope during the second operation, as implied from (1) the recognition by all parties of the need of inspection, (2) the limitation of the opportunity of inspection, and (3) the sufficiency of the interest of the respondents in the quick dispatch of the subsequent operation in order that they might obtain re-delivery of the rope; to the alternative explanation which required an element of danger in the operation which should be in proper contrast with the danger present in the case of *Caledonian Railway Company* v. *Warwick*, cited. The case of *Oliver* v. *Saddler & Company*, appears to me to be special within its group only in so far as an original control with corresponding responsibility was regarded as continuing, notwithstanding a transfer of the article for use in a subsequent operation which was directed by strangers. *Elliott* v. *Hall*, L.R. 15 Q.B.D. 315, may be similarly explained. These cases, as also the case of *Kemp & Dougall* v. *Darngavil Coal Company, Limited*, 1909 S.C. 1314, appear to me to have no special concern with the element of danger, but to have been determined on an application of the doctrine of proximate cause. In my opinion the case of *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109, is only another illustration of the same legal principle. I would in any case have regarded that case as too special in its circumstances to afford authority for the support of any principle of general application. In any event it clearly appears to me to be entirely remote in this connection. The plaintiff did not claim against the defendant as manufacturer or supplier of the coach. For aught that appears in the case the coach may have been perfect when supplied; but the supplier of the coach entered into a supplementary contract under which he became bound to repair and maintain it. He thus undertook for the Postmaster-General those duties,

but as contractor for its upkeep.

including upkeep and inspection, which were or might be exigible at the instance of strangers to the contract against the party making use of the coach. These are duties for which, even in a question with others than his servants, it is far from certain whether one who uses and controls a vehicle is entitled to discharge himself of responsibility by delegating the duty under contract. It would rather appear that any negligence of the delegate would be imputed and would be pleadable against his constituent. See *MacDonald* v. *Wyllie & Son*, 1 F. 339. All these considerations indicate that the only appropriate defendant would have been the Postmaster-General. It was apparently because this defendant was in a position to plead that immunity against claims in tort which is open to be pleaded by a Government Department, that an attempt was made to transfer responsibility for the injury against the party who had taken himself bound under a contractual obligation to maintain and repair. It was recognised that 'hard cases make 'bad law,' and the plaintiff was accordingly refused a title to sue. The decision appears to me to be merely an illustration of the rules of law described by the phrases '*res inter alios actæ*' and 'proximate cause.' The case of *Earl* v. *Lubbock*, 1905, 1 K.B. 253, affords nothing more than a less notable example of the application of the same rules of law.

There were, however, three among the cases which were cited by Mr Clyde, in two of which the learned Judges appear to recognise, and in the third to proceed upon a distinction as regards liability towards third parties, which was assumed in law to affect those who produce or prepare articles or appliances according as these are or are not dangerous *per se*. The first two of these cases were both concerned with paraffin lamps, one of which was designed for domestic lighting and the other for industrial brazing. In *Longmeid* v. *Holliday*, 6 W. H. & G. Exchequer Reports 761, Parke B. as his ground for deciding

A that there had been no breach of a duty of diligence on the part of the maker and seller of a lamp, which had exploded and caused injury to others than the party to the contract, appears to have recognised that a different decision might have been required in the case of an article which should have been 'in
B 'its nature dangerous.' In *Blacker* v. *Lake & Elliot, Limited*, cited *supra*, there appears to have been a difference of opinion between the two learned Judges who constituted the Court. Holding that the question whether an article was or was not dangerous *per se* fell to be decided by the Court as a question
C of law, Hamilton, J. (afterwards Lord Sumner) found in law that a paraffin brazing-lamp was not a dangerous article. Incidentally I may be allowed to say that I myself would have preferred the finding of the jury who had come to an opposite conclusion on the facts. Taking the view he took, however,
D the learned Judge, under reference to 'authorities from *Winter-*'*bottom* v. *Wright*, 10 M. & W. 109, to *Earl* v. *Lubbock*, '91 L.T. Rep. 830; 1905 1 K.B. 253,' decided the case upon the view that the jury had been misdirected when they were charged to regard as relevant mere acts of negligence on the
E part of the maker towards the user of the lamp. I have already endeavoured to distinguish the cases upon which this opinion proceeds. On the other hand, Lush, J., preferred to take the case on the footing that the brazing-lamp fell within the class of chattels which are 'dangerous in themselves.' Upon this
F view the learned Judge recognised that one or other of three special duties might attach to the defender. Among these duties, so far as here in point, was a duty not to misrepresent the real nature of an article towards persons who should make use of it. This duty would only arise if the real nature of the
G article was not apparent on the face of it, and would be discharged once a warning had been given to the recipient. The liability of one who deals in dangerous articles, as measured

by Lush, J., thus involves a duty to give warning of latent A dangers but does not involve any duty of exercising diligence in the preparation of the article. In the view which he took of the case, on the other hand, Hamilton, J., while recognising that such a supplementary liability might exist, preferred to reserve the question of its measure for a case in which a decision B should be required. These cases accordingly appear to me to fall short of deciding that the suggested distinction is a proper one. The latter case, however, affords some authority for the wider proposition that by the law of England no duty to avoid negligence attaches apart from contract whether the article be C or be not dangerous *per se*. The case of *Bates* v. *Batey & Company, Limited*, 1913, 3 K.B. 351, is, on the other hand, directly in point as an authority for the proposition which is in question. In that case a Judge of first instance found that a bottle containing ginger beer, although not an article dangerous *per se*, D had been rendered dangerous through the negligence of the defendant before it came into the hands of the plaintiff. A danger introduced by negligence in contrast with a danger inherent in the article itself appears to have afforded the ground for giving judgment for the defendants. The reasoning upon E which the judgment proceeds is only in point if the existence of an inherent danger would have led to an opposite result.

Upon these authorities it was argued, and I am not prepared, or indeed qualified, to negative the argument, that the law of England finds the foundation of any liability to exercise F diligence in the preparation for purposes of sale of articles other than 'dangerous articles' in the law of contract only and not in the law of tort. Although there are indications of views pointing in this direction, I am not entirely satisfied that even in the case of dangerous articles that system of law recognises G a duty other than such duties as have their origin in contract, which enjoins manufacturers or vendors in the course of

preparation to avoid negligence and exercise care. If and in so far as such a supplementary duty is recognised to exist, I find that it is traced by Sir John Salmond in the 7th edition of his Law of Torts at page 484, to a distinction between misfeasance and nonfeasance which is not recognised in this connection by the law of Scotland. At page 482 the learned author, whose work, as I was told from the Bar, had been referred to with approval by an eminent English Judge, expresses regret 'that so narrow a view has been taken as to 'the liabilities of those who negligently put dangerous chattels 'in circulation to the hurt of other persons.' He describes the result of the rule established by *Earl* v. *Lubbock* as 'sufficiently 'remarkable'; while at page 486 he refers to the authorities on the question as 'unsatisfactory and inconsistent'; and again on the following page, in reference to *Blacker* v. *Lake & Elliot, Limited*, and *Bates* v. *Batey & Company*, he says, 'It is difficult 'to accept these decisions as containing a satisfactory statement 'of the law on this important point.' So far as I am free to refuse, I would find myself reluctant to borrow from an ultra Scottish system and apply a doctrine of law which is so characterised by one of its own qualified legal writers.

On the assumption that there was a doctrine of English law which had been determined on these lines, it was conceded by Mr Normand that no decision had been pronounced by the Courts in Scotland which made that doctrine part of the Scottish system of law. He could only refer to certain observations by learned Judges which had been pronounced *obiter* in the course of Opinions delivered in cases which were decided upon other grounds. Thus Lord Shand in the case of *Caledonian Railway Company* v. *Warrick*, 25 R. (H.L.) 1, at page 7, took a distinction between the railway wagon there in question and 'an instrument noxious or dangerous in itself.' As regards such an instrument, however, he reserved his

opinion, merely saying in connection with it, 'it may be that 'wider and other responsibilities might arise.' In commenting on this passage in Lord Shand's Opinion, Lord Kinnear, in the case of *Kemp & Dougall* v. *Darngavil Coal Company, Limited*, 1909 S.C. 1314, at page 1322, recognised that articles associated with a high degree of danger might call upon people who meddle with them for a corresponding degree of caution, and make them liable to people with whom the active party was not in any particular relation. The matter is again referred to only for the purpose of distinction, and the measure of the supplementary liability (of which *Rylands* v. *Fletcher*, cited *supra*, would furnish a sufficient explanation) again is not defined. In *Campbell* v. *Morrison*, 19 R. 282, ship carpenters had put up a gangway connecting a vessel with a dock on the order of the shipbuilders. The gangway proved defective, and a workman employed by a firm of engineers who had no relation with the carpenters or builders, sustained personal injury. It was clear that the workman had no relation with the carpenters either by contract or as the result of an invitation. The action which he raised against them was accordingly dismissed. It may be that if he had sued the shipbuilders upon invitation he might have been more fortunate. It was in the course of his opinion in this case that Lord Young observed that 'delict or quasi-'delict was out of the question.' I do not find occasion to question this, because I do not see how this expression of opinion advances the defender's argument. The carpenters were the makers but not the users or controllers of the gangway. The most direct and important reference by Scottish Judges to this alleged doctrine of English law is, however, to be found in the Opinions which were pronounced by the learned Judges in the recent case of *Mullen* v. *Barr & Company, Limited*, 1929 S.C. 461.

The facts considered by the Court in that case were almost identical with the facts of the present case. Lord Ormidale formulated as a question for decision, 'Whether in the absence 'of any contractual relation between the pursuers and the 'defenders, the latter owed a duty to the pursuers as the 'consumers of the beer, of taking precautions to see that 'nothing of a poisonous or deleterious nature was allowed to 'enter and remain in the bottles.' As himself advised, Lord Ormidale would have answered this question in the affirmative, but found in the same authorities as those which have already been referred to in this opinion an 'unbroken and consistent 'current of opinion' which constrained him to answer it in the negative. On the same authorities his Lordship recognised that a duty of taking such precautions would have existed if the article sold had been dangerous in itself. Although Lord Ormidale concurred with his brethren in deciding the case upon another ground, this opinion is available to the defenders' Counsel as direct authority for the proposition which they advanced. The opinion of Lord Hunter, on the other hand, is directly to the contrary. Lord Anderson deals with this matter by referring on page 479 of the report to a concession by the pursuers which I do not find easy to reconcile with the third sub-head of the summary of their argument as printed upon page 465 of the report. The Lord Justice-Clerk reserved his opinion; and the decision of the case proceeded upon the footing that negligence, if relevant, had not been proved.

Upon this view of the authorities and of the *dicta* which have been pronounced by learned Judges in Scottish cases, and under further reference to theexpressions of opinion by Lord Dunedin in the *Dominion Natural Gas Company, Limited* v. *Collins & Perkins*, and *Oliver* v. *Saddler & Company*, upon which I have already commented, I am of opinion that there is no authority in Scotland

for refusing to a party who has sustained injury as a direct result of the negligence of the manufacturer of goods designed to reach him through retail dealers, a right of action founded on a negligent omission to introduce proper safeguards, or to exercise due diligence to exclude infection of the articles in the course of manufacture. I am not satisfied that a distinction is taken by the law of England upon this matter between goods which are or are not dangerous *per se*. If such a distinction be taken, I fail to find a warrant for it whether in logic or in expediency; and as the question appears to be entirely open, I decline to decide that any such distinction forms part of the law of Scotland.

Applying that law as I have endeavoured to formulate it, to the case set forth in the pursuer's averments, I find a sufficient disclosure of (1) a danger of infection of the goods in the course of manufacture inferring a duty to exercise care, (2) a destination of the goods which brought the pursuer within the probable incidence of the danger and so completed a relation inferring a title to sue, and (3) a breach of the duty resulting in injury from which the breach was not disassociated by any intervening originating cause. These averments are in my opinion relevant, and as this question of law arises antecedently and is independent of any question remaining to be solved upon consideration of the facts. I shall repel the First Plea in Law stated by the defender.

I may add that I find the propriety of taking this course confirmed by a consideration of consequences. I regard the argument *ab inconveniente*, while of very doubtful substantive value, as readily available to furnish a test. Agreeing, as I do, with Lord Hunter in questioning whether the pursuer could obtain a remedy against the proprietor of the cafe who supplied the ginger-beer (see *Mullen* cited *supra*, per Lord Hunter at

See 4 F.

page 474), a judgment upon relevancy in favour of the defender in this case would result in one or other of two forensic situations, with which law in the one case and equity in the other must be concerned to deal. If on the one hand a liability should in the event of action be found to attach the retail trader, such a liability in the circumstances of the case having its necessary origin in breach of warranty and not in negligence, is one which that trader (apart from any contractual release from liability which is not alleged) would be entitled to pass on against the present defender in a separate action of relief. In answer to such an action, the plea founded on independent negligence which received effect in *Wood* v. *Mackay*, 8 F. 625, would not be open to the defender. Any award so to be obtained would merely charge the law with the requirement of an operose and costly circuity of process. If, on the other hand, such an award should be refused, the pursuer, who avers that she has sustained an undeniable injury, would be left without redress. Although such a possible consequence has an established recognition under the rubric '*Damnum absque injuria*,' it is only under the gravest possible constraint that equity dare acknowledge a wrong without a remedy.

This question of relevancy having been disposed of, and the questions which remain for disposal being typical questions of fact, the case would in ordinary course have been sent to a jury. Mr Morton, however, did not propose an issue, and on his motion I shall accordingly allow a proof. The allowance of proof will, however, be after answer on the question of law.

2.—OPINIONS of the JUDGES of the SECOND DIVISION OF THE COURT OF SESSION, delivered when giving Judgment on 13th November 1930.

(1) The Lord Justice-Clerk (Lord Alness).

Lord Justice-Clerk

My Lords, the rubric in *Mullen's* case (1929 S.C. 461), the facts of which are familiar to your Lordships, bears that it was 'Held, 'dissenting Lord Hunter, that the defenders fell to be assoilzied; 'per Lord Ormidale and Lord Anderson (the Lord Justice Clerk 'reserving his opinion) on the ground that, as the defenders 'neither knew that the contents of the bottle were dangerous, 'nor were dealers in articles *per se* dangerous, they owed no 'duty to the consumers, who had not contracted with them.' And then the rubric goes on to say that the majority of the Court held that there was no negligence proved on the part of the defenders. That part of the rubric however does not concern us at this stage of this case.

Well, now, when one turns to the Opinions, one finds that both Lord Ormidale and Lord Anderson expressed very clear views to the effect which the rubric bears. Indeed, Lord Ormidale proceeded upon that view in deciding the case against the defenders. For myself—if I may be pardoned for a moment referring to what I said—it is quite true that, as the rubric bears, I formally reserved my opinion upon the topic, saying, 'I feel absolved from expressing a concluded opinion 'on the thorny and difficult question of law whether, assuming fault to be proved on the part of the defenders, the 'pursuer has in law a right to sue them. I prefer to base my 'judgment on the proposition that the pursuer has failed to

'prove fault on the part of the defenders.' But, while formally reserving my opinion, I think I indicated not obscurely the view which I entertained, on a perusal of the English cases, if it had been necessary to express that view and decide the case upon it.

Now, the only difference—and, so far as I can see, it is not a material difference—between that case and this case is that there we were dealing with a mouse in a ginger-beer bottle, and here we are dealing with a snail in a ginger-beer bottle. *Quoad ultra* the circumstances appear to be identical.

Now, my Lords, if the opinions which were expressed by Lord Ormidale and Lord Anderson be sound, and if the opinion which I at any rate indicated, if I did not clearly express it, be sound, then it follows that the conclusion which the Lord Ordinary arrived at in this case, namely, that a proof is necessary, was a wrong conclusion. His Lordship held that the plea to relevancy tabled by the defenders was a bad plea, and repelled it. If the views which I have expressed are sound, that plea ought to have been sustained and not repelled.

We have been invited by Mr Milligan to re-consider the views which were expressed in *Mullen's* case, and to which I have drawn attention. I am bound to say that, having re-considered the whole matter in light of the cases to which reference was made on that occasion and on this, having read with attention the Lord Ordinary's Opinion, and having listened with care to the argument propounded by Mr Milligan at the Bar, my opinion remains unaltered. My view is that the averments of the pursuer in this case are irrelevant.

I think it unnecessary to detain your Lordships by going through the cases for a second time, seeing that they were so fully canvassed on a recent occasion in this Division. I will

only say that, if my view be right, it would seem to be unnecessary to go into the facts of the present case at all. The two questions are quite distinct, and it appears to be a convenient way—if it is a sound way—of disposing of this case to recall the Lord Ordinary's Interlocutor, and to dismiss the action. That is the view which I entertain, and which I suggest to your Lordships we should adopt.

(2) LORD ORMIDALE.

Lord Ormidale

My Lord, I agree. I think it is quite impossible for myself personally to go back upon the view of the law which I expressed in the previous case which has been referred to. Except for the distinction referred to by your Lordship, I think the circumstances of the present case are substantially identical. And, accordingly, I agree with your Lordship that we must recall the Interlocutor of the Lord Ordinary, and dismiss the action.

(3) LORD HUNTER.

Lord Hunter

I agree with your Lordships in thinking that the question raised in this case was raised under precisely similar circumstances in the case of *Mullen*, to which your Lordship has referred. In that case I dissented from the view taken by the majority of the Court. The judgment there proceeded upon the ground that the pursuer had failed to establish negligence against the defenders. At the same time, it is perfectly true that two of your Lordships expressly proceeded upon the ground that there had been a failure upon the part of the pursuer to

establish the preliminary plea that there was any duty on the part of the manufacturer to take reasonable care so far as the consumer of the manufactured article was concerned. I think there is no doubt that both Lord Ormidale and Lord Anderson made it an express ground of judgment. It is equally true, I think, as your Lordship has said, that what you did say in that case indicated fairly clearly that that also was the view entertained by your Lordship. At the same time, it was not made an express ground of judgment, but the opinion was reserved. The result of that seems to me to be this, that, as I read the opinion which I expressed in the case of *Mullen*, I am not under obligation in the present case to assent to the view which your Lordship proposes, upon the ground that the case is governed by the decision in *Mullen's* case.

All that I desire to say in this case is that I see no reason whatever, after the further argument presented, to alter the opinion which I there expressed. Notwithstanding the elaborate and interesting opinion expressed by the Lord Ordinary, I prefer to rest my opinion upon the grounds which I previously stated. As regards the Lord Ordinary's view, I have great difficulty in seeing, notwithstanding the circumstance that the English system of jurisprudence is different from the Scottish system of jurisprudence, that there can be any essential difference in the duty owned by the manufacturer of goods in England to customers who have actually consumed goods manufactured by him from the duty which is owed by a similar manufacturer in Scotland.

I, therefore, formally dissent from the course which your Lordship proposes, and I do so simply upon the ground I have indicated.

(4) Lord Anderson.

My Lords, in my opinion this case is indistinguishable in its facts from the case of *Mullen*. Mr Milligan submitted some arguments based upon a consideration of the same cases as were urged in the case of *Mullen*, but I see no reason to alter the opinion I expressed in *Mullen*, and I refer to what I said in that case, for the reasons which compel me to differ from the views expressed by the Lord Ordinary. I agree that the Lord Ordinary's Interlocutor must be recalled.