for double and treble damages for cutting and removing timber.[1]

Such is, in general, the law in Pennsylvania on the subject of EMINENT DOMAIN as is derived from an examination of the cases. The numerous Acts of Assembly (principally relating to railroad, municipal and other corporations, and to roads and highways), in a manner connected with the subject, merely regulate the exercise of the right and establish a method of procedure in certain instances. These legislative enactments are outside the scope of this paper and have only been referred to, incidentally, in connection with some of the cases considered.

ALFRED ROLAND HAIG.

Supreme Court of Pennsylvania.

JOHN G. CURTIN *v.* P. H. SOMERSET.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS, NO. 3, OF PHILADELPHIA COUNTY.

Argued January 27, 1891. Decided February 16, 1891.

SYLLABUS.

(1.) In order that a person who has been injured by an accident may hold another responsible therefor upon the ground of negligence, there must be a causal connection between the negligence and the hurt, and such causal connection must be uninterrupted by the interposition between the negligence and the hurt of any independent human agency.

(2.) A contractor for the erection of a hotel building who uses improper material in its construction and in other respects departs from the specifications embodied in his contract, so that the building when completed is structurally weak and unsafe, will not be liable to a guest of the hotel for an injury caused to him by such defective construction, but occuring after the owner has taken possession.

(3.) The contractor would be responsible to his employer for any loss sustained by the latter in consequence of his failure to erect the building in conformity with the requirements of the contract; but, to one who was not a party to the contract, and between whom and himself no confidence has been exchanged, he owes no duty which will support an action.

[1] *Bethlehem South Gas & Water Co.* v. *Yader*, 112 Pa. 136.

The facts of the case appear in the opinion of the court.

Opinion, MR. CHIEF JUSTICE PAXSON:

The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company, for the erection of a hotel building, at Sea Isle City, according to certain plans and specifications. The building was completed and accepted by the hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons, some twenty or more, having collected on the porch, a girder, which in part supported it, gave way, the porch fell, and by reason thereof the plaintiff was injured. He brought this suit in the court below against the contractor, to recover damages for the injury he thus sustained, with the result of a verdict in his favor for $4,000.

Upon the trial the defendant asked the court below to instruct the jury that if "Somerset, the defendant, was the contractor for the erection of the hotel in question for the Sea Isle City Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle City Hotel Company on June 30, 1880, which company accepted it; and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant." See first assignment. This point was refused, and it fairly presents the important question in the case.

The contention of the plaintiff is that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timbers inferior in size and quality to those called for by the plans were used; that these defects were not observable after the building was completed, and in point of fact were unknown to the company when it accepted the building from the contractor.

We must assume these allegations as substantially found by the jury, and the question arises, what is the responsibility of the contractor under such circumstances? That he would be responsible to the company for any loss sustained by it in

consequence of his failure to erect the building in conformity to the plans and specifications, may be conceded. There was a contractual relation between them, and for breach of a contract, not known to and approved by the company, he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for as before observed, there was no contract between the parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated as a general proposition that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty—the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that because A. is not responsible for an accident, B., or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it may be found in *Wharton on Negligence.* It is as follows: 2d ed., Sec. 438.

"There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency * * * Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain

such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection."

In Sec. 438, the same learned author refers to the case of a contract with the Postmaster-General to furnish certain road-worthy carriages; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built. "No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchanged between him and the contractor; and between them, breaking the causal connection is the postmaster-general, acting independently, forming a distinct legal centre of responsibilities and duties." This rule is distinctly recognized in *Winterbottom* v. *Wright*, 10 M. & W. 115. There, one Atkinson, contracted with the Postmaster-General to provide a mail-coach to carry the mail-bags over a certain route. The driver was injured while in this service from a hidden defect in the coach. In a suit by him against Atkinson, it was held that he could not recover, ALDERSON, J., saying: "The contract in this case was made with the Postmaster-General; and the case is just the same as if he had come to the defendant and ordered a carriage, and had handed at once over to Atkinson. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

Francis v. *Cockrell*, L. R. 5 Q. B. 501; *Heaven* v. *Pender*, 11 Q. B. 503; *Collis* v. *Selden*, L. R. 3 C. P. 495, and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by MARTIN, B., in *Francis* v. *Cockrell*, *supra*: "The law

of England looks at proximate liabilities as far as possible, and endeavors to confine liabilities to the persons immediately concerned." In *Losee* v. *Clute*, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction; and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action because of such injury against the manufacturer.

We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In *Godley* v. *Hagerty*, 20 Pa., 387, the builder was the owner, and he was properly held responsible for an inherent weakness in the building, by which an accident occurred. In *Carson* v. *Godley*, 26 Pa., 111, the warehouse was erected under the personal superintendence of the owner, and having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building in consequence of its insufficiency for the purpose for which it was erected and leased. In *Thomas* v. *Winchester*, 6 N. Y., 397, the Court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine and sends it so labeled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labeled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer.

We need not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason. The consequences of holding the opposite doctrine would be far reaching. If the contractor who erects a house, who builds a bridge or performs any other work; a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his

steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of opinion that the defendant's first point should have been affirmed. So, also, his second point, which asked for a binding instruction in his favor.

This disposes of the case, and we should stop here were it not that we do not wish any conclusions to be deduced from our silence in regard to the portions of the charge referred to in the fourth and fifth assignments. In these portions of the charge the learned Judge used very strong expressions in regard to the alleged departure of the contractor from his plans and specifications. When the Court characterizes such departure as "gross and almost criminal negligence," and "glaringly and knowingly done," "for which he could have no excuse, except the desire to increase his profits," the defendant has not much chance with the jury. Such intense expressions are ill-suited to a judicial charge, and may seriously interfere with a calm and impartial consideration of the facts by the jury. More than this, it was assuming the province of the jury, for the facts are for them. Were there nothing else in the case, we would reverse upon these assignments alone. We prefer, however, to place our decision upon a ground which controls the case.

(Judgment reversed).

"Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or on the tort." *Wharton on Negligence*, Sec. 435, *Addison on Torts*, 913; *Boorman* v. *Brown*, 31 Q. B., 526, 11 Cl. & F. 1; *Ives* v. *Carter*, 24 Conn., 392; *Butts* v. *Collins*, 13 Wend. 154; *Newman* v. *Fowler*, 37 N. J. L. 89.

But it is a rule well established that "where a tort arises out of a contract, only a party to the contract can sue." *Tollit* v. *Sherstone*, 5 M. & W. 283.

One who is not a party to a contract, but who sustains an injury as the result of negligence in the performance of any duty imposed by the contract, can not recover from the party who is guilty of negligence, unless the latter owes a duty to the plaintiff independent of such a contract.

As the law on subject is so well settled, this note must necessarily be confined to an examination of the cases, to show under what circumstances it

has held that there is a duty aside from a contract, and where it has been held there is a breach of contract only.

The leading case on this subject is *Winterbottom* v. *Wright*, 10 M. & W. 109, (1842), cited in the principal case. In the declaration the plaintiff averred, "whilst the said several contracts were in force, having notice thereof, and trusting and confiding in the contract between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure and proper state and condition for the purposes aforesaid, and not knowing, and not having any means of knowing to the contrary thereof, hired himself as mail-coach-man to drive and take the conduct of said mail-coach, which but for said contract he would not have done." And further averred that by reason of a latent defect of one of the mail-coaches furnished by said defendant under said contract, it broke down and he sustained injury. Upon demurrer the Court of Exchequer entered judgment for defendant upon the grounds already stated.

In *Blakemore* v. *The Bristol & Exeter Ry. Co.*, 8 E. & B. 1035, (1858), the defendants furnished, gratuitously, a crane for the use of consignees of goods, for the purpose of unloading. By reason of defects in its construction, the crane broke and Blakemore, a volunteer assisting the servants of a consignee, was injured. The Court of Queen's Bench held that plaintiff could not recover. COLERIDGE, J., in delivering the opinion of the Court, said: "A breach of duty is alleged in not providing a safe crane; and that duty under the circumstances, could only arise from the contract in law between the borrower and the lender; and to that contract James Blakemore was no wise privy."

In *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213, (1865), a master brought suit against the railway company to recover for loss of service of his servant, resulting from a personal injury sustained by the latter, through the negligence of the carrier. The contract by which the defendants agreed to carry the servant, was made with the latter, and not with the master.

The Court held that the duty of the defendant to safely carry the servant was not independent of the contract, but arose out of it, and that none but one of the stipulating parties could sue for a breach of a duty arising out of the contract, and therefore the plaintiff could not recover.

The rule is well recognized in this country.

In *Savings Bank* v. *Ward*, 100 U. S. 195, (1879), Ward, an attorney-at-law, who had been employed and paid solely by one Chapman to examine and report the title of the latter to a certain lot of ground, gave a certificate over his signature, stating that "the title of Chapman to the lot is good and the property unincumbered." The Savings Bank, with whom Ward had no contract or communication, relied upon this certificate as true and loaned money to Chapman, accepting as security therefor, a deed of trust of said lot. It appeared that Chapman had, previous to the time when certificate was given, sold the lot by a duly recorded conveyance and which Ward, by exercising a reasonable degree of diligence, could have discovered. The Supreme Court held that there being no privity of contract between the Savings Bank and Ward, the former could not recover for any loss sustained by reason of the certificate. See also *Kahl* v. *Love*, 37 N. J. L. 5, (1874); *Safe Co.* v. *Ward*, 46 N. J. L. 19, (1884); *Mayor* v. *Cunliff*, 2 Comstock 165, (1849); *Houseman* v. *B. & L. Association*, 81 Penn. 257 (1876); *Passenger R. Co.* v. *Stutler*, 54 Pa. 375, (1867); *Necker* v. *Murry*,

49 *Mich.* 517, (1831); the recent case of *Roddy* v. *Mo. Pac. R. R. Co.*, 140 Mo. 234 (1891).

Two reasons have been assigned for the rule.

In *Winterbottom* v. *Wright*, supra, ALDERSON, B., says: "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

In *Safe Co.* v. *Ward*, *supra*, DEPUE, J., says, in delivering the opinion of the Court: "The reason on which this doctrine rests is obvious. The object of the parties in inserting in their contract specific undertakings with respect to the work to be done, is to create obligations and duties *inter sese*. The engagements and undertakings must necessarily be subject to modifications waived by the contracting parties. If third persons can acquire a right in the contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of the control over their own contract, the employer will have taken from him the power to direct how the work shall be done, and the employé may find himself under responsibilities to third parties which do not exist between him and his employer."

Notwithstanding this general rule is so well settled, there are a number of cases which appear to be exceptions to it. Strictly speaking, however, these cases are not exceptions to the rule itself, but are instances of a duty being imposed upon one, not by a contract, but independent of a contract. As stated by Mr. Horace Smith, in his treatise on the Law of Negligence, page 7, (2d ed.): "The true question always is, has the defendant committed a breach of duty, apart from contract? If he has only committed a breach of contract he is liable only to those with whom he has contracted; but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person."

In *Heaven* v. *Pender*, L. R. 11, Q. B. D. 503 (1883), BRETT, M. R., lays down the following rule to ascertain when a duty is owing by one person to another: "Whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the persons and property of the others, a duty arises to use ordinary care and skill to avoid such danger."

In that case the defendant, a dock owner, supplied and put up staging outside a ship in his dock under contract with the ship owner. The plaintiff was a workman in the employ of a ship painter who had contracted with the ship owner to paint the outside of the ship, and in order to do the painting the painter went on and used the staging, when one of the ropes by which it was hung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured. In the Court of Appeal, it was held, reversing the Queen's Bench Division, that the plaintiff could recover.

The value of this case as an authority upon this point is questionable, as the Court, consisting of BRETT, M. R., COTTON and BOWEN, L. J. J., were divided upon the ground of reversal. BRETT, M. R., was of the opinion that the defendant must have known, if he had considered the matter at all, that the staging would not be used by the ship owner, and it would be used by such a person as the plaintiff, a working ship painter, and that, following the

rule already stated, the defendant owed a duty to the plaintiff to exercise ordinary care.

COTTON and BOWEN, L. J. J., were of the opinion that the plaintiff was entitled to judgment upon the ground that the plaintiff was upon staging engaged in business in which the dock owner was interested, and he must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incidents to the use of the dock. In addition, they stated that they were unwilling to concur with the Master of Rolls in laying down the broader principle.

In *Collis* v. *Seldon*, L. R. 3 C. P., 495 (1868,) declaration stated that the defendants wrongfully, carelessly, negligently and improperly hung a chandelier in a public house, knowing that the plaintiff and others were likely to be in said public house and near and under the chandelier, and that the chandelier, unless carefully and properly hung, was likely to fall upon and injure the plaintiff and others, and without giving any notice or warning to the plaintiff of the dangerous way in which the chandelier was hung, so as to enable him to protect himself; and that by means of the premises, and of the carelessness, negligence, wrongful and improper conduct of the defendant in that behalf, the chandelier fell upon the plaintiff whilst he was lawfully in the public house and unconscious of the danger, and greatly hurt him, etc. To this declaration a demurrer was filed on the ground that the declaration did not disclose any duty from the defendant to the plaintiff, for the breach of which the action would lie.

Judgment was entered for defendant upon the demurrer, as the declaration disclosed no duty owing by the defendant to the plaintiff.

In *Farrant* v. *Burnes*, 11 C. B. N. S., 553 (1862,) the defendant being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week) handed it to a servant of a Croydon carrier, without communicating to him (and their being nothing in its appearance to indicate) its dangerous nature. Whilst carrying this carboy to his coach it burst, and the contents flowed over the plaintiff, severely injuring him. The Court held the plaintiff liable, on the ground that it was the duty of the defendant, who knew the danger, to take care that the dangerous character of the article should be made known to all persons who were to be concerned in the carriage of it.

Brass v. *Maitland*, 6 El. & B., 470.

In *George* v *Skivington*, L. R. 5 Ex. 1 (1869,) declaration by Joseph George and Emma, his wife, that the defendant, in the course of his business, professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, without injury to the person using it, and to have been carefully compounded by him; that the plaintiff, Joseph George, thereupon bought of the defendant a bottle of the hair wash to be used by the plaintiff, Emma George, as the defendant then knew, and on the terms that it could be safely so used and had been carefully compounded, and alleging as a breach that the defendant had so negligently and unskillfully conducted himself in preparing and selling the hair wash, that by reason thereof, it was unfit to be used for washing the hair, whereby the plaintiff, Emma George, who used it for that purpose, was injured. On demurrer it was held that the declaration disclosed a good cause of action.

CLEASBY, B., said: "No person can sue on a contract but the person with whom the contract is made; and this undoubted proposition was attempted to be taken advantage of in *Langridge* v. *Levy*, 4 M. & W. 337."

"The answer was that admitting the proposition to be true, still the vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor. It was therefore held in that case that the boy who used the defective gun, and for whose use the defendant knew it was intended, had a good cause of action. Substitute the word "negligence" for "fraud" and the analogy between *Langridge* v. *Levy* and this case is complete." *Losee* v. *Clute*, 51 N. Y. 494 (1873).

In *Coughtry* vs. *Woolen Co.*, 56 N. Y. 124, (1874,) a firm contracted with the defendant to put a cornice on its mill, scaffolding required for that purpose to be erected by the firm free of cost to them. Plaintiff's intestate, a workman in the employ of the contractors, while engaged in the work, was killed by the fall of the scaffold created by the defendant, for that work. The plaintiff was nonsuited upon the ground that the defendant owed no duty to the deceased in respect to the construction of the scaffold, that the only duty resting upon the defendant in respect to the scaffold arose out of its contract with the contractors, and that it was therefore liable to them only for injury arising from negligence in its construction: Upon appeal this judgment was reversed, the Court of Appeals holding that the scaffold being erected upon its own premises for the express purpose of accommudating the workmen, a duty was imposed upon it towards them to use proper diligence in constructing and manufacturing the structure.

A familiar case of a duty independent of a contract and the consequent right of a third party to sue, is that of a physician and patient.

If A employs a physician to attend B, and the latter is injured by reason of unskillful treatment by the physician, B may recover damages for the injury.

The duty in such cases arises not from the contract of employment, but from the undertaking to treat the patient.

Peppin and Wife vs. *Sheppard*, 11 Price, 400, (1822.) In that case RICHARDS, C. B., says: "From the necessity of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient is the patient himself, for damages could not be given on that account to any other person, although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon has nothing to do with the action."

Gladwell vs. *Steggal*, 5 Bing., N. C., 292.

From the peculiar circumstances of the undertaking in that case, the only right of action is in the servant, and no action will lie by the master himself, who makes the contract, for loss of service of his servant, resulting from unskillful treatment by the physician.

Everard vs. *Hopkins*, 2 Bulst, 332.

Another illustration of the independent duty is that where the act of negligence is imminently dangerous to the lives of others. In such case the wrongdoer is responsible to the person injured, whether there be a contract between them or not.

The leading case of this class is *Thomas & Wife* v. *Winchester*, 2 Selden, 397 (1852). The defendant, engaged in putting up vegetable extracts, put up and sold to one Aspinwall, a druggist engaged in business in New York City,

a jar of "extract of belladonna" which was improperly labeled as "extract of dandelion." Aspinwall relying upon the label sold this belladona to a druggist of Cazenovia as extract of dandelion. The latter sold a portion of the same to Winchester, which was administered to the wife of the latter, by which she was greatly injured.

The Court held that the defendant was liable. In the opinion of the Court delivered by RUGGLES, C. J., much stress is laid upon the fact that it is a criminal act to falsely label poisonous medicines. He said, "In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel.

No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in the drug and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put a human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creating of that danger by the exercise of greater caution? Or that the exercise of that caution was a duty only to his immediate vendor whose life was not endangered? The defendant's duty arose out of the nature of his business and the damage to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market, and the defendant is justly responsible for the probable consequences of the act.

The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison mislabeled into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as an extract of dandelion by some person then unknown."

In *Loop* v. *Litchfield*, 42 N. Y., 351 (1870,) the defendants sold to one Collister a balance wheel, manufactured by them, which contained a visible defect, and which was called to the attention of the purchaser. This defect was a hole in the wheel, caused by the shrinkage in the casting, and by which the wheel was materially weakened. The defendants filled this cavity with lead, to secure which a bolt was inserted, which further weakened the wheel. It was then adjusted by defendants to certain machinery of Collister's, who used it for a period of about four years. At the end of that time it burst and a fragment struck and killed the plaintiff's intestate, who was using the machinery with the consent of the owner.

The Court held that the wheel was not a dangerous instrument and therefore the defendant was not liable. In delivering the opinion of the Court, HUNT, J., said: "The appellants recognize the principle of this decision (*Thomas* v. *Winchester*) and seek to bring their case within it, by asserting that the fly-wheel in question was a dangerous instrument. Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring-gun, a loaded rifle or the like. They are instruments and articles in their nature calculated to do an injury to mankind, and generally intended to accomplish that purpose. They are essentially and in their elements instruments of danger. Not so, however, is an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than

another. If the article is abused by too long use, or by applying too much weight or speed, an injury may occur as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit. There is scarcely an object in art or nature, from which an injury may not occur under such circumstances. Yet they are not in their nature sources of danger, nor can they with any regard to the accurate use of language, be called dangerous instruments. That an injury actually occurred by the breaking of a carriage axle, the failure of the carriage body, the falling to pieces of the chair or sofa, or the bursting of a fly-wheel, does not in the least alter its character.

" It is suggested that it is no more dangerous or illegal to label deadly poison as a harmless medicine than to conceal a defect in a machine and paint it over so that it will appear sound. Waiving the point that there was no concealment, but that the defect was fully explained to the purchaser, I answer that the decision in *Thomas* v. *Winchester* was based upon the idea that the negligent sale of poisons is both at common law and by statute an indictable offence. If the act in that case had been done by the defendant instead of his agent, and the death of Mrs. Thomas had ensued, the defendant would have been guilty of manslaughter as held by the Court. The injury in that case was a natural result of the act. It was just what was to be expected from putting falsely labeled poisons in the market, to be used by whosoever should need the true articles. It was in its nature an act imminently dangerous to the lives of others. Not so here. The bursting of the wheel and the injury to human life was not the result or expected consequence of the manufacture and sale of the wheel. Every use of the counterfeit medicine would be necessarily injurious, while the wheel was, in fact, used with safety for five years."

In *Davidson* v. *Nichols*, 11 Allen 514 (1866,) the defendant, who was a chemist sold to one Geyer, an apothecary, sulphide of antimony in mistake for black oxide of manganese. Geyer without opening the package sold this sulphide of antimony to the plaintiff as black oxide of manganese. The plaintiff believing this substance to be black oxide of manganese, proceeded to use it in combination with chlorate of potassia, with which it might safely be used, but from the combination of which with sulphide of antimony a dangerous explosion followed, by which the plaintiff was injured.

It was held that the plaintiff could not recover as the substance itself was not dangerous and become so only when used in a manner of which the defendants had no notice.

In *Roddy* v. *Mo. Pac. R. Co.*, 140 Mo. 234 (1891,) it was held that the a railway car with a defective brake was not imminently dangerous.

The principle enunciated in *Winchester* vs. *Thomas*, that when the act of negligence is imminently dangerous to the lives of others, any one who suffers from such negligence, no matter how remote, may recover, has been cited with approval by many writers, and in numerous cases, but it is believed that the principle has never been followed in any decided case, and it may be questioned whether, as suggested by Brett. M. R. in *Heaven* vs. *Pender*, the decision did no go too far.

Another ground upon which a few cases have decided is that of fraud.

In *Langridge* vs. *Levy*, 2 M. & W., 519, the declaration states that the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, for the use of himself and his sons, and the defendant then by falsely and fraudulently warranting the gun to have

been made by Nock, and to be a good, safe and secure gun, then sold the same to the plaintiff's father for the use of himself and his sons, whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence and improper conduct, in this, that the gun was not made by Nock, nor was a good, safe or secure gun, but, on the contrary thereof, was made by a very inferior maker to Nock, and was a bad, unsafe, ill-manufactured and inferior gun, and of wholly unsound and very inferior materials; all of which the defendant, at the time, and warranty of such sale, had notice: and that the plaintiff knowing and confiding in the said warranty, used the gun, which but for the warranty he would not have done; and that the gun being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded; whereby the plaintiff was greatly injured, etc. Upon motion in arrest of judgment the action was maintained. Baron Parke, said: "If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been *simply* delivered by the defendant without any contract or representation upon his part, to the plaintiff, an action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the leading one is that of *Paisley* v. *Freeman*, 3 T. R. 51 which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that must produce damage to him; if, instead of its being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate party to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference also that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction of the instrument to be delivered, in order to be so used by the plaintiff, although it does not appear that the defendant intended the false representation itself to be communicated to him. There is false representation made by the defendant, with a view *that the plaintiff should use the instrument* in a dangerous way, and, unless the representation had been made, the dangerous act would never have been made. Upon appeal this judgment was affirmed. 4 M. & W., 337.

In *Longmead and Wife* v. *Holliday*, 20 L. J. Ex. 430; 6 Eng. L. & Eq., 562, (1851) the declaration in case by Longmead and his wife stated that the defendant, who was the maker and seller of certain lamps called "Holliday's lamps," sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warrantry, attempted to use it,

but that in consequence of the insufficient materials with which it was constructed, it exploded and burnt her. At the trial the jury found that the accident had been caused by the defective nature of the lamp; but that the defendant was ignorant of this unsoundess, and had sold the lamp in good faith. This finding of the jury negativing any fraud on the part of the defendant, the Court of Exchequer held that the action could not be maintained by the wife, who was not a party to the contract.

Taking all these cases into consideration, it is evident that in many instances it is very difficult to determine whether the negligence complained of is a mere breach of contract, and for which only a party to the contract can sue, or whether it is a breach of contract which also constitutes a breach of duty owing to some third person, aside from such contract, and for which breach such third person may bring suit.

To ascertain when such independent duty exists it is evident that the contract itself must be excluded from consideration, and recourse must be had to the relations between the parties.

The rule enunciated by the Master of the Rolls in *Heaven* v. *Pender*, appears to be the true one to apply to determine whether such relations create any duty,

His remarks upon the application of this rule to the various cases, while but a *dictum*, is so instructive as to be worthy of quotation:

"Let us apply this proposition to the case of one person supplying goods or machinery, or instruments, or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person, under such circumstances that every one of an ordinary sense would if he thought, recognize at once that, unless he used ordinary care and skill, with regard to the condition of the things supplied or the modes of supplying it, there will be danger of injury to the persons or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition and manner of supplying such thing. And for a neglect of such ordinary care or skill as the consideration or manner of supplying such thing. And for neglect of such ordinary care or skill whereby injury happened, a legal liability arises, to be enforced by an action for negligence. This includes the care of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying it, if he thought that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering a defect which might exist, and where the things supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would be probably be means of observing any defects, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would probably not produce danger or injury to person or property."

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