

seriously hinder the proper and efficient administration of the act and prevent the development of the desired system of state accountability.

Various supplemental provisions deny the subrogation of insurance companies to the claimants' rights, and provide that a deduction shall be made from the claimant's claim equal to the amount which he has received from insurance companies.¹⁷³ Juries are eliminated.¹⁷⁴ Excessive attorneys' fees are discouraged by criminal sanctions.¹⁷⁵ Redress for claims in excess of \$25,000 is still to be obtained by legislative appeal.¹⁷⁶ Assignments of claims are prohibited.¹⁷⁷ The state is to pay only its proportionate share of the damage caused by its agent and a joint tortfeasor.¹⁷⁸ Short periods of limitation are established.¹⁷⁹ The exaggeration of a claim or the presentation of false evidence "with intent to defraud" bars the claim.¹⁸⁰ To encourage more efficient public service and yet not to impose too heavy a burden on public employees, the proposed statute provides for governmental redress from employees or officers, but only for "wilful" tortious invasions.¹⁸¹ While this provision departs from the view taken by the common law,¹⁸² it is in accord with modern justifications for vicarious liability of the private employer.¹⁸³

MANUFACTURERS' LIABILITY—*McPHERSON v. BUICK* COMES OF AGE

Cutting across the general problem of protecting the pocketbook of the consumer¹ is the problem of protecting the person of any member of the public, whether consumer, user, or bystander from injuries due to defects in chattels.² There have been two distinct judicial approaches to this latter problem: the

¹⁷³ § 16.

¹⁷⁵ § 18.

¹⁷⁷ § 7.

¹⁷⁹ §§ 5, 8, 14.

¹⁷⁴ § 8.

¹⁷⁶ § 20.

¹⁷⁸ § 12.

¹⁸⁰ § 19.

¹⁸¹ § 17. It is suggested that employees should not be free from ultimate liability in cases where there is "gross" negligence amounting to reckless conduct.

¹⁸² At common law, the agent was liable for negligence in performing his undertaking. See Mechem, Agency §§ 1274-80 (2d ed. 1914).

¹⁸³ Douglas, Vicarious Liability and the Administration of Risk, 38 Yale L. J. 584, 720 (1929).

¹ Soule, Consumer Protection, 4 Encyc. Soc. Sci. 282 (1931); Hamilton, Caveat Emptor, 3 Encyc. Soc. Sci. 280 (1930). Organizations such as Consumer's Research and Consumer's Union send informative periodical bulletins to members. In addition, significant attempts are being made to utilize the mass buying power of the consuming public through consumers co-operatives. Such non-legal means as these go far toward solving this problem.

² No less than eighty cases in tort alone have appeared in the appellate reports since 1928; in New York alone there have been sixteen cases in this interval. When the cases tried on warranty theory and the high percentage of all such cases that are tried in lower courts or settled out of court are also considered, the practical importance of the problem is clear.

first employs orthodox tort analysis;³ the second, the warranty of quality analysis.⁴ The difficulties of either approach have centered on the case of the plaintiff not in immediate privity of contract with the defendant maker.⁵ Considerable ingenuity has been expended in the law of warranty to justify suit by one in the chain of privity.⁶ But the warranty device cannot be used to extend relief to one totally outside the chain of privity. On the other hand this limitation is entirely accidental to the tort theory. The case of *McPherson v. Buick*⁷ brought to culmination a gradual recognition of this fact.

This liberation of tort theory from privity restrictions has been so gradual that an historical note is still relevant to a discussion of the present state of the law. In 1842 *Winterbottom v. Wright*,⁸ although perhaps not in point, is said to have established the rule that privity of contract was necessary to a suit in tort against the maker of a chattel. *Thomas v. Winchester*⁹ in 1852 was the first case to make an exception to the privity rule. In 1903 *Huset v. Case Threshing Ma-*

³ For a general discussion see: Bohlen, Basis of Affirmative Obligations in the Law of Torts, 53 U. of Pa. L. Rev. 209, 237, 337 (1905); Bohlen, Liability of Manufacturers to Persons Other than Their Immediate Vendees, 45 L. Q. Rev. 343 (1929); Feezer, Tort Liability of Manufacturers and Vendors, 10 Minn. L. Rev. 1 (1925); 40 Harv. L. Rev. 888 (1927).

⁴ 33 Col. L. Rev. 868 (1933).

⁵ Labatt, Negligence in Relation to Privity of Contract, 16 L. Q. Rev. 168 (1900); 30 Yale L. J. 607 (1921).

⁶ The majority view is still against recovery in the absence of privity. *Chysky v. Drake Bros.*, 235 N.Y. 468, 139 N.E. 576 (1923); 1 Williston, Sales § 244 (2d ed. 1924). But it has been suggested that the consumer is the third party beneficiary of the contract between the manufacturer and the dealer. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1920); 2 U. of Cin. L. Rev. 330 (1928); that the warranty is assigned by the dealer to the consumer. *Madouros v. Kansas City Coca-Cola Bottling Co.*, 90 S.W. (2d) 445 (Mo. 1936) (*semble*); that the advertising of the manufacturer is really an express warranty directly to the consumer. *Baxter v. Ford Motor Co.* 168 Wash. 456, 12 P. (2d) 409 (1932); 7 Wash. L. Rev. 351 (1932); that the dealer is really the agent of the manufacturer and not autonomous. *Steffen, Independent Contractor and the Good Life*, 2 Univ. Chi. L. Rev. 501, 519 (1935); that the warranty runs with the goods as a matter of policy. *Mazetti v. Armour & Co.* 75 Wash. 622, 135 Pac. 633 (1913); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920). The *Baxter* case is the only case allowing recovery to a sub-purchaser of a chattel other than food. A later case with almost identical facts is *contra*. *Chanin v. Chevrolet Motor Co.*, 15 F. Supp. 57 (Ill. 1935). A donee of the sub-purchaser has been allowed to sue on the theory that the warranty passed with the gift. *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 883, 111 So. 305, 307 (1927); see also *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920).

⁷ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁸ 10 M. & W. 109. Mr. Bohlen has vigorously contended that the case is out of point. Bohlen, Affirmative Obligations in the Law of Torts, 53 U. of Pa. L. Rev. 280-85 (1905).

⁹ 6 N.Y. 397. The defendant, a dealer in drugs, mislabeled belladonna, a deadly poison, as extract of dandelion. The court distinguished *Winterbottom v. Wright* and a series of similar although hypothetical cases: "No such imminent danger existed in those cases."

chine Co.,¹⁰ attempted to classify all the cases making exceptions to the rule into three categories, one of which, the inherent danger category,¹¹ caught the judicial fancy. Unfortunately the category rested on an illusory distinction. Except perhaps in rare cases, man does not make chattels which are inherently dangerous.¹² Such a chattel would be dangerous even if made and used properly. But chattels made for the ultimate consumer are dangerous only when improperly used, as an auto in the hands of a child, or when so defective that proper use is impossible. Even granting that it was desirable to limit recovery to those cases where the chattel endangered life and limb, the judicial inquiry should have been how dangerous is this defective chattel. Instead the courts discussed the hypothetical case of how dangerous the chattel would have been had it not been defective. But the decisions, of course, resulted in an erratic classification of those chattels which were most dangerous when defective.¹³ Finally in 1916,

¹⁰ 120 Fed. 865 (C.C.A. 8th 1903). The plaintiff's employer had purchased a thresher made by the defendant. The first day it was put into use, the belt on which the plaintiff was properly standing collapsed and he was injured. After deciding that a thresher was not inherently dangerous, the court nevertheless dismissed a demurrer because the plaintiff had alleged that the defendant knew of the defect.

¹¹ The other categories were: (1) where the defendant knows of the defect at time of transfer; (2) where the defendant invites the plaintiff to use the chattel on his premises. The second refers to an unrelated problem and the first has ceased to be of much importance because of the unlikelihood that the manufacturer will have actual knowledge. It does raise the problem of what constitutes adequate notice of the defect. See *Farley v. Standard Pyroxoloid Co.*, 271 Mass. 230, 171 N.E. 639 (1930) (dealer's failure to communicate notice of the defect to consumer should have been foreseen by maker); see also, *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S.W. 1047 (1911).

Judge Sanborn did not entirely read the inherent danger category into the earlier cases although he could not account for the two defective ladder cases allowing recovery. *Devlin v. Smith*, 89 N.Y. 470 (1882); *Shubert v. Clark*, 49 Minn. 331, 51 N.W. 1103 (1892). It probably finds its origin in *Loop v. Litchfield*, 42 N.Y. 351 (1870) (fly-wheel held not inherently dangerous); see also, *Losee v. Clute* 51 N.Y. 494 (1873) (boiler explosion).

The most remarkable feature of Judge Sanborn's opinion was not his codification of the law, but his apologia for the privity rule in negligence terms. In language which might well have come from Brett or Cardozo he states the general theory of liability for negligence and concludes: "It is a rational and fair deduction from the rules to which brief reference has been made that one who makes or sells a machine, building, a tool, or an article of merchandise fitted for a specific use is liable to the person who in the natural course of events uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale." And then he says that the only person likely to be injured is the party to the contract, who in a vast majority of these cases is the dealer who has bought not to use but to resell. For an elaborate criticism of the opinion, see Bohlen, *op. cit. supra* note 8.

¹² There are some chattels such as dynamite the use of which under circumstances in which harm is probable is nevertheless proper because of the social utility. But in none of these cases were the courts concerned with the imposition of absolute liability, as in the blasting cases; nor was the chattel in any case properly made. Thus the poison in *Thomas v. Winchester* was dangerous only because mislabelled.

¹³ Recovery granted: *Torgesen v. Schultz*, 192 N.Y. 156, 84 N.E. 956 (1908) (siphon bottle); *Herman v. Markham Air Rifle Co.*, 258 Fed. 475 (D.C. Mich. 1918) (air rifle). Recovery re-

in the *McPherson* case, Cardozo, J., sharply called to judicial attention that the real question was and always had been: How dangerous is this chattel with this defect?¹⁴

The *McPherson* case did not complete the attack on the privity rule. It left open three questions: whether protection should be extended to property interests, whether to those injured by minor batteries and whether also to bystanders injured by the chattel. Subsequent cases have answered all of these questions in the affirmative.¹⁵ But attempts to extend recovery to atypical property interests have been unsuccessful.¹⁶ The recognition that the inherent danger category is coextensive with dangerously defective chattels together with these extensions has played havoc with the privity rule. Although the cases still talk of exceptions to the privity rule,¹⁷ the exceptions literally are the rule. To-

fused: *Burkett v. Studebaker Bros.*, 126 Tenn. 467, 150 S.W. 421 (1912) (horse-driven carriages); *Simons v. Gregory*, 120 Ky. 116, 85 S.W. 751 (1905) (elevator, "Such an elevator cannot be distinguished from a defective steam boiler, a defective coach for the carriage of passengers, a defective wall, defective shelving in a storeroom, or a defective chandelier in a hotel, or the other things for which the maker was held not to be responsible to third persons injured thereby in the cases above cited." See also, *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S.W. 1009 (1915) (tobacco not food and hence not within the exceptions).

¹⁴ The same result has been reached in England. *Donoghue v. Stevenson*, [1932] A. C. 562; *Grant v. Australian Knitting Mills*, [1936] A.C. 85; 3 Univ. Chi. L. Rev. 673 (1936); 46 Yale L. J. 709 (1937). For a discussion of the opinion of Cardozo, J., as an example of the American judicial process see Radin, *Case Law and Stare Decisis*, 33 Col. L. Rev. 199 (1933).

¹⁵ Recovery allowed for slight battery: *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 Atl. 120 (1935); *contra*, ostensibly on other grounds, *Jaroniec v. C. O. Hasselbarth*, 131 Misc. 314, 228 N.Y.S. 302 (1928); *Cook v. Garside & Sons*, 259 N.Y.S. 947 (1932). Recovery denied for injury to property: *Tompkins v. Quaker Oats Co.*, 239 Mass. 147, 131 N.E. 456 (1921); *Windram Mfg. Co. v. Boston Blacking Co.*, 239 Mass. 123, 131 N.E. 454 (1921). Recovery allowed where chattel was dangerous to person and injured property: *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N.Y.S. 131 (1915); *Genesee County Patrons v. Sonneborn*, 263 N.Y. 463, 189 N.E. 551 (1934). Recovery allowed where chattel was dangerous only to property: *E. I. Dupont de Nemours v. Baridon*, 73 F. (2d) 26 (C.C.A. 8th 1934). See also, *Wright v. Holland Furnace Co.*, 186 Minn. 265, 243 N.W. 387 (1932); *Conn v. Lexington Utilities Co.*, 233 Ky. 230, 25 S.W. (2d) 370 (1930); *Monroe v. Guess*, 41 Ga. App. 697, 154 S.E. 301 (1930). The Restatement of Torts apparently regarded the question as open—§ 395 speaks only of "substantial bodily harm." Recovery granted to pedestrian: *Kalinowski v. Truck Equipment Co.*, 237 App. Div. 472, 261 N.Y.S. 657 (1933); see also, *Guinan v. Famous Players-Lasky Co.*, 267 Mass. 501, 167 N.E. 235 (1929); *Flies v. Fox Buick Co.*, 196 Wis. 196, 218 N.W. 855 (1928).

¹⁶ Recovery denied to candidate for office in suit against defendant maker for expenses of obtaining recount occasioned by a defect in voting machine. *Creedon v. Automatic Voting Machine Co.*, 243 App. Div. 339, 276 N.Y.S. 609 (1935). The inhibiting effect of the vestigial privity vocabulary was evident in the court's summary dismissal of the analogy to the *McPherson* case with the words: "Danger was not inborn in these voting machines." *Cf. Slatery v. Colgate*, 25 R.I. 220, 55 Atl. 639 (1903); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913) (injury to good will).

¹⁷ *Crane Co. v. Sears*, 168 Okla. 603, 35 P. (2d) 916 (1934); *Nehi Bottling Co. v. Thomas*, 236 Ky. 684, 33 S.W. (2d) 701 (1930); *Kalash v. Los Angeles Ladder Co.*, 1 Cal. (2d) 229, 34 P. (2d) 481 (1934); see note 16 *supra*.

day the rule restated is that the maker is not liable to those not in privity with him unless he is negligent. It is significant that the Restatement of Torts has abandoned the privity idiom and has examined the problem in terms of the reasonable man turned manufacturer.¹⁸

Courts have been so concerned with the question of whether the maker is under a duty to use due care that they have paid little attention to what would constitute such care. In any process of manufacture, however careful, the production of some defective chattels is inevitable. If negligence is to be meaningful as a criterion of liability there must be some basis for distinguishing those defects which are the result of negligence from those which are the result of chance. For purposes of discussion it may be said that negligence of the maker will be present either in the process of making or in the inspection.

Negligence in the process of making may be discussed on two levels: In the first place, the management may be negligent in selecting the pattern of making. In the second place, an individual workman may be negligent in failing to follow a proper pattern in making the chattel involved in litigation; in such case the master's liability is based not on negligence but on *respondeat superior*. A negligence determination on either level involves a consideration of three factors: (1) the mathematical possibility of harm; (2) the desirability of the product; (3) the facility of changing to a better method.¹⁹ On the first level, the progress of the useful arts will largely determine the reasonableness of a given pattern. On the second level, any deviation foreseeably causing harm will normally involve negligence, since there is seldom any social utility in such deviation. Consequently, once the deviation by an individual workman is shown, the question becomes whether the deviation would foreseeably cause a defect which in turn would foreseeably cause harm.

When both the use²⁰ and the user²¹ are normal and harm ensues, it is difficult to think of cases where the harm was not the probable consequence of the defect. Several recent cases which have refused recovery because the harm was said to be unforeseeable are explicable on other grounds. The courts may have

¹⁸ Rest., Torts, c. 14 (1934), particularly § 395.

¹⁹ Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1, 7 (1927).

²⁰ Recovery refused where use was abnormal. *Cheli v. Cudahy Bros.*, 267 Mich. 690, 255 N.W. 414 (1934) (eating pork raw); *Georgia Power Co. v. Robbins*, 47 Ga. App. 517, 171 S.E. 218 (1933) (running electric vibrator reducing machine so rapidly as to cause displacement of kidney); see also, *Dubbs v. Zak Bros.*, 33 Ohio App. 299, 175 N.E. 626 (1931) (wearing shoes which did not fit); *Schfranek v. Benjamin Moore Co.*, 54 F. (2d) 76 (D.C. N.Y. 1931); *Gouillon v. Ford Motor Co.*, 44 F. (2d) 310 (C.C.A. 6th 1930); *Moore v. Jefferson Distilling Co.*, 169 La. 1155, 126 So. 691 (1930) (third party lit match to see whether there was gas in drums shipped by defendant); *Waterman v. Liederman*, 60 P. (2d) 881 (Cal. App. 1936) (reckless driving); but see *Guinan v. Famous Players-Lasky Co.*, 267 Mass. 501, 167 N.E. 235 (1929).

²¹ Recovery denied where the plaintiff was peculiarly susceptible to the harm. *Walstrom Optical Co. v. Miller*, 59 S.W. (2d) 895 (Tex. 1933); *Karr v. Inecto*, 247 N.Y. 360, 160 N.E. 398 (1928) (hair dye). For burden of proof of idiosyncrasy, see *Cahill v. Inecto*, 208 App. Div. 191, 203 N.Y.S. 1 (1924).

been unwilling to allow recovery for minor batteries²² or to allow recovery when the defect produced harm of unexpected magnitude.²³ In making the determination of whether there has been negligence in inspection, factors such as the cost of effective inspection, the magnitude of the possible harm, the reasonableness of sampling as a method of inspection, and the relevance of business custom are to be considered.²⁴

When we turn from definition to proof, negligence does become almost meaningless as a criterion of liability. The ability of the plaintiff to prove negligence by circumstantial evidence tends to spell absolute liability for the defendant.²⁵ This results not so much from a desire on the part of the courts to impose such liability as from the inevitable paucity of evidence in the defendant's favor. The plaintiff by establishing that he was injured by a chattel which was made by the defendant and which was used properly raises an inference of negligence²⁶ which either entitles him to go to the jury or shifts the burden of going forward to the defendant.²⁷ In rebuttal the defendant may attempt to show: (1) that the defect was not present at the time of transfer; (2) that the defect, if present,

²² See note 15 *supra*. Byers v. Flushovalve Co., 160 N.Y.S. 1050 (1916) (hand injured by breaking of handle); *contra*, Clark v. Standard Mfg., 8 N.J. Misc. 284, 149 Atl. 828 (1930); Osheroff v. Rhodes-Burford Co., 203 Ky. 408, 262 S.W. 583 (1924) (porch swing); Spiegel v. Libby, McNeil & Libby Inc., 244 N.Y.S. 654 (1930) (concealed pin); *contra*, La Frumento v. Kotex Co., 226 N.Y.S. 750 (1928) (pin in sanitary napkin); see also, Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157 (1909).

²³ Field v. Empire Case Goods Co., 179 App. Div. 253, 166 N.Y.S. 508 (1917) (collapse of bed; injury serious because plaintiff was pregnant); Sherwood v. Lax & Abowitz, 259 N.Y.S. 949 (1932) (defective heel caused plaintiff to fall downstairs).

²⁴ Marsh Wood Products Co. v. Babcock & Wilcox, 207 Wis. 209, 240 N.W. 392 (1932); Kalash v. Los Angeles Ladder Co., 1 Cal. (2d) 229, 34 P. (2d) 481 (1934); Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932). See also Martin v. Studebaker, 133 Atl. 384 (N.J. 1926) (assembler of parts satisfies duty if he buys from reputable maker).

²⁵ Although the court does not usually make it explicit, the plaintiff is relying on *res ipsa loquitur*. See Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W. (2d) 701 (1930). On *res ipsa* in general see Prosser, Procedural Effect of *Res Ipsa Loquitur*, 20 Minn. L. Rev. 241 (1936); 3 Univ. Chi. L. Rev. 126 (1935). Since one of the so-called requirements for a *res ipsa* case is possession in the defendant at the time of the accident and since in none of these cases does the defendant have possession, the defendant's lawyer can trouble the court by invoking the doctrine by name. 5 Wigmore, Evidence § 2509 (2d ed. 1923); Miller v. Steinfeld, 174 App. Div. 337, 160 N.Y.S. 800 (1916); Doughnut Mach. Corp. v. Bibby, 65 F. (2d) 634 (1933); and for a *reductio ad absurdum*, see Kilgore v. Shephard Co., 52 R.I. 151, 158 Atl. 720 (1932).

²⁶ The inference requires two steps. From the facts of the accident, the existence of a defect in the chattel immediately prior to and the cause of the accident is inferred. From the existence of the defect the negligence of the defendant is inferred. See Breck v. Rollaway Motor Co., 23 Ohio App. 79, 155 N.E. 147 (1926); Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934) (accident did not establish defect); Kramer v. Mills Lumber Co., 24 F. (2d) 313 (C.C.A. 8th 1928) (defect did not establish negligence).

²⁷ For an extensive analysis of the procedural effect of *res ipsa* see Heckel and Harper, The Effect of the Doctrine of *Res Ipsa Loquitur*, 22 Ill. L. Rev. 724 (1928); Prosser, *op. cit. supra* note 14.

was not a foreseeable consequence of the process of making; (3) that the defect was not discoverable by reasonable inspection. Proof is made difficult by the fact that the precise nature of the defect is frequently not known since the chattel causing the injury is generally the only one of the lot that is defective and since it is more or less demolished by the accident. Further difficulty is introduced by the minute specialization and the volume production characteristic of the modern factory. Determination of the first proposition of the defendant's rebuttal involves weighing the possibility that the defect was present at the time of transfer against the possibility that it was introduced subsequently. Even if the defendant attempts to show that the defect was not present at the time of transfer by showing that it would have been discovered by the customary inspection, there nevertheless remains the plausible possibility that in this one case there was a deviation from the customary care. If, however, a court wishes to conclude that the defect was not present at the time of transfer it must explain its subsequent appearance. When there has been a substantial lapse of time this is easy since no one imputed negligence to the maker of the one horse shay when it finally broke.²⁸ If there is no lapse of time the court must deny the existence of the defect,²⁹ ascribe it to the whim or malevolence of a stranger or impute fraud to the plaintiffs.³⁰

The fact that there has been as yet little positive evidence of or outcry against fraud is not significant because the doctrine of maker's liability is still too novel to have had its possibilities fully exploited. Since plaintiffs are less willing to undergo serious injury as the price of faked claims, restriction of recovery to cases of serious injury will tend to minimize the possibilities of fraud. In fact the courts on one ground or another seem to have been making this restriction.³¹ However, the exposé of auto accident rackets indicates that a discouragingly large number of people are willing to undergo or simulate serious injury.³²

²⁸ *Lynch v. International Harvester Co.*, 60 F. (2d) 223 (C.C.A. 10th 1932) (five year interval destroyed possibility of proving negligence in making thresher); but *cf.* *Reed & Barton Co. v. Maas*, 73 F. (2d) 359 (C.C.A. 1st 1924) (seven year interval did not destroy possibility of proving negligence in making coffee urn).

²⁹ *Swenson v. Purity Baking Co.*, 183 Minn. 289, 236 N.W. 310 (1931); Prosser, *op. cit. supra* note 25, at 269.

³⁰ Llewellyn, *On Warranty of Quality and Society*, 36 Col. L. Rev. 699, 704 n. (1936). A survey of litigation over foreign substances in tobacco is suggestive: *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S.W. 1009 (1915) (bug); *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918) (decaying human toe); *R. J. Reynolds Co. v. Loftin*, 99 So. 13 (Miss. 1924) (small snake); *Foley v. Liggett & Myers Tobacco Co.*, 241 N.Y.S. 233 (1930) (dead mouse); *Liggett & Myers Tobacco Co. v. Rankin*, 246 Ky. 65, 54 S.W. (2d) 612 (1932) (woolly worm); *Corum v. R. J. Reynolds Tobacco Co.*, 205 N.C. 213, 171 S.E. 78, (1933) (fish hook); *Liggett & Myers Tobacco Co. v. Wallace*, 69 S.W. (2d) 857 (Tex. 1934) (bits of metal); *Keith v. Liggett & Myers Tobacco Co.*, 207 N.C. 645, 178 S.E. 90 (1935) (bug). But see 37 Col. L. Rev. 77 (1937).

³¹ See notes 15, 22 *supra*.

³² *Arnold, Faking Car Accidents*, 143 Nation 601 (Nov. 21, 1936).

Thus far this note has proceeded on the assumption that negligence is a desirable criterion of liability. But this assumption is subject to the challenge that fault is an outmoded and inadequate criterion and that the real question is one of distributing all the risks of defective chattels on those best able to prevent the defects, to absorb the initial impact of liability, and to redistribute it as widely as possible through insurance and increase in prices.³³ The extension of this approach to the present problem would compel some recognition of the diverse distribution patterns involved in marketing chattels.³⁴ A new pattern consisting of many small manufacturers and one dominant retailer has, with the appearance of the chainstore, taken its place beside the orthodox pattern of large manufacturer-jobber-small retailer. It has been properly suggested that in such cases the ultimate liability be placed on the seller.³⁵ But to what extent judicial notice can feasibly be taken of the variety of patterns in between is questionable.

The attempt made by the Columbia University Committee to Study Compensation for Automobile Accidents, to extend the mechanics of workmen's compensation to automobile compensation³⁶ suggests the possibility of similar extension to the instant problem. Primarily three changes from the existing law would be involved: (1) the explicit imposition of absolute liability for defective chattels upon the manufacturer or the dominant link in the distribution chain; (2) the abolition of the injured party's common law action and the substitution of fixed awards by a board; (3) the imposition of compulsory insurance on the dominant link in the distribution chain. The explicit imposition of absolute liability would probably produce little change in the outcome of cases. Taking the measuring of damages away from capricious juries and minimizing the delay and expense of redress are both highly desirable. But the difficulties confronting the framers of the auto compensation plan when they attempted to schedule the kinds of injuries and fix awards cannot here be ignored.³⁷ Insurance

³³ See generally, Laski, *Basis of Vicarious Liability*, 26 *Yale L. J.* 105 (1916); Steffen, *Independent Contractor and the Good Life*, 2 *Univ. Chi. L. Rev.* 501 (1935).

³⁴ 37 *Col. L. Rev.* 77 (1937). The courts have partially recognized the facts of marketing: thus where the defendant does not make but distributes under his own name, he is liable as a manufacturer. *Burkhardt v. Armour Co.*, 115 *Conn.* 249, 161 *Atl.* 385 (1932); *Swift & Co. v. Hawkins*, 174 *Miss.* 253, 164 *So.* 231 (1935); *Rest.*, *Torts* § 400 (1934); and the maker of parts is liable as a manufacturer. *Smith v. Peerless Glass Co.*, 259 *N.Y.* 292, 181 *N.E.* 576 (1932); *White Sewing Mach. Co. v. Feisel*, 38 *Ohio App.* 152, 162 *N.E.* 633 (1927).

³⁵ 37 *Col. L. Rev.* 77 (1937).

³⁶ See Report to Columbia University Council for Research in the Social Sciences by the Committee to Study Compensation for Automobile Accidents. As a result of investigating 8,849 cases the committee suggested the compensation plan. On the plan see Ballantine, *Compensation for Automobile Accidents*, 18 *A.B.A.J.* 221 (1932); Smith, Lilly, Dowling, *Compensation for Automobile Accidents: A Symposium*, 32 *Col. L. Rev.* 785 (1932). See also Brown, *Automobile Accident Litigation in Wisconsin*, 10 *Wis. L. Rev.* 170 (1935); 46 *Yale L. J.* 713 (1937).

³⁷ This feature of the plan has been severely criticized. Lilly, *op. cit. supra* note 36; Brown, *op. cit. supra* note 36.

is of course desirable as a way of getting financially responsible defendants, but the tendency of such a scheme to rapidly augment the costs of insurance must also be considered.³⁸ In general these changes would require legislation and raise constitutional objections which, however, are not insuperable. A satisfactory appraisal of the necessity and expediency of such a plan must await an investigation similar to that made as a basis for the auto compensation plan. Until then the public must be content with judicial protection which grows increasingly satisfactory.

To go from no liability to absolute liability within a hundred years is no small step. Perhaps Lord Abinger had this in mind when he said: "Unless we confine the operations of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."³⁹

SURETYSHIP RELEASES IN THE LAW OF MORTGAGES

Recent application of a familiar suretyship rule to cases in which a mortgagor's grantee had not assumed the mortgage debt offers a practical reason for investigating the bases of the rule.¹ This rule—releasing a surety when, without his consent, the creditor has contracted to extend time to the principal debtor—has frequently been the target of authoritative criticism.² Little or no attention, however, has been paid to its mortgages counterpart—releasing a mortgagor when time has been extended by the mortgagee to a grantee of the mortgaged land. A discussion of the desirability of releasing a mortgagor involves an examination not only of the propriety of the analogy but of the reasons for the suretyship rule and its application in practice. Even though the analogy may be found to be a poor one, the frequency with which courts extend the suretyship rule to mortgage cases and the desirable results reached in certain of these cases³ make an inquiry into the nature and scope of the suretyship rule a necessary preliminary.

THE SURETYSHIP RULE

THE SURETY'S LOSS OF RIGHTS

Regardless of the rule's comparatively modern origin in 1789⁴ it is usually considered a well-settled doctrine of suretyship.⁵ The traditional justification

³⁸ Under a compulsory automobile insurance plan in Massachusetts the cost of insurance doubled. *Lilly, op. cit. supra* note 36.

³⁹ *Winterbottom v. Wright*, 10 M. & W. 109, 113 (1842).

¹ *Kazunas v. Wright*, 286 Ill. App. 554, 4 N.E. (2d) 118 (1936).

² *Cardozo, The Nature of the Judicial Process* 153 (1925); 4 *Williston, Contracts* § 1225 (2d ed. 1936); *Durfee, Book Review*, 17 *Corn. L. Q.* 707 (1932).

³ See p. 479 *supra*.

⁴ *Nisbet v. Smith*, 2 Bro. C.C. 579 (1789); *Ames, Cases on Suretyship* 156, n. 1 (1901).

⁵ 4 *Williston, Contracts* § 1222 (2d ed. 1936).