[PRIVY COUNCIL.]

GRANT . . . . . APPELLANT;

AND

AUSTRALIAN KNITTING MILLS, LIMITED, AND OTHERS . . . . . RESPONDENTS.

J. C.*
1935
Oct. 21.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Sale of Goods—Woollen Underwear—Defective Condition—Chemical Irritant—Latent Defect—Dermatitis contracted—Breach of Implied Condition—Retailer liable in Contract—Negligence in Manufacture—Liability in tort—South Australia Sale of Goods Act, 1895 (58 & 59 *Vict. No.* 630), *s.* 14, *sub-ss.* 1, 2.

The appellant, who contracted dermatitis of an external origin as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found, had been negligently left in it in the process of manufacture, claimed damages against both retailers and manufacturers:—

Held, first, that the retailers were liable in contract for breach of implied warranty or condition under exceptions (i.) and (ii.) of s. 14 of the South Australia Sale of Goods Act, 1895 (identical with s. 14 of the English Sale of Goods Act, 1893).

Medway Oil and Storage Co., Ld. v. *Silica Gel Corporation* (1928) 33 Com. Cas. 195; and *Cammell Laird & Co., Ld.* v. *Manganese Bronze and Brass Co., Ld.* [1934] A. C. 402 referred to.

The presence of the deleterious chemical in the garment was a hidden and latent defect, and could not be detected by any examination that could reasonably be made; nothing happened between the making of the garment and its being worn to change its condition; and the garment was made by the manufacturers for the purpose of being worn exactly as it was worn in fact by the appellant.

Held, that those facts established a duty to take care as between the manufacturers and the appellant for the breach of which the manufacturers were liable in tort.

Principle of *Donoghue* v. *Stevenson* [1932] A. C. 562 applied.

That principle can be applied only where the defect is hidden and unknown to the customer or consumer.

The liability in tort was independent of any question of contract.

Judgment of the High Court of Australia (*Australian Knitting Mills, Ld.* v. *Grant* 50 C. L. R. 387) reversed.

* *Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD MACMILLAN, LORD WRIGHT, and SIR LANCELOT SANDERSON.

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APPEAL (No. 84 of 1934), by special leave, from a judgment of the High Court of Australia (August 18, 1933), reversing the judgment of the Supreme Court of South Australia (March 13, 1933).

The appellant, Richard Thorold Grant, a fully qualified medical man practising at Adelaide, South Australia, brought an action against the respondents, Australian Knitting Mills, Ld., and John Martin & Co., Ld., claiming damages on the ground that he had contracted dermatitis by reason of the improper condition of some " Golden Fleece " woollen underwear purchased by him from John Martin & Co., Ld., retailers, on June 3, 1931, and manufactured by the Australian Knitting Mills, Ld. He alleged that he began to wear the underwear on June 28, 1931, and that on the next day he became ill of a dermatitis which gradually developed into an acute form. The dermatitis, he pleaded, was caused by a chemical irritant —free sulphite—which the respondents, Australian Knitting Mills, Ld., had negligently omitted to remove in the process of manufacture, and he alleged that in breach of warranty the underwear was not fit for the purpose for which it was required and was not of a merchantable quality, and that the respondents, Australian Knitting Mills, Ld., had in breach of their duty to him not used due or proper care in the manufacture of the underwear. He claimed damages from both respondents.

The respondents denied liability.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court of South Australia (Murray C.J.) found that the dermatitis was caused by bisulphite of soda in at least one pair of the underpants, and he gave judgment for the appellant for 2450*l.* The form of the judgment was against both respondents for a single amount.

An appeal to the High Court of Australia (Starke, Dixon and McTiernan JJ.; Evatt J. dissenting) was allowed. The appeal is reported at 50 C. L. R. 387.

Dixon and McTiernan JJ. were of opinion that the evidence was not sufficient to make it safe to find for the appellant.

Starke J. accepted substantially the findings of Murray C.J., but differed from him on his general conclusions of liability based on those findings.

1935. July 1, 2, 4, 5, 8, 9, 11, 12, and 15. *G. P. Glanfield* and *P. J. H. Heycock* for the appellant. The question is whether the appellant suffered from dermatitis caused by a chemical agent in the garment. It was irrelevant whether his skin was normal or not. The degree of care owed by the manufacturer involved the special duty of rendering the garment safe and innocuous, or of protecting by warning or otherwise. Reliance was placed on *In re Polemis and Furness, Withy & Co.* (1) and on *Belhaven and Stenton Peerage* (2) where Lord Cairns, dealing with circumstantial evidence, said: "We have to consider the weight which is to be given to the united force of all the circumstances put together." On the question whether the appellant suffered from dermatitis caused by external cause it was necessary to consider the purely medical evidence and the whole history of the case. The general principles involved were dealt with in *Donoghue* v. *Stevenson* (3), in *Ballard* v. *North British Ry. Co.* (4), and in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* (5) The liability of the manufacturers in tort was founded on *Donoghue's* case (3) as expressed in the judgment of Lord Atkin. (6) Liability in respect of breach of implied condition depended on the decision in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* (5), where Lord Wright said: "The condition of fitness may in proper cases be implied where it was only in some respects that the buyer relied on the seller's skill and judgment." The sale of the underclothes was a sale by description, and a condition that they were of merchantable quality was to be implied. They were not of merchantable quality. On the question of fact that the Chief Justice had an opportunity of seeing and hearing the

(1) [1921] 3 K. B. 560.
(2) (1875) 1 App. Cas. 278, 279.
(3) [1932] A. C. 562.
(4) 1923 S. C. (H. L.) 43.
(5) [1934] A. C. 402, 429.
(6) [1932] A. C. 599.

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witnesses, and of forming his opinion as to reliability, see *Powell* v. *Streatham Manor Nursing Home.* (1)

Wilfrid Greene K.C., *Wilbur Ham K.C.* (of the Australian Bar), and *Ian C. Baillieu* for the respondents. *Heaven* v. *Pender* (2) dealt with a special class of person, while in *Donoghue* v. *Stevenson* (3) the manufacturer had so conducted himself that he was in effect handing the subject-matter direct to the ultimate consumer. The essence of that decision was that the relationship must be absolutely direct. There is no duty if there is no immediate relationship. The appellant, to succeed, must get right into that category of immediate relationship. It was the conduct of the manufacturer in treating the article in such a way that it went direct to the consumer without intermediate intervention that imposed on him the duty of taking care that the consumer was not injured. That was the real decision in *Donoghue's* case. (3) The manufacturers in the present case owed no duty to the appellant. [Counsel read a number of extracts from the judgments in *Donoghue's* case.] Lord Atkin (3) founded that duty on the fact that the consumer was so closely and directly affected by an act that the manufacturer ought reasonably to have had him in contemplation as being affected. Lord Thankerton (4) laid down that to establish the existence of the duty the method of dealing by the manufacturer must be such as intentionally to exclude interference with or examination of the article by any intermediate person. Lord Macmillan (4) said that responsibility ceases when control ceases. The principle laid down by Lord Atkin in *Donoghue's* case (4) was that where a manufacturer so dealt with goods as to establish a direct proximity between himself and the ultimate consumer, and there was no reasonable opportunity of inspection intervening between delivery by the manufacturer and the taking into effective consumption, then the manufacturer has a duty to take care that the consumer is not injured. That involved a very far-reaching proposition which might be extended to a variety

(1) [1935] A. C. 243.
(2) (1883) 11 Q. B. D. 503.
(3) [1932] A. C. 562, 580.
(4) Ibid. 603, 622, 662.

of things. What was true of the facts in *Donoghue's* case (1) was not true of the facts in the present case, where the garments might be handled and inspected by others before reaching the appellant. The finding of negligence by Murray C.J. was against the weight of evidence. There was no warranty or condition of fitness for any particular purpose on the part of the retailers. [Reference was also made to *Dominion Natural Gas Co., Ld.* v. *Collins & Perkins* (2) and to *Farr* v. *Butters Bros. & Co.* (3), in which *Donoghue's* case (4) was discussed in the Court of Appeal.]

Glanfield replied.

Oct. 21. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellant is a fully qualified medical man practising at Adelaide in South Australia. He brought his action against the respondents, claiming damages on the ground that he had contracted dermatitis by reason of the improper condition of underwear purchased by him from the respondents, John Martin & Co., Ld., and manufactured by the respondents, the Australian Knitting Mills, Ld. The case was tried by Sir George Murray, Chief Justice of South Australia, who, after a trial lasting for twenty days, gave judgment for the appellant against both respondents for 2450*l.* and costs. On appeal the High Court of Australia set aside that judgment by a majority. Evatt J. dissented, and agreed in the result with the Chief Justice though he differed in regard to the Sale of Goods Act, 1895. Of the majority, the reasoning of Dixon J., with whom McTiernan J. concurred, was in effect that the evidence was not sufficient to make it safe to find for the appellant. Starke J., who accepted substantially all the detailed findings of the Chief Justice, differed from him on his general conclusions of liability based on these findings.

The appellant's claim was that the disease was caused by the presence, in the cuffs or ankle ends of the underpants

(1) [1932] A. C. 562, 603, 622, 662.
(2) [1909] A. C. 640.
(3) [1932] 2 K. B. 606.
(4) [1932] A. C. 562.

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which he purchased and wore, of an irritating chemical, namely, free sulphite, the presence of which was due to negligence in manufacture, and also involved on the part of the respondents, John Martin & Co., Ld., a breach of the relevant implied conditions under the Sale of Goods Act.

The underwear, consisting of two pairs of underpants and two singlets, was bought by the appellant at the shop of the respondents, John Martin & Co., Ld., who dealt in such goods, and who will be hereafter referred to as "the retailers," on June 3, 1931. The retailers had in ordinary course at some previous date purchased them with other stock from the respondents, the Australian Knitting Mills, Ld., who will be referred to as the manufacturers; the garments were of that class of the manufacturers' make known as Golden Fleece. The appellant put on one suit on the morning of Sunday, June 28, 1931; by the evening of that day he felt itching on the ankles but no objective symptoms appeared until the next day, when a redness appeared on each ankle in front over an area of about $2\frac{1}{2}$ inches by $1\frac{1}{2}$ inches. The appellant treated himself with calomine lotion, but the irritation was such that he scratched the places till he bled. On Sunday, July 5, he changed his underwear and put on the other set which he had purchased from the retailers; the first set was washed and when the appellant changed his garments again on the following Sunday he put on the washed set and sent the others to the wash; he changed again on July 12. Though his skin trouble was getting worse, he did not attribute it to the underwear, but on July 13 he consulted a dermatologist, Dr. Upton, who advised him to discard the underwear, which he did, returning the garments to the retailers with the intimation that they had given him dermatitis; by that time one set had been washed twice and the other set once. The appellant's condition got worse and worse; he was confined to bed from July 21 for seventeen weeks; the rash became generalized and very acute. In November he became convalescent and went to New Zealand to recuperate. He returned in the following February, and felt sufficiently recovered to resume his practice, but soon had

a relapse, and by March his condition was so serious that he went in April into hospital, where he remained until July. Meantime, in April, 1932, he commenced this action, which was tried in and after November of that year. Dr. Upton was his medical attendant throughout and explained in detail at the trial the course of the illness and the treatment he adopted. Dr. de Crespigny also attended the appellant from and after July 22, 1931, and gave evidence at the trial. The illness was most severe, involving acute suffering, and at times Dr. Upton feared that his patient might die.

It is impossible here to examine in detail the minute and conflicting evidence of fact and of expert opinion given at the trial: all that evidence was meticulously discussed at the hearing of the appeal before the Board. It is only possible to state briefly the conclusions at which their Lordships, after careful consideration, have arrived.

In the first place, their Lordships are of opinion that the disease was of external origin. Much of the medical evidence was directed to supporting or refuting the contention, strenuously advanced on behalf of the respondents, that the dermatitis was internally produced and was of the type described as herpetiformis, which is generally regarded as of internal origin. That contention may now be taken to have failed: it has been rejected by the Chief Justice at the trial, and in the High Court by Starke and Evatt JJ., and, in effect also, by Dixon and McTiernan JJ. The evidence as to the symptoms and course of the disease given by the two doctors who attended the appellant is decisive: dermatitis herpetiformis is an uncommon disease, of a type generally not so severe as that suffered by the appellant, and presenting in general certain characteristic features, in particular, bullae or blisters and symmetrical grouping of the inflammatory features, which were never present in the appellant. Dr. Wigley, a very eminent dermatologist, who examined the appellant, and as an expert gave evidence in support of the doctors who actually attended him, expressed his opinion that all dermatitis had an external origin, but whether he was right in this or not, he was confident that in the appellant's

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case the origin of the disease was external, and on all the evidence their Lordships accept this view.

But then it was said that the disease may have been contracted by the appellant from some external irritant the presence of which argued no imperfection in the garments, but which only did harm because of the appellant's peculiar susceptibility. Thus the disease might have been initiated by the mechanical irritation of the wool itself, or if it was due to some chemical ingredient in the garments, that might have been something in itself harmless, either because of its character or because of the actual quantity in which it was present, so that the mischief was attributable to the appellant's own physical defect and not to any defect in the garments; the respondents, it was said, could not be held responsible for anything in the garments which would not be harmful in normal use. Two issues were thus involved; one, was the appellant's skin normal? and the other, was there in the garments, or any part of them, a detrimental quantity of any mischievous chemical?

The Chief Justice held that the appellant's skin was normal. He had habitually up to the material time worn woollen undergarments without inconvenience; that he was not sensitive to the mechanical effects of wool seemed to be proved by an experiment of his doctors, who placed a piece of scoured wool on a clear area on his skin and found, after a sufficient interval, no trace of irritation being produced. It was said that he had suffered from tuberculosis some years before, and that the disease had merely been arrested, not eliminated, and it was then said that tuberculosis made the patient more susceptible to skin disease, because it weakens the resistance of the skin and lowers the patient's vitality. But this contention did not appear to be established. It was admitted that the appellant's skin had by reason of his illness become what is denominated "allergic," that is, unduly sensitized to the particular irritant from which he had suffered; but that could throw no light on the original skin condition. A point was made that a skin ordinarily normal might transiently and unexpectedly show a peculiar sensitivity, but

that remained a mere possibility which was not developed and may be ignored. In the result there does not seem any reason to differ from the Chief Justice's finding that the appellant's skin was normal.

What then caused this terrible outbreak of dermatitis? The place and time of the original infection would seem to point to the cause being something in the garments, and in particular to something in the ankle ends of the underpants, because the inflammation began at the front of the shins where the skin is drawn tight over the bone, and where the cuff of the pants presses tightly under the socks against the skin, and began about nine or ten hours after the pants were first put on. The subsequent virulence and extension of the disease may be explained by the toxins produced by the inflammation getting into the blood stream. But the coincidence, it was pointed out, was not sufficient proof in itself that the pants were the cause. The appellant then relied on the fact that it was admitted in the respondents' answers to interrogatories that the garments, when delivered to the retailer by the manufacturers, contained sulphur dioxide, and on the fact that the presence of sulphur dioxide indicated the presence of free sulphites in the garment. If there were in a garment worn continuously all day next the skin free sulphites in sufficient quantities, a powerful irritant would be set in operation. Sweat is being slowly and continuously secreted by the skin, and combines with the free sulphites to form successively sulphur dioxide, sulphurous acid and sulphuric acid: sulphuric acid is an irritant which would produce dermatitis in a normal skin if applied in garments under the conditions existing when the appellant wore the underpants. It is a fair deduction from the answers and from the evidence that free sulphites were present in quantities not to be described as small, but that still left the question whether they were present in quantities sufficient to account for the disease.

It is impossible now, and was impossible at any time after the garments were washed, to prove what quantities were present when the garments were sold. That can only be

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inferred from various considerations. The garments were handed back to the retailers in July, 1931, and by them sent back to the manufacturers. In November, 1931, Mr. Anderson, of Victoria, an analytical chemist, on the instructions of the manufacturers analysed one-half of one of the pants to ascertain what quantity of water soluble salts they contained, and found certain quantities of sulphates, but sulphates would not irritate the skin. In the following May, Mr. Anderson made a further analysis of the other three garments and of the remaining half of the pair of pants: he was testing for sulphites, which he expressed in terms of sulphur dioxide percentage by weight. In one singlet he found a nil return, in the other ·0070; in the pants he found ·0082 in one and ·0201 in the other. There was some debate whether these figures were of free sulphites, or of sulphites adherent to the wool molecule, and not soluble by sweat. Their Lordships, after careful consideration and for a variety of reasons, do not differ from the conclusion of the Chief Justice that these results proved the presence of free sulphite. But the results were not such as to show quantities likely to cause irritation. On the other hand, a very eminent scientist, Professor Hicks, called by the appellant, gave his opinion that the garments before washing must have had sulphites in considerably greater quantity: and these tests of Mr. Anderson were of each garment as a whole, whereas it was clear that the relevant parts in each pair of pants were the ankle ends, since the disease was initiated at that point in each leg. It is clear that no further light could be thrown by fresh analysis of the actual garments.

Evidence was given on behalf of the manufacturers as to the processes used in the manufacture of these garments. The webs of wool were put through six different processes: of these the second, third and fourth, were the most significant for this case. The second was for shrinking, and involved treatment of the web with a solution of calcium hypochloride and hydrochloric acid. The third process was to remove these chemicals by a solution of bisulphite of soda, and the fourth process was to neutralize the bisulphite by means of

bicarbonate of soda; the fifth process was for washing, and the sixth was a drying and finishing process. If the fourth process did not neutralize the added bisulphite, free sulphites would remain, which the subsequent washing might not entirely remove. The manufacturers' evidence was that the process was properly applied to the wool from which these garments were made, and if properly applied was bound to be effective. The foreman scourer, Smith, was not called at the trial, where his absence was made matter of comment, but Ashworth, one of the scourers, gave evidence and, among other things, said that they had to be very careful that there was no excess of one chemical or the other. If there were an excess of some sort or the other, it would be bound to be somebody's fault. The washing off was to clear out as much of the traces of the previous process as possible. But something might go wrong, some one might be negligent, and as a result some bisulphite of soda which had been introduced might not have been got rid of. The cuffs of the pants were ribbed and were made of a different web separately treated. The appellant's advisers had at the trial no independent information as to the actual process adopted in respect of these garments, or even when they were made, and, by petition, they asked for leave to adduce further evidence which would go to show, as they suggested, that the process deposed to was not adopted by the manufacturers until after June 3, 1931. Their Lordships, however, feel themselves in a position to dispose of the appeal on the evidence as it stands, taking due account of the fact that the manufacturers' secretary was called and deposed that in the previous six years the manufacturers had treated by a similar process 4,737,600 of these garments, which they had sold to drapers throughout Australia, and he had no recollection of any complaints, which, if made, would in ordinary course have come under his notice. Dr. Hargreaves, an analytical chemist, on the instructions of the manufacturers analysed specimen garments, subjecting them to tests which would extract any sulphur adherent to the wool as well as free sulphites, if any were present, and found only negligible quantities. Against this evidence was that of Professor

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Hicks, who agitated in unheated water for two minutes a singlet of the manufacturers' Golden Fleece make, purchased in November, 1932, and found that the aqueous extract contained a percentage by weight of sulphite of ·11, which, in his opinion, was free in the fabric and readily soluble in cold water. The significance of this experiment seems to be that however well designed the manufacturers' proved system may be to eliminate deleterious substances it may not invariably work according to plan. Some employee may blunder.

Mr. Greene, for the respondents, quite rightly emphasized how crucial it would have been for the appellant's case to prove, by positive evidence, that in fact the garments which the appellant wore contained an excess of free sulphites. He contended that the appellant's case involved arguing in a circle; his argument, he said, was that the garments must have caused the dermatitis because they contained excess sulphites, and must have contained excess sulphites because they caused the disease: but nought, he said, added to nought still is no more than nought. This, however, does not do justice either to the process of reasoning by way of probable inference which has to do so much in human affairs, or to the nature of circumstantial evidence in law courts. Mathematical, or strict logical, demonstration is generally impossible: juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion. Dixon J., in the judgment in which he dissented from that of the Chief Justice, does not seem to suggest that there was no evidence for a decision in the appellant's favour, but merely that it was not safe so to decide. But the coincidences of time and place, and the absence of any other explanation than the presence of free sulphite in the garments, point strongly in favour of the appellant's case. It is admitted, as has been said above, that some sulphites were present in the garments,

and there is nothing to exclude the possibility of a quantity sufficient to do the harm. On the whole, there does not seem adequate reason to upset the judgment on the facts of the Chief Justice. No doubt this case depends in the last resort on inferences to be drawn from the evidence, though on much of the detailed evidence the trial judge had the advantage of seeing and hearing the witnesses. The plaintiff must prove his case, but there is an onus on a defendant who, on appeal, contends that a judgment should be upset: he has to show that it is wrong. Their Lordships are not satisfied in this case that the Chief Justice was wrong.

That conclusion means that the disease contracted, and the damage suffered by the appellant, were caused by the defective condition of the garments which the retailers sold to him, and which the manufacturers made and put forth for retail and indiscriminate sale. The Chief Justice gave judgment against both respondents, against the retailers on the contract of sale, and against the manufacturers in tort, on the basis of the decision in the House of Lords in *Donoghue* v. *Stevenson*. (1) The liability of each respondent depends on a different cause of action, though it is for the same damage. It is not claimed that the appellant should recover his damage twice over; no objection is raised on the part of the respondents to the form of the judgment, which was against both respondents for a single amount.

So far as concerns the retailers, Mr. Greene conceded that if it were held that the garments contained improper chemicals and caused the disease, the retailers were liable for breach of implied warranty, or rather condition, under s. 14 of the South Australia Sale of Goods Act, 1895, which is identical with s. 14 of the English Sale of Goods Act, 1893. The section is in the following terms:—

"14. Subject to the provisions of this Act, and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—

I. Where the buyer, expressly or by implication, makes

(1) [1932] A. C. 562.

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known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

II. Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

III. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

IV. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

He limited his admission to liability under exception (ii.), but their Lordships are of opinion that liability is made out under both exception (i.) and exception (ii.) to s. 14, and feel that they should so state out of deference to the conflicting views expressed in the Court below. Sect. 14 begins by a general enunciation of the old rule of caveat emptor, and proceeds to state by way of exception the two implied conditions by which it has been said the old rule has been changed to the rule of caveat venditor: the change has been rendered necessary by the conditions of modern commerce and trade. The section has been recently twice discussed by the House of Lords, once in *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (1) and again in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* (2) There are numerous cases on the section,

(1) 33 Com. Cas. 195. (2) [1934] A. C. 402.

but as these were cited below it is not necessary to detail them again. The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller " so as to show that the buyer relies on the seller's skill or judgment." It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make: the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply: there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is none the less the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods. In this case the garments were naturally intended, and only intended, to be worn next the skin. The proviso does not apply to a case like the sale of Golden Fleece make such as is here in question, because Golden Fleece is neither a patent nor a trade name within the meaning of the proviso to exception (i.). With great deference to Dixon J., their Lordships think that the requirements of exception (i.) were complied with. The conversation at the shop in which the appellant discussed questions of price and of the different makes did not affect the fact that he was substantially relying on the retailers to supply him with a correct article.

The second exception in a case like this in truth overlaps in its application the first exception; whatever else merchant-

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able may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. The appellant was satisfied by the appearance of the underpants; he could not detect, and had no reason to suspect, the hidden presence of the sulphites: the garments were saleable in the sense that the appellant, or any one similarly situated and who did not know of their defect, would readily buy them: but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next the skin. It may be that after sufficient washing that defect would have disappeared; but the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment. The proviso to exception (ii.) does not apply where, as in this case, no examination that the buyer could or would normally have made would have revealed the defect. In effect, the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result. It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.

The retailers, accordingly, in their Lordships' judgment are liable in contract: so far as they are concerned, no question of negligence is relevant to the liability in contract.

But when the position of the manufacturers is considered, different questions arise: there is no privity of contract between the appellant and the manufacturers: between them the liability, if any, must be in tort, and the gist of the cause of action is negligence. The facts set out in the foregoing show, in their Lordships' judgment, negligence in manufacture. According to the evidence, the method of manufacture was correct: the danger of excess sulphites being left was recognized and was guarded against: the process was intended to be fool proof. If excess sulphites were left in the garment, that could only be because some one was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances: even if the manufacturers could by apt evidence have rebutted that inference they have not done so.

On this basis, the damage suffered by the appellant was caused in fact (because the interposition of the retailers may for this purpose in the circumstances of the case be disregarded) by the negligent or improper way in which the manufacturers made the garments. But this mere sequence of cause and effect is not enough in law to constitute a cause of action in negligence, which is a complex concept, involving a duty as between the parties to take care, as well as a breach of that duty and resulting damage. It might be said that here was no relationship between the parties at all: the manufacturers, it might be said, parted once and for all with the garments when they sold them to the retailers, and were therefore not concerned with their future history, except in so far as under their contract with the retailers they might come under some liability: at no time, it might be said, had they any knowledge of the existence of the appellant: the only peg on which it might be sought to support a relationship of duty was the fact that the appellant had actually worn the garments, but he had done so because he had acquired them by a purchase from the retailers, who were at that time

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the owners of the goods by a sale which had vested the property in the retailers and divested both property and control from the manufacturers. It was said there could be no legal relationships in the matter save those under the two contracts between the respective parties to those contracts, the one between the manufacturers and the retailers and the other between the retailers and the appellant. These contractual relationships (it might be said) covered the whole field and excluded any question of tort liability: there was no duty other than the contractual duties.

This argument was based on the contention that the present case fell outside the decision of the House of Lords in *Donoghue's* case. (1) Their Lordships, like the judges in the Courts in Australia, will follow that decision, and the only question here can be what that authority decides and whether this case comes within its principles. In *Donoghue's* case (1) the defendants were manufacturers of ginger-beer, which they bottled: the pursuer had been given one of their bottles by a friend who had purchased it from a retailer who in turn had purchased from the defendants. There was no relationship between pursuer and defenders except that arising from the fact that she consumed the ginger-beer they had made and bottled. The bottle was opaque, so that it was impossible to see that it contained the decomposed remains of a snail: it was sealed and stoppered so that it could not be tampered with until it was opened in order that the contents should be drunk. The House of Lords held these facts established in law a duty to take care as between the defenders and the pursuer.

Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin (2):

"A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the

(1) [1932] A. C. 562. (2) Ibid. 599.

consumer's life or property, owes a duty to the consumer to take that reasonable care."

This statement is in accord with the opinions expressed by Lord Thankerton and Lord Macmillan, who in principle agreed with Lord Atkin.

In order to ascertain whether the principle applies to the present case, it is necessary to define what the decision involves, and consider the points of distinction relied upon before their Lordships.

It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists. In *Donoghue's* case (1) the duty was deduced simply from the facts relied on—namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger: there was, it is true, no personal intercourse between the maker and the user; but though the duty is personal, because it is inter partes, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; no question of consideration between the parties is relevant: for these

(1) [1932] A. C. 562, 599.

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reasons the use of the word " privity " in this connection is apt to mislead, because of the suggestion of some overt relationship like that in contract, and the word " proximity " is open to the same objection ; if the term " proximity " is to be applied at all, it can only be in the sense that the want of care and the injury are in essence directly and intimately connected ; though there may be intervening transactions of sale and purchase, and intervening handling between these two events, the events are themselves unaffected by what happened between them : " proximity " can only properly be used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury, and like " privity " may mislead by introducing alien ideas. Equally also may the word " control " embarrass, though it is conveniently used in the opinions in *Donoghue's* case (1) to emphasize the essential factor that the consumer must use the article exactly as it left the maker, that is in all material features, and use it as it was intended to be used. In that sense the maker may be said to control the thing until it is used. But that again is an artificial use, because, in the natural sense of the word, the makers parted with all control when they sold the article and divested themselves of possession and property. An argument used in the present case based on the word " control " will be noticed later.

It is obvious that the principles thus laid down involve a duty based on the simple facts detailed above, a duty quite unaffected by any contracts dealing with the thing, for instance, of sale by maker to retailer, and again by retailer to consumer or to the consumer's friend.

It may be said that the duty is difficult to define, because when the act of negligence in manufacture occurs there was no specific person towards whom the duty could be said to exist : the thing might never be used : it might be destroyed by accident, or it might be scrapped, or in many ways fail to come into use in the normal way : in other words the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual

(1) [1932] A. C. 562, 599.

use by a particular person. But the same theoretical difficulty has been disregarded in cases like *Heaven* v. *Pender* (1), or in the case of things dangerous per se or known to be dangerous, where third parties have been held entitled to recover on the principles explained in *Dominion Natural Gas Co., Ld.* v. *Collins & Perkins*. (2) In *Donoghue's* case (3) the thing was dangerous in fact, though the danger was hidden, and the thing was dangerous only because of want of care in making it; as Lord Atkin points out in *Donoghue's* case (3), the distinction between things inherently dangerous and things only dangerous because of negligent manufacture cannot be regarded as significant for the purpose of the questions here involved.

One further point may be noted. The principle of *Donoghue's* case (3) can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

If the foregoing are the essential features of *Donoghue's* case (3), they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle: it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant: it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in contract against the retailers, because that is a quite independent cause of action, based on different considerations, even though the

(1) 11 Q. B. D. 503. (2) [1909] A. C. 640.
(3) [1932] A. C. 562, 583, 595.

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damage may be the same. Equally irrelevant is any question of liability between the retailers and the manufacturers on the contract of sale between them. The tort liability is independent of any question of contract.

It was argued, but not perhaps very strongly, that *Donoghue's* case (1) was a case of food or drink to be consumed internally, whereas the pants here were to be worn externally. No distinction, however, can be logically drawn for this purpose between a noxious thing taken internally and a noxious thing applied externally: the garments were made to be worn next the skin: indeed Lord Atkin (1) specifically puts as examples of what is covered by the principle he is enunciating things operating externally, such as "an ointment, a soap, a cleaning fluid or cleaning powder."

Mr. Greene, however, sought to distinguish *Donoghue's* case (1) from the present on the ground that in the former the makers of the ginger-beer had retained "control" over it in the sense that they had placed it in stoppered and sealed bottles, so that it would not be tampered with until it was opened to be drunk, whereas the garments in question were merely put into paper packets, each containing six sets, which in ordinary course would be taken down by the shopkeeper and opened, and the contents handled and disposed of separately, so that they would be exposed to the air. He contended that though there was no reason to think that the garments when sold to the appellant were in any other condition, least of all as regards sulphur contents, than when sold to the retailers by the manufacturers, still the mere possibility and not the fact of their condition having been changed was sufficient to distinguish *Donoghue's* case (2): there was no "control" because nothing was done by the manufacturers to exclude the possibility of any tampering while the goods were on their way to the user. Their Lordships do not accept that contention. The decision in *Donoghue's* case (2) did not depend on the bottle being stoppered and sealed: the essential point in this regard was that the article should reach the consumer or user subject to the same defect

(1) [1932] A. C. 562, 583, 595. (2) Ibid. 562, 591.

as it had when it left the manufacturer. That this was true of the garment is in their Lordships' opinion beyond question. At most there might in other cases be a greater difficulty of proof of the fact.

Mr. Greene further contended on behalf of the manufacturers that if the decision in *Donoghue's* case (1) were extended even a hair's-breadth, no line could be drawn, and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner: he assumed that it was fitted and the steamer sailed the seas for some years: but the rudder had a latent defect due to faulty and negligent casting, and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that if *Donoghue's* case (1) were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time, and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote: in any case the element of directness would obviously be lacking. Lord Atkin deals with that sort of question in *Donoghue's* case (1), where he refers to *Earl* v. *Lubbock* (2): he quotes the common-sense opinion of Mathew L.J.: "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on."

In their Lordships' opinion it is enough for them to decide this case on its actual facts.

No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to

(1) [1932] A. C. 562, 591. (2) [1905] 1 K. B. 253, 259.

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say that their Lordships hold the present case to come within the principle of *Donoghue's* case (1), and they think that the judgment of the Chief Justice was right in the result and should be restored as against both respondents, and that the appeal should be allowed, with costs here and in the Courts below, and that the appellant's petition for leave to adduce further evidence should be dismissed, without costs.

They will humbly so advise his Majesty.

Solicitors for appellant: *Roney & Co.*
Solicitors for respondents: *Broad & Son.*

[PRIVY COUNCIL.]

J. C.* 1935 Oct. 24.

NORTHWESTERN UTILITIES, LIMITED, APPELLANTS;

AND

LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, AND OTHERS . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada (Alberta)—Negligence—Damages—Gas main—Excavation work by Local Authority beneath main—Leakage of gas—Building destroyed by fire—Failure of Gas Company to inspect city's operations—Breach of duty—Liability for loss—"Locate and Construct"—Water, Gas, Electric and Telephone Companies Act, R. S. A., 1922, *c.* 168, *s.* 13.

A hotel belonging to and insured by the respondents respectively was destroyed by fire caused by the escape and ignition of natural gas which percolated through the soil and penetrated into the hotel basement from a fractured welded joint in a 12-in. intermediate pressure main, 3 ft. 6 ins. below the street level, belonging to the appellants, a public utility company who supplied natural gas to consumers in the City of Edmonton, Alberta.

(1) [1932] A. C. 562.

* *Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, and LORD WRIGHT.