Touro Law Review

Volume 41 | Number 1 Article 37

2026

One Step Forward, Two Steps Back: How the New York Appellate Division Slowed the Progress of Judge Cardozo's Effort in Macpherson v. Buick Motor Co. To End Privity's Stranglehold Over Negligence Claims in Product Injury Cases

Jeffrey A. Van Detta

ONE STEP FORWARD, TWO STEPS BACK: HOW THE NEW YORK APPELLATE DIVISION SLOWED THE PROGRESS OF JUDGE CARDOZO'S EFFORT IN *MACPHERSON V. BUICK MOTOR CO.* TO END PRIVITY'S STRANGLEHOLD OVER NEGLIGENCE CLAIMS IN PRODUCT INJURY CASES

Jeffrey A. Van Detta[†]

ABSTRACT

This article aims to tell the story of how the various Departments of the New York State Appellate Division sometimes helped—and just as often hindered—the development of the product-injury law in the wake of *MacPherson v. Buick Motor Co.* (1916). Hailed for loosening the privity requirement that barred persons injured by products from suing manufacturers and suppliers for negligence, *MacPherson* has become the stuff of legal legend. No one put it more picturesquely than Dean William L. Prosser, who in a justly famous law review article described privity as a "citadel" and presented *MacPherson*'s author, Judge Benjamin Nathan Cardozo, as a judicial superhero, leaping outdated law in a single bound: "Cardozo, wielding a mighty axe, burst over the ramparts, and buried the general rule under the exception."[1] But just as Rome didn't decline and fall in

[†] The John E. Ryan Professor Of International Business & Workplace Law, Atlanta's John Marshall Law School (AJMLS) (1999-present); Law Clerk to Hon. Roger J. Miner, U.S. Second Circuit Court of Appeals (1987-1988); Member, New York & Georgia Bars. The author got a first-hand look at the Appellate Division's operations when he was Summer Law Clerk to Hon. Howard A. Levine, Appellate Division Third Department, in 1985, where he drafted one of Justice Levine's most significant opinions that year, *People v. Wheeler*, 491 N.Y.S.2d 206 (App. Div. 1985), *aff'd mem.*, 494 N.E.2d 88 (N.Y. 1986). The inspiration for this article came from a case synthesis exercise using Appellate Division decisions dealing with *MacPherson* that the author designed and worked through with his Spring 2024 Evening Torts II class. That exercise, in turn, had been inspired by Paul Figley, *Teaching Rule Synthesis With Real Cases*, 61 J. LEGAL ED. 245 (2011).

[1] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the*

a single day, privity wasn't vanquished in a single decision—even one as memorably wrought as *MacPherson*. While Prosser's larger-than-life legend of *MacPherson* has endured, this legend, like many myths, is incomplete. It omits the real struggle of *MacPherson* to live up either to the myth or to its initial promise. Particularly noteworthy is the difficult treatment *MacPherson* got in New York's four Appellate Divisions, whose decisions grappling with *MacPherson* over the next thirty years establish that the tale is not one of the "mighty axe." Instead, we find an ox-cart's slogging journey, wheels laden with heavy mud, fighting to take one step forward to every two steps back. This slow progress in the Appellate Divisions contrasts sharply with the more rapid embrace *MacPherson*'s full implications enjoyed in other appellate courts, not only in many other American states and the federal system, but also in common-law courts abroad. Indeed, *MacPherson*'s journey through the New York Appellate Divisions demonstrates that traditional accounts of doctrinal progress may not adequately account for the profound role that mid-level appeals courts play in the timeline and scope of what later comes to be seen as a legal revolution. *MacPherson*'s struggle—one step forward, two steps back—also illuminates the origins and vital role of mid-level appellate courts in America during the twentieth century, whose legacy continues into the twenty-first.

I. INTRODUCTION

Some assert that story is scholarship.[2] And there is truth in that statement—but it is not a reason to permit story to gain ascendance over legal analysis that has been an essential feature of legal scholarship for three centuries in America. A remarkable story unto itself is the work of appellate courts, particularly *mid-level appellate courts*, in the development—as well as hindrance—of significant, new doctrinal pronouncements in great cases by legendary judges.[3] For the

Consumer), 69 YALE L.J. 1099, 1100 (1960).

[2] *See, e.g.*, Lance McMillian, *Story Is Scholarship*, 18 CHARLESTON L. REV. 575 (2023). The notion, however, is hardly novel. *See, e.g.*, Richard A. Matasar, *Storytelling in Legal Scholarship*, 68 CHI.-KENT L. REV. 353 (1992-1993); MILLNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW (2000).

[3] As a series of Foundation Press books have taught us, telling the stories that gave rise to cases great and small is a very important application of story in the service of legal scholarship. *See, e.g.*, Leslie Bender, *Teaching Torts Stories*, 55 J. LEGAL ED.

percolation of doctrine, through the lived experience of appellate judges and litigants left to grapple with those doctrinal pronouncements, has as much determined the progress of our law as have the landmark cases that announced them.

This article aims to tell the story of how the various Departments of the New York State Appellate Division helped—and hindered—the development of Judge Cardozo's startling abandonment of the privity limitation that barred persons injured by products from suing manufacturers and suppliers.[4] In Section II, we orient the institution of mid-level appellate courts in America generally, and in New York specifically a century ago. Section III then considers the doctrine of privity that barred negligence claims against remote sellers, suppliers, and manufacturers in New York from the time that *Winterbottom v. Wright*[5] entered American law there, and how Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.*[6] turned the page

---

108 (2004). The late Professor James A. Henderson wrote a story of the *MacPherson* case for one of these books. *See* James A. Henderson, Jr., MacPherson v. Buick Motor Co.: *Simplifying the Facts While Reshaping the Law*, *in* TORTS STORIES 41-71 (Robert L. Rabin & Stephen D. Sugarman eds., Found. Press 2003); *see also James A. Henderson, Jr. '59*, PRINCETON ALUMNI WKLY. (Jan. 2020), https://paw.princeton.edu/memorial/james-henderson-jr-59 (on file with the Touro Law Review). The need to teach the stories of the seminal cases and to continue facilitating the engagement by our apprentices ("students," as they are inaptly called by most) with the demanding and difficult (that even sends them—*gasp!*—to *dictionaries* on occasion) is very well argued by Deborah W. Post, *Cardozo, the Canon and Some Critical Thoughts about Pedagogy*, 34 TOURO L. REV. 321-22, 325-26 (2018). Contributing to such pedagogy is among this article's purposes.

[4] *See, e.g.*, DAN B. DOBBS, MARK T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 33.2, at 800 (West 2d ed. 2016) ("Judge Cardozo substantially abolished the privity rule for negligence cases in the famous case of *MacPherson v. Buick* . . . decided in 1916.").

[5] Winterbottom v. Wright [1842] 152 Eng. Rep. 402; 10 M & W 109 (Exch. Pleas 1842), declining to extend Langridge v. Levy [1837] 150 Eng. Rep. 863; 2 M & W 519; *see* Vernon Palmer, *Why Privity Entered Tort—An Historical Reexamination of* Winterbottom v. Wright, 27 AM. J. LEGAL HIST. 25 (1983).

[6] 217 N.Y. 382 (1916). This case, and this article, can be further situated in the contexts of both Judge Cardozo's work and impact by referring to the March 2017 Symposium, *Benjamin N. Cardozo: Judge, Justice, Scholar*, co-sponsored by Touro Law Center and the Jewish Law Institute. That event featured thirty presentations from judges, lawyers, and scholars hailing from throughout the United States, and resulted in a remarkable issue of the *Touro Law Review* in which scholarly articles by participants were published. *See* Samuel J. Levine, *Foreword: Benjamin N. Cardozo: Judge, Justice, Scholar*, 34 TOURO L. REV. 1 (2018). The articles of that

to a new chapter for those injured by products in an industrial age. In Section IV, we document the struggle the *MacPherson* rule faced in its implementation through the decisions of the various Appellate Divisions of the New York State Supreme Court that had to reckon with its application to scenarios beyond *MacPherson*. The contemporaneous reception of *MacPherson* in federal courts within the U.S. Second Circuit is the topic of Section V. Section VI considers the influence of—and resistance to—*MacPherson* in the appellate courts of two other states in the mid-20th century, Massachusetts and Mississippi, neither of which had intermediate appellate courts at the time. In Section VII, stock is taken of what has been established in the previous sections, and the author provides a reflective coda to consider other impacts operating on the story of *MacPherson*'s progress during its first forty years.

II. THE CONCEPT OF AN INTERMEDIATE APPELLATE COURT—THE NEW YORK SUPREME COURT APPELLATE DIVISION'S INFANCY A CENTURY AGO

A. An Intermediate Appellate Court: Neither Original, Nor Inevitable

The problems that led to creation of intermediate appellate courts in America go part and parcel with the challenges to the courts that increasing population, industrialization, and recognition of individual rights in a liberal society have posed. Yet, from the founding era, not to mention the pre-founding English experience, it was not inevitable that there would be organized, intermediate appellate courts.[7] Indeed, among the thirteen states at the time of Independence,

---

issue have been of immense help to the present author. Citations to those articles are found *supra* note 2 and *infra* notes 38, 49, 54, 68, 71, 73, 243, 317, 325, 326, 327.

[7] Indeed, "the *right* to appeal is not recognized as one of our fundamental rights of due process or equal protection." J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 433 & n.1 (1994). "[T]he *ability* to appeal an adverse decision," by contrast, "would nevertheless appear to be one of the most cherished indica of civilized government." *Id.* One is reminded of Justice Robert H. Jackson's similar observation about the probate system in American states, which many lawyers might well assume, like the proverbial "right to an appeal," is somehow enshrined in due process or similar Constitutional notions:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules

Georgia attempted to function without even a regularly constituted appellate court, let alone intermediate appellate courts, from 1776 until 1846.[8] That did not mean that the Georgia judges did not feel compelled to meet ad hoc, as a group, to settle questions of law that were dividing them and producing disharmonious results within the State.[9]

B. New York Gets an Intermediate Appellate Court

On January 2, 1896, the *New York Times* heralded the birth of New York's four Appellate Divisions of the State Supreme Court.[10]

> succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (Jackson, J.); *but see* Hodel v. Irving, 481 U.S. 704, 717-18 (1987) (O'Connor, J.) (noting that "abolition of both the descent and devise of a particular class of property may be a taking" for purposes of the Fifth Amendment Takings Clause).

[8] *See* Jeffrey A. Van Detta, *(S)election Of Georgia Supreme Court Justices: Democracy—Or Dynasty?*, 87 ALB. L. REV. 101 (2024) (State Constitutional Commentary Issue). The New York Court of Appeals itself originated with the New York Constitution of 1846. Prior to that time, the 1777 New York Constitution had provided for an unwieldy "court for the 'Trial of impeachments and the Correction of Errors,'" which consisted "of the president of the senate, the senators, the chancellor [the chief judge in the equity courts of the State], and the judges of the supreme court," as New York idiosyncratically appellated its trial court of general jurisdiction even in those days. FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932, at 8-9 (Columbia Univ. Press 1985).

[9] *See, e.g.*, Walter F. Dodd, *The Problems of Appellate Courts*, 6 AM. L. SCH. REV. 681 (1929) ("But this led to such difficulties with respect to the uniform application of the law throughout [Georgia] that the trial judges themselves met together at intervals for the purpose of 'advising with each other, and discussing freely and fully all questions of a doubtful and complex character which might arise before each in their respective circuits, and thereby to enable each judge to decide such question in the law of the united wisdom of the whole Georgia bench.'").

[10] *OUR NEW JUDICIAL SYSTEM; It Now Goes into Effect and Will Work Many Changes. CERTAIN COURTS ARE ABOLISHED A Series of Six Courts Under the New Plan -- The Scope of Each -- Business Will Now Be Facilitated*, N.Y. TIMES, Jan. 2, 1896, at 11, [hereinafter *OUR NEW JUDICIAL SYSTEM*], https://www.nytimes.com/1896/01/02/archives/our-new-judicial-system-it-now-goes-into-effect-and-will-work-many.html; *see* BENJAMIN N. CARDOZO, THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, Preface (Banks & Co. 1903) (noting "important changes in the jurisdiction of the Court of Appeals" including "the adoption of the amended [New York] Constitution, which,

Elihu Root, lawyer and Nobel Peace Prize Laureate who would serve in many leading roles including Secretary of War, Secretary of State, U.S. Senator, and President of the Carnegie Endowment for Internaitonal Peace,[11] was a major mover and shaper behind the Appellate Division innovation.[12] In explaining the magnitude of the change to its reading public, the *Times* pulled no punches:

> The judiciary of New-York State entered upon a new era yesterday. The General Term of the Supreme Court, like the Court of Chancery, is a thing of the past. Its place is taken by the Appellate Division of the Supreme Court, which, however, has greater powers than did the General Term, and in some actions is the court of final resort.[13]

---

so far as the Judiciary Article is concerned, became a law on January 1, 1896"). While not by any means Cardozo's most sparking prose, the narrative of this early work provides a workman's explanation of the Appellate Division's origins. "The crowded condition of its calendar made necessary some further restriction upon [the Court of Appeals'] powers, and these restrictions were imposed by sec. 9 of Art. VI, which at the same time conferred upon the Legislature the power of further limitation." *Id.* § 4, at 6. Among those limitations, "the [C]ourt of [A]ppeals, except where the judgment is of death, shall be limited to the review of questions of law, "and "[n]o unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the [C]ourt of [A]ppeals." *Id.* Cardozo further elaborated that "[e]xcept where the judgment is of death, appeals may be taken as of right, to said court only from judgments or orders entered upon decisions of the appellate division of the supreme court, finally determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them." *Id.* at 6-7. However, as Cardozo emphasized—and as will become relevant in the later discussion of the Appellate Division's treatment of *MacPherson*—"[t]he appellate division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the [C]ourt of [A]ppeals." *Id.* at 7.

[11] *See* PHILLIP C. JESSUP, ELIHU ROOT (1938).

[12] BERGAN, *supra* note 8, at 200 (stating that "[o]ne lawyer of great stature was largely responsible for it—Elihu Root"); *see* Appellate Division, First Judicial Department, *Pre-1896*, N.Y. CTS., https://www.nycourts.gov/courts/ad1/centennial/pre1896.shtml (on file with the Touro Law Review) (last visited Jan. 20, 2026) (discussing Root's role as Chair of the Judiciary Committee at the 1894 New York Constitutional Convention); *see* 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 460-68, 892-900, 927-28 (William H. Steele & Charles Elliott Finch eds., Argus Co., Printers 1900).

[13] *OUR NEW JUDICIAL SYSTEM*, *supra* note 10.

The problem with which the 1894 New York Constitional Convention wrested has proven a particularly difficult one. As one of the author's teachers, retired New York Court of Appeals Judge Francis Bergan, observed in 1985, "[t]he problem . . . was to an adequate review in litigation in large volume and to preserve consistency in legal policy."[14] In turn, "[c]onsistency can best be ensured when the same judges in a single tribunal have the final say," because when "a right to appeal is broadly allowed, no single panel of judges can give adequate attention to the volume flowing from mass litigation in large judicial establishments."[15] This problem left "little range of choice," in Judge Bergan's view.[16] "Either the right to appeal must be drastically limited to a volume manageable by a single appeals court," Judge Bergan mused, "or an intermediate appellate court must be provided to determine which cases should have the attention of the final tribunal and to decide all the rest."[17]

In Judge Bergan's assessment, "[t]he 1894 [New York Constitutional] Convention devised a mechanism that was novel in conception and eminently successful in practice and thus made a significant contribution to the management of appellate review."[18]

---

[14] BERGAN, *supra* note 8, at 199. The author was most fortunate to be among the apprentices in Judge Bergan's Spring 1987 seminar at Albany Law School titled, "The Judiciary." Judge Bergan recognized the author's efforts with the rare course grade of A+.

[15] *Id.* at 199.

[16] *Id.*

[17] *Id.*; *see* Jonahan D. Gillerman, *The Albany Nine: Recognizing Albany Law School's Alumni Justices of the Third Department*, 73 ALB. L. REV. 1145, 1145 & n. 1 (2010) ("In 1894, New York's Constitutional Convention set out to correct the inefficiencies of the state's intermediate appellate courts when it supplanted the general terms with the appellate division and its four judicial departments.").

[18] BERGAN, *supra* note 8, at 199. The 1894 Convention's innovations ran more deeply than just the decision, championed by Root, to divide the intermediate appellate court into four Judicial Departments by geography. For example, "[o]n appeals from an original court determination of facts, the appellate division became the final court of review; the Court of Appeals was left without any jurisdiction." *Id.* at 200. Three filtering mechanisms were provided to police the membrane between intermediate and ultimate appellate courts as to questions of law. On questions of law, appeals from the Appellate Division to the Court of Appeals were permitted only when (1) "when the appellate division reversed the original court"; (2) when the appellate division "had itself divided in affirming"—i.e., there was at least one dissent; or (3) by application for leave to appeal, in those infrequent cases in which the Court of Appeals granted it. *See id.* at 200; CARDOZO, *supra* note 10, at 6-7; *see*

Prominent among the features of the Appellate Division system was the opportunity for "percolation" of issues before resolution by a state's high court. Professors Coenen and Davis have recently provided us with a vivid description of the percolation theory:

> Few legal metaphors enjoy more prominence than that of a legal issue "percolating" through the courts. The underlying image is intuitive and appealing: Like crude and granular liquid seeping through a purifying filter, a difficult legal issue becomes clearer, cleaner, and more refined as more lower courts have the chance to weigh in on its merits. When at last the time comes for the [High] Court to resolve that question for itself, the prior percolation of the issue will help the [judges] render a decision that is especially thoughtful and well-informed.[19]

Here, the federal system had led the way with the Evarts Act, as the Judiciary Act of 1891[20] was commonly called, which relieved the U.S. Supreme Court Justices of Circuit-riding duties and established the system of intermediate appellate courts that endure to this day.[21]

Judge Bergan described the percolation process for the Appellate Divisions as "a continuing process of identification of significant legal issues."[22] Even "more importantly" than reducing "the

---

also N.Y. C.P.L.R. §§ 5601 (appeals of right), 5602 (appeals by permission) (McKinney 2024).

[19] Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 365 (2021).

[20] Judiciary Act of 1891, Pub. L. No. 51-517, 26 Stat. 826.

[21] Roger Foster, *Recent Decisions Under the Evarts Act*, 1 YALE L.J. 95 (1891); *The Evarts Act: Creating the Modern Appellate Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/us-courts-appeals-and-their-impact-your-life/evarts-act-creating-modern-appellate-courts (on file with the Touro Law Review) (last visited Jan. 20, 2026); Ross E. Davies, *Evarts Act Day: The Birth of the U.S. Circuit Courts of Appeals*, 6 J. L. 251 (2016); John Fabian Witt, *Constraint, Authority, and the Rule of Law in a Federal Circuit Court of Appeals*, 85 FORDHAM L. REV. 3 (2016); DANIEL S. HOLT, 2 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY (1875-1939), at 30-65 (2013); JON O. NEWMAN, HISTORY OF THE ARTICLE III APPELLATE COURTS, 1789–2021: THE EVOLUTION OF THEIR GEOGRAPHIC SCOPE, NUMBER OF JUDGESHIPS, AND JURISDICTION (2021), https://www.fjc.gov/sites/default/files/materials/31/Appellate%20Court%20History%2012-14-21.pdf.

[22] BERGAN, *supra* note 8, at 200.

volume of cases coming to the Court of Appeals," the Appellate Divisions were intended to "identif[y] the truly important legal policy questions for final settlement by the Court of Appeals."[23] "It can be safely assumed," Judge Bergan wrote, "that if the appellate division reversed the original court's view of the law or if the appellate division justices themselves divided on what the law ought to be, here was just the kind of debatable legal issue that the final court ought to resolve."[24] (As we shall see in Section IV, this process does not work so well when the Appellate Divisions themselves are simply misstating, misunderstanding, or misconstruing the law—which leaves the only source of correction to an often elusive *discretionary* appeal to the high court, just as we have seen with the problem of Circuit splits in the federal courts.[25])

There were, however, naysayers who were strongly skeptical of the need for or utility of any intermediate appellate court in the several States.[26] Prominent among them was Professor Edison R.

---

[23] *Id.*

[24] *Id.*

[25] The problem generated significant governmental and academic discussion beginning in the 1970s. *See, e.g.*, Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J. L. REFORM 201, 205-06 (1979) ("Today, however, the Supreme Court is giving plenary consideration on the merits to less than one percent of the cases decided by the courts of appeals. The lack of supervision that results from this limited review reduces the institutional responsibility of the appellate courts. Judges know that the likelihood that any decision they make will become the subject of a full hearing before the Supreme Court is very slight. On many issues, there is no definitive legal ruling that must be followed. As a result, it is not unusual for the appellate courts to reach different decisions on the same issue."); *see also* Charles R. Haworth, *Circuit Splitting and the New National Court of Appeals: Can the Mouse Roar*, 30 SW. L.J. 839 (1977) (discussing proposals for a "national court of appeals" to resolve splits among Circuits on issues that the U.S. Supreme Court is not taking up through the highly selective certiorari process). The problem continues, *exacerbated* rather than *abated*, nearly a half-century later. *See, e.g.*, Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1403 (2020) ("For decades we have relied on the Supreme Court to resolve conflicts among the courts of appeals. Yet over time, the caseloads of the lower federal courts have ballooned while the Supreme Court's docket has shrunk such that most now doubt the Supreme Court's capacity to meaningfully maintain uniformity in the lower courts by resolving conflicts.").

[26] *See, e.g.*, Edison R. Sunderland, *Intermediate Appellate Courts*, J. AM. JUDICATURE SOC'Y, Aug. 1930, at 54. Thus, some states did not adopt an intermediate appellate court until after the mid-twentieth century, such as Massachusetts (*see infra* Section VI.A); others, such as Mississippi, not until the late twentieth century (*see infra* Section VI.B); and eight others still have not adopted

Sunderland, who spent his career at the University of Michigan Law School. Indeed, Sunderland has been deemed, along with Harvard's Dean Roscoe Pound, one of "the principal academic commentators on the appellate process during the first half of the twentieth century."[27] Sunderland sought to make a powerful case against the establishment of intermediate appellate courts.[28] Indeed, Sunderland declared, "[i]t is plain that the use of intermediate appellate courts has been attended with many drawbacks" such that as of 1930, "[t]wo states, Colorado and Kansas, totally abandoned their use after trying them."[29] He advocated for a single high court in a state, which could be expanded

---

one, as reference to their State Constitutions and Codes will reveal (i.e., Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming). For useful historical perspective, see generally MARLIN O. OSTHUS & MAYHO H. STIEGLER, STATE INTERMEDIATE APPELLATE COURTS—A RESEARCH PROJECT OF THE AMERICAN JUDICATURE SOCIETY 1-19 (1980), and for historical lists of organization and jurisdiction of state intermediate appellate courts; *see id.* at 20-46 (Appendices A & B). Sunderland's skepticism had its adherents well into the latter 20th century. *See, e.g.*, Carl Norberg, *Some Second and Third Thoughts on an Intermediate Court of Appeals*, 7 WM. MITCHELL L. REV. 93 (1981). Others have written that the intermediate appellate court system simply shifts the location of a seemingly inevitable bottleneck. *See, e.g.*, Matthw E. Gabrys, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years after the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547; Victor Eugene Flango & Nora F. Blair, *Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court?*, 64 JUDICATURE 74 (Aug. 1980).

[27] Jeffrey M. Anderson, *Right for Any Reason*, 44 CARDOZO L. REV. 1015, 1024 n.47 (2023).

[28] *See* Sunderland, *supra* note 26, at 54-57. Professor Sunderland gathered his further thoughts in a treatment a decade later. *See* Edison Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3 (1940). There, we learn in the author's footnote, that as of 1940, he was Chairman, Am. Bar Ass'n Committee on Simplification and Improvement of Appellate Practice; member, Jud. Admin. Committee (1938); Member, U. S. Supreme Court Advisory Committee on Rules for Civil Procedure; and Professor of Law and Legal Research, University of Michigan. *Id.* From the Duquesne University Catalogue, we find his monographs and his lifespan, 1874-1959. DUQ. UNIV., https://duquesne.locate.ebsco.com/search?%20Love%22&option=author&query=Sunderland%2C%20Edson%20R.%20%28Edson%20Read%29%2C%201874-1959 (on file with the Touro Law Review) (last visited Jan. 20, 2026). We find his image in a 1938 photo with the United States Supreme Court Advisory Committee on Rules of Civil Procedure at First Exclusive Picture in New Supreme Court Building (1935) (on file with Libr. of Cong, Harris & Ewing Collection), https://www.loc.gov/resource/hec.39641/?st=image.

[29] Sunderland, *supra* note 26, at 56.

into "divisions" for purposes of handling increasing numbers of appeals from an increasingly litigious society.[30]

In our examination of *MacPherson*'s journey through the intermediate appellate courts in Section IV, we will see that there are elements of validity in both Root's and Sunderland's views.[31]

III. THE IMPORT OF *MACPHERSON V. BUICK*: THE FALL OF THE HOUSE OF PRIVITY?

A. Perspectives on *MacPherson*

When *MacPherson* was decided in 1916, Judge Cardozo appeared to hide its light under a bushel.[32] His endeavors to package the case as a natural outgrowth of extant law, rather than a radical break and setting of a new course,[33] have been well documented in the

---

[30] *Id.* at 57-58. For a contrary view of a supreme court sitting in panels, see Walter F. Dodd, *The Problems of Appellate Courts*, 6 AM. U. L. REV. 681, 689 (1930). Judge Bergan tells us that such schemes "had been debated for many years" in New York until the 1894 New York Constitutional convention decisively rejected "all" such plans. BERGAN, *supra* note 8, at 200.

[31] For example, even with the Appellate Division innovation, the volume of litigation grew between 1896 and 1916 such that "an extraordinary backlog of cases" pending before the Court of Appeals accumulated, with some 600 pending by May 1915, when "the [C]ourt's backlog was growing at a rate of 100 cases per year." Meredith R. Miller, *A Picture of the New York Court of Appeals at the Time of* Wood v. Lucy, Lady Duff-Gordon, 28 PACE L. REV. 357, 371 (2008). Further amendments of the state Constitution concerning the Court of Appeals were rejected by New York voters after a 1915 Constitutional Convention; the Legislature thereafter enacted statutory relief; and those further changes were enshrined as a Constitutional amendment by New York voters in 1925. *See id.* at 371-74 (tracing and recapitulating the jurisdictional changes).

[32] An assessment with which Grant Gilmore agreed in Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1031 (1975). Judge Francis Bergan observed that "at the end of a long paragraph" in *MacPherson*, "the greatest change here in the direction of legal theory"—"the role that contract played in the obligation imposed" through "the cherished common law doctrine of privity"—"was quietly announced." *See* BERGAN, *supra* note 8, at 297.

[33] "By [George] Priest's reckoning, the history of the politics of torts scholarship, particularly pertaining to the products area, goes back at least to Frances Bohlen, who in 1905 was 'at the radical edge' and later was intellectual mentor to Cardozo in inspiring his 'theoretical justification' of the decision in the landmark *MacPherson* case.'" Walter Probert, *The Politics of Torts Casebooks: Jurisprudence Reductus*, 69 TEX. L. REV. 1233, 1234 & n.8 (1991) (citing and quoting George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations*

scholarly literature.[34] We need not revisit that discussion here, other than to observe that perhaps Judge Cardozo's sanguine modesty[35]

---

of Modern Tort Law, 14 J. LEGAL STUD. 461 (1985)). Indeed, there was a kind of renvoi between Professor Bohlen and Cardozo, as Bohlen took Cardozo's citation in *MacPherson* of Bohlen's work as a foundation stone for his own death-stroke to the privity rule in the Restatement (First) of Torts, for which Bohlen was the Reporter. *See, e.g.*, Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 97-98 (2007) (discussing *MacPherson*'s role in Bohlen's RESTATEMENT (FIRST) OF TORTS § 395 (1934)). For a discussion of the much more modest role of the Restatement (First) of Torts during the percolation of *MacPherson* through the New York Appellate Divisions, see *infra* notes 107-18 and accompanying text.

[34] As Walter Pobert described the subterfuge:

> His reasoning was based primarily on his interpretation of New York precedent, with a sidelong look at parallel developments in England. He wrote with utmost assurance that the decision and its reasoning were clearly in accordance with the law of the sovereign state of New York.

Walter Probert, *Applied Jurisprudence: A Case Study of Interpretive Reasoning in* MacPherson v. Buick *and Its Precedents*, U.C. DAVIS L. REV. 789, 789 (1988). In dissenting from Cardozo's opinion, Chief Justice Bartlett relied "on an interpretation of mostly the same authority on which Cardozo had relied" and expressed "with the strongest conviction that his conclusions were required by the law." *Id.* "Given Cardozo's assurances," Professor Probst observed, "Bartlett's position must have been that Cardozo's interpretation and reasoning were either badly mistaken or deceptive." *Id.* at 789-90.

[35] *See, e.g.*, RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS 424 n.1 (5th ed. 1990) (commenting on Cardozo's use of precedent in *MacPherson*); RICHARD POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 457 (1982) (same). As a Cardozo biographer aptly put it,

> Cardozo's opinion in *MacPherson* did not acknowledge that any important principle was at stake. He disposed of the contrary authorities either by reconciling them on the ground of the remoteness of the negligence in those cases or by viewing them as merely different applications of the same principle. *Thus, Cardozo presented the new rule in the most modest terms.*

ANDREW L. KAUFMAN, CARDOZO 273 (1998) (emphasis added). While this feigned modesty confounded the Appellate Divisions as discussed *infra* Section IV, Buick, the corporate defendant, and Chief Judge Bartlett, the dissenter, were not fooled. As for Buick, Andrew Kauffman notes:

> Buick realized that MacPherson's suit was important to tits business. It sent a lawyer from Detroit to try the case in Saratoga Springs, New York. A director from a testing laboratory at Purdue University and representatives of leading auto and wheel makers from all over the country testified as experts for Buick. Whether Buick really believed, as it argued, that "liability would seriously interfere with the commerce of the world and restrict business," it

might have fostered some of the problems discussed in Section IV that arose in the Appellate Division's halting encounter with the practical application of the precedent when lawyers began citing it to them.[36] For now, however, we need only extract the key language in which Judge Cardozo expressed its holding. Given his apparent desire to tone down the novelty of his true intentions, Judge Cardozo's prose makes that task less than easy:

> We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things *which in their normal operation* are implements of destruction. *If the nature of a thing is such that it is reasonably certain to place and limb in peril when negligently made, it is then a thing of danger*. Its nature gives warning of the consequences to be expected. *If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the*

> presented the case as if it expected those consequences for the automobile industry if it were found liable.

Id. at 270-71. Bartlett, for his part, responded with calculated exasperation at Cardozo's judicial sleight-of-hand:

> I do not see how we can uphold the judgment in the present case without overruling what has been so often said by this court and other courts of like authority in reference to the absence of any liability for negligence on the part of the original vendor of an ordinary carriage to any one except his immediate vendee. The absence of such liability was the very point actually decided in the English case of Winterbottom v. Wright (supra), and the illustration quoted from the opinion of Chief Judge Ruggles in Thomas v. Winchester (supra) assumes that the law on the subject was so plain that the statement would be accepted almost as a matter of course. In the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and yet unless the courts have been all wrong on this question up to the present time there would be no liability to strangers to the original sale in the case of the horse-drawn carriage.

MacPherson v. Buick Motor Co., 111 N.E. 1050, 1056-57 (N.Y. 1916).

[36] *See also infra* Section V.B. and accompanying text.

> *manufacturer of this thing of danger is under a duty to make it carefully.*[37]

In this very lengthy exegesis of the holding, Cardozo buried the most important point in the midst of a dense paragraph of textual musing:

> That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. *We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.* We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series as too remote to constitute, as to the ultimate user, an actionable wrong. We leave that question open. We shall have to deal with it when it arises.[38]

---

[37] *MacPherson*, 111 N.E. at 1053 (citations omitted) (emphases added). Some commentators, however, see Cardozo's rule as much more complex than that, see *infra* notes 40-48, 51-53, 56-58, a complexity that may have caused further difficulty with the accurate reception of the case by New York's Appellate Divisions.

[38] *MacPherson*, 111 N.E. at 1053 (emphasis added).

Re-stating the holding whose edge his prose has blunted, Cardozo mused still further that

> The difficulty which it suggests is not present in this case, There is here no break in the chain of cause and effect. *In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be*. We have put its source in the law.[39]

The case was quickly cited by Harvard Dean Roscoe Pound within a year of its decision.[40] Student writers at law reviews soon noted the

---

[39] *Id.* (emphasis added). Nothing in this article, however, should be read to imply that Judge Cardozo was ever careless or indolent about what he was doing at any time. Quite to the contrary. As he himself observed of his method five years after *MacPherson*, his decision making followed a disciplined, exceedingly self-aware taxonomy:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

Joel K. Goldstein, *The Nature of the Judicial Process: The Enduring Significance of a Legal Classic*, 34 TOURO L. REV. 159, 164 & n.36 (2018) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921)). Of privity, specifically, the inner voice driving Cardozo's thinking was more consonant with a key point he made in the Storrs Lectures at Yale, that "[a] judgemade rule which experience showed clashed with the sense of justice or did not serve social welfare should be abandoned or fixed, especially when it did not shape the litigants' conduct." *Id.* at 167 (quoting CARDOZO, *supra*, at 150-51).

[40] Roscoe Pound, *The End of Law As Developed in Juristic Thought*, 30 HARV. L. REV. 201, 214 n.47 (1917).

case as well.[41] Within a decade, the significance of the case was being discussed in the law reviews at law schools in the Northeast.[42]

According to the account of a Cardozo biographer, "when Cardozo was still sitting on the Court of Appeals only by designation" in 1916,[43] "he drew wide attention when he addressed an issue of national importance" in *MacPherson*, which "presented a substantial advance in consumers' rights and manufacturers' responsibilities" and "also made Cardozo well known in the legal profession, in the law schools and throughout the country."[44] "Henceforth," Cardozo's biographer declares, "professionals began to take note when Cardozo wrote."[45]

---

[41] Note, *Torts-Negligence-Liability of A Manufacturer*, 32 HARV. L. REV. 89 (1918). The student author placed *MacPherson* in the perspective of his time:

> The principle that a manufacturer is not liable for negligence to a sub-vendee is based upon an erroneous interpretation of *Winterbottom v. Wright*, 10 M. & W. 109. That case was decided upon a question of pleading and stands for no such proposition. So numerous are the exceptions to the general rule in favor of foods, drugs and articles imminently dangerous to human life, and so varied are the opinions as to what is imminently dangerous, that the exceptions might be said to be the rule itself. That the duty of due care should be imposed only on manufacturers of foods, drugs and articles imminently dangerous to human life is illogical. If the duty exists, it ought to apply equally to all manufacturers. Such was the view taken in *McPherson v. The Buick Motor Co.*, 217 N. Y. 382, 111 N.E. 1050.

Id. (citations omitted).

[42] *See* Note, *Tort Liability of Manufacturers and Contractors: Some Recent Developments*, 40 HARV. L. REV. 886 (1927) ("*MacPherson v. Buick Motor Co*. had a twofold importance in the law of torts. It marked a trend in favor of imposing liability for negligence on manufacturers and contractors, irrespective of 'privity of contract,' and it settled that under a specific set of facts recovery might be had. But necessarily it left open many questions as to the precise requirements of the broad duty of care which it laid down.").

[43] In that era, the Court of Appeals had "a roster of seven permanent, elected judges and up to four additional, temporary judges designated by gubernatorial appointment." Miller, *supra* note 31, at 361 (the title refers to the celebrated Cardozo opinion from December 1917 reported at 118 N.E. 214 (N.Y. 1917), which followed his March 1916 MacPherson opinion by twenty months).

[44] KAUFMAN, *supra* note 35, at 162.

[45] *Id.* Yet, Judge Cardozo was not always inclined to dispense law change with quite so much liberality. Kaufman notes that Cardozo sometimes "took a different view of the [C]ourt's power to impose new liabilities." *Id.* at 249. In describing *Cullings v. Goetz*, 176 N.E. 397 (N.Y. 1931), Kaufman notes of "Cardozo's willingness to use the concept of foreseeability of harm to erode the exemption from liability of a

Another Cardozo biographer took a perspective of the Judge at the time that President Herbert Hoover nominated him to succeed Justice Oliver Wendell Holmes, Jr., on the U.S. Supreme Court:

> Cardozo had handed down pathbreaking decisions which demonstrated the law's adaptability to modern

---

remote seller of a defective product to the buyer in *MacPherson*," that "[e]ven after *MacPherson*, however, he was unwilling to erode a lessor's exemption from liability on the same basis." *Id.* Forty-five years later, Judge Domenick Gabrielli wrote for a unanimous Court of Appeals in overruling Cardozo's opinion in *Cullings*, but a more gentle overruling one will rarely find. And in the course of the overruling, Judge Gabrielli showered credit upon Cardozo for launching privity's demise:

> These rationales no longer retain the vitality they may once have had. The doctrinal limitation of privity of contract in tort actions by third parties was born in the 19th century case of *Winterbottom v. Wright* (152 Eng. Rep. 402) and was widely adopted (2 Harper and James, Torts, s 18.5). However, by the turn of this century the first cracks in the doctrine were evident (see Huset v. Case Threshing Mach. Co., 8 Cir., 120 F. 865) and New York was in the vanguard of the attack (see MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050). Indeed, by 1931, Chief Judge Cardozo was able to declare that "(t)he assault upon the citadel of privity is proceeding in these days apace" (Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445). Subsequent decisions by this court proved the correctness of his perception (Greenberg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (child permitted recovery through father's privity of contract); Randy Knitwear v. American Cyanamid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (remote purchaser of product permitted recovery); Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 306 N.Y.S.2d 942, 255 N.E.2d 173 (rescuer of product purchaser permitted recovery)). Thus, it came as no surprise that in Codling v. Paglia, . . . 298 N.E.2d 622, 626, we eschewed 'the temptation to devise more proliferating exceptions' to the privity rule and instead overturned it, at least insofar as it applies to cases involving a claim of strict liability once described as breach of warranty. In so doing we recognized that "(t)he policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to old and out-moded technical rules of law which, if observed, might be productive of great injustice" . . . Similarly, in the case of harm occurring to third parties who have come upon property with the invitation or license of the occupier, and often with the knowledge and consent of the landowner, consideration must be given to protecting these persons from injury, rather than adhering to technical, out-moded rules of contract.

Putnam v. Stout, 345 N.E.2d 319, 324 (N.Y. 1976).

> needs. That was the underlying message of *MacPherson v. Buick Motor Company* (1916), the ruling cited most frequently at the time of his elevation to the high court. Writing for the Court of Appeals, Cardozo held that automobile manufacturers' responsibility for the safety of their product extended not only to dealers to whom, technically speaking, they sold the car but also to the customers who eventually brought them from the dealers. The opinion rejected "precedents drawn from the days of travel by stage-coach" and insisted that legal principles should harmonize with "the needs of life in a developing civilization."[46]

However, G. Edward White has observed that "Cardozo was indulging in something of a gloss on the sources, innovating in the guise of following precedent."[47] The late Edward Levi, former U.S. Attorney General and Dean at the University of Chicago Law School, offered an even more trenchant insight when he wrote, "[t]he movements in legal concepts in case law ha[ve] frequently been shown by pointing to the breakdown of the so-called 'inherently dangerous' rule."[48] "It is easy to do this," Dean Levi remarked, "because the opinion in *MacPherson* . . . is the work of a judge acutely conscious of the legal process and articulate about it."[49] However, Dean Levi was more restrained in his overall assessment of *MacPherson*, observing that it "was only part of a cyclical movement in which differences and similarities first rejected are then adopted and later cast aside."[50]

---

[46] Richard Polenberg, *Prologue: A Man of Fastidious Reticence*, *in* THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 1-2 (1997) (discussing the context in which President Hoover nominated Cardozo on February 15, 1932). Polenberg's endnotes do not provide a source for the quoted assertion, however. *See id.* at 251. Nor does he identify those who cited *MacPherson* when he states that this case was "the ruling cited most frequently at the time of his elevation to the high court." *Id.* at 2.

[47] G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 120 (1980).

[48] EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING iv, 7-8 (Univ. Chi. Press 2013) (1949).

[49] *Id.* at 8.

[50] *Id.* At times, and in opinions such as *MacPherson*, Cardozo saw that "t[he final cause of law is the welfare of society." Steven L. Winter, *Cardozo's Freudian Slips*, 34 TOURO L. REV. 359, 375 & n.86 (2018) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921)).

B. Scholars Write of *MacPherson*: The Fall of the House of Privity

Despite Dean Levi's modest assessment, many other scholars have viewed the Fall of the House of Privity[51] to be synonymous with the *MacPherson* decision in 1916. For example, the late Professor Dan Dobbs wrote of *MacPherson*:

> Judge Cardozo substantially abolished the privity rule for negligence cases in the famous case of *MacPherson v. Buick Motor Co.*, decided in 1916. In that case, a wheel on the plaintiff's new car collapsed and the plaintiff was injured. The plaintiff was not in privity with the manufacturer–he had purchased the car from a retailer, not from the manufacturer–but Judge Cardozo permitted his claim against the manufacturer to proceed. Imminent, inherent, or intrinsic danger was no longer required to avoid the privity limitation. "If [the manufacturer] is negligent where danger is to be foreseen, a liability will follow."[52]

Professor Dobbs also wrote that "the privity rule, which had been abolished by *MacPherson* for negligence cases, still applied to bar the

---

[51] The author's *homage* to Poe provides a better metaphor for how privity acted and was overturned than Professor Prosser's "citadel." *See* Edgar Allan Poe, *The Fall of the House of Usher*, BURTON'S GENTLEMEN'S MAG., Sep. 1839, at 145. Intriguingly, Poe's story was published contemporaneously with Winterbottom's injury on the Royal Mail coach in August 1840. *See* Winterbottom v. Wright [1842] 152 Eng. Rep. 402, 403; 10 M & W 110. Like the House of Usher, the roots of the doctrine's own destruction lay in its very foundation–i.e., the blunt instrumentalism with which the Exchequer Court glommed onto the rule. *See* Palmer, *supra* note 5, at 84, 98 (arguing that "English judges in 1842 were wrestling with the difficult problem of controlling concurrence between contract and tort duties, and the privity objection was a natural bar to prevent contract-based duties from becoming actionable in tort.").

[52] DOBBS ET AL., *supra* note 4 (footnotes omitted). The same passage appears in the first edition of his Hornbook. *See* DAN B. DOBBS, LAW OF TORTS § 353 (2000). Professor Dobbs then went on to observe, "Over the years, other courts came to accept *MacPherson*." *Id.* However, there is no footnote with citations offered for this important observation; indeed, apparently even the best can miss an opportunity. In Section V, this article explores cases which Professor Dobbs might have cited.

express and implied warranty claims except when the plaintiff sued his immediate seller."[53]

More recently, Professor Alexandra Lahav described the prevailing orthodoxy about *MacPherson* in an article contending that privity posed not quite the bar that scholars have argued (or assumed) that it did (a contention that, as shown below, is not entirely accurate when one considers the work of intermediate appellate courts—let alone unpublished orders of the trial courts, whose dismissals of lawsuits in the 19th and early 20th centuries are no longer readily accessible, or are at least incredibly difficult to identify):

> The traditional narrative of the development of products liability is that the doctrine of privity required parties to have entered into a contract of sale for the consumer to sue the producer for injuries resulting from their product. Privity in this narrative was a "citadel" that was dismantled by Judge Benjamin Cardozo in *MacPherson v. Buick Motor Co.*, a case that was the genesis of products liability law as we know it. Before *MacPherson*, the story goes, the doctrine of privity largely prevented individuals from suing the manufacturers whose products injured them, except in a narrow set of circumstances. Judge Cardozo revolutionized products liability by moving it from contract to tort, magically turning an exception into a rule.[54]

---

[53] DOBBS ET AL., *supra* note 4. Later in his hornbook, Professor Dobbs cited *MacPherson* for the proposition that "[c]ourts long ago eliminated the need to show privity in most tort cases." *Id.* at 1070 & n.74.

[54] Alexandra D. Lahav, *A Revisionist History of Products Liability*, 122 MICH. L. REV. 509, 511 (2023) (footnotes omitted). Later in her article, Professor Lahav elaborates:

> The traditional story of products liability law is that its genesis is in 1916 with the New York Court of Appeals decision in *MacPherson v. Buick Motor Co*. Eminent scholars and jurists such as California Supreme Court Justice Roger Traynor all told more or less the same story: products liability came to be when privity of contract fell to tort in 1916. Prior to that time, privity of contract prevented third-party purchasers from suing for injuries caused by dangerous products. Judges imported privity doctrine to the United States through an 1842 English case called *Winterbottom v.*

Others in the 21st-century continue to see *MacPherson* as the decisive blow. For example, Professor John C.P. Goldberg of Harvard Law School, writing in the pages of the *Touro Law Review* in 2018, observed:

> [I]t is worth recalling that, in the judicial opinion that put him on the map (written while he was still sitting on the Court of Appeals by designation), Cardozo had no compunction swatting aside a directly on-point general common law ruling that had been issued a year earlier by the Second Circuit. Writing for a 5-1 court in *MacPherson v. Buick*, he declared the old privity rule dead, holding instead that, under New York law, automobile manufacturers owe it to users of their cars to take care that their cars not cause injury.[55]

But no one put it more picturesquely and vividly than Dean William L. Prosser, who in a justly famous law review article described Cardozo in *MacPherson* as judicial superhero, leaping outdated law in a single bound. "In 1842 Lord Abinger foresaw 'the most absurd and outrageous consequences, to which I can see no limit' if it should ever be held that the defendant who made a contract with A would be liable to B for his failure to perform that contract properly," wrote Prosser as his succinct prologue.[56] In the next act of the play, Prosser proclaimed,

> What happened in the next century was enough to make the learned jurist turn in his grave. The courts began by the usual process of developing exceptions to the "general rule" of nonliability to persons not in privity. The most important of these was that the seller of a chattel owed to any one who might be expected to use it a duty of reasonable care to make it safe, provided

---

> *Wright*, which, the story went, was widely adopted by American courts.

Id. at 514 (footnotes omitted).

[55] John C. P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 TOURO L. REV. 147, 149-50 (2018) (footnotes omitted). Professor Goldberg refers to *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (2d Cir. 1915). *See* Goldberg, *supra*, at 150 & n.20. *Johnson* is discussed in Section V of this article. *See infra* Section V and accompanying text.

[56] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099-1100 (1960).

> that the chattel was "inherently" or "imminently" dangerous.[57]

These were but warm-ups for Prosser's brief overture to a stunning finale: "In 1916 there came the phenomenon of the improvident Scot [i.e., *MacPherson*] who squandered his gold upon a Buick, and so left his name forever imprinted upon the law of products liability. *Cardozo, wielding a mighty axe, burst over the ramparts, and buried the general rule under the exception*."[58] He did so, Prosser pointed out, by recasting the rule in the language of what had been the exception: "'If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.'"[59]

The advantages of negligence over warranty or other strict liability theories may not be at first obvious. As practitioners in the trenches would advise us, however:

> More plaintiffs would prefer to present their respective cases to a jury on a negligence, rather than on a strict liability, basis. In McLuenesque terms negligence is "hot" and strict liability is "cold." It is easier to prevail by showing that the defendant did something wrong than that there is something technically defective about the product. It is easier to win (and collect substantial damages) by showing that a drug company concealed information about side effects than to show that in fact there was no warning on the labeling about the risks.[60]

Through a casebook that became dominant in American law schools, and remains in use today (including in the author's own Torts course),[61] Prosser's larger-than-life legend of *MacPherson* endures

---

[57] *Id.*
[58] *Id.*
[59] *Id.* (quoting MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916)).
[60] Paul D. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974).
[61] Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 28, 39, 72-73 & n.178 (2013); *see, e.g.*, John P. Frank, *John W. Wade*, 48 VAND. L. REV. 591, 593 (1995). The most recent edition is VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS (15th ed. 2024). For a review of the first edition, see, e.g., Harold F. McNiece, *Review of "Cases and Materials on Torts," By Young B. Smith & William L. Prosser*, 1953 WASH. U. L.Q. 229 (1953).

and has imbued many generations of American law school graduates with one of the foundational origin stories in American law. However, like many myths, this one leaves out the real struggle of *MacPherson* to live up either to the myth or to its initial promise. As we explore in the next Section, that is particularly so in the difficult history *MacPherson* experienced with New York's four Appellate Divisions, where the tale is not that of the "mighty axe," but rather, one of an ox-cart's slogging journey, wheels laden with heavy mud, fighting to take one step forward to every two steps back.

IV. *MACPHERSON* IN NEW YORK'S APPELLATE DIVISION: ONE STEP FORWARD, TWO STEPS BACK

While the image of *MacPherson* traced in the previous section leaves the impression that the 1916 decision caused a seismic shock wave to roar through the courts of America, the reality is quite different. From a commentator who wrote in the 1950s, an account was given of the difficult and uneven progress *MacPherson* had in the four Departments of the Appellate Division of the New York State Supreme Court.[62] That commentator described the problem as that—

[62] Robert Martin Davis, *A Re-examination of the Doctrine of* MacPherson v. Buick *and Its Application and Extension in the State of New York*, 24 FORDHAM L. REV. 204 (1955). The commentator was a practicing attorney admitted to the New York Bar. *Id.* at 204. Into this area, he has proven a guide worthy as Dante's Vergil touring the Underworld in *La Divinia Comedia*. He may well be the same attorney quoted in a 1958 New York Times article about opposition to a federal funded housing project. See *UNION HOUSING OPPOSED; Group Opens Chelsea Office to Fight I.L.G.W.U. Plan*, N.Y. TIMES, March 2, 1958 ("Robert Martin Davis, a lawyer with an office in the area, and attorney for the Chelsea group, estimated that 7,500 persons would be forced to give up homes and stores if the Board of Estimate approved the project."), cited and quoted in Christopher Stephenson, From Anarchic Utopia To Instrument Of Power: The Story Of Abraham Kazan's Housing Cooperative Empire In New York City 51-52 & n.123 (May 2024) (M.A. thesis, Rutgers University), https://rucore.libraries.rutgers.edu/rutgers-lib/72909/PDF/1/play/. If prosody is any indication, he is also likely a correspondent who wrote to the Times in 1936 and 1964. In the 1936 letter, he commented on the false lure of autocrats and the need for free people to be introspective: "one cannot evade the question, 'Is autocracy just?' Initiative and ambition are smothered. This brings about the suppression of the inherent rights of man." Letter to the Editor, *Sapping Ambition—Smothered Initiative Seen As Result Of Dictatorship*, N.Y. TIMES, May 31, 1936, at 68. In the 1964 letter, he wrote about a rent strike against indifferent landlords by tenants in Harlem, "[b]ut the legal rule of non-excuse of rent is anachronistic and morally questionable. One might do better to urge its abolition than to characterize those

> The courts have too frequently been inaccurate in their comprehension of the broad meaning of the doctrine of *MacPherson v. Buick*. While acknowledgment must be given to the principle that, "No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association," the principles formulated in Judge Cardozo's opinion have a wider scope than has been recognized in many subsequent decisions. And these decisions have been further in error by interpreting the doctrine as applying only in situations that were not even acknowledged, as a matter of judicial finding, to be present in *MacPherson v. Buick* itself.[63]

---

disregarding it as anarchic and lawless." *Letters to The Times; Realty Law Change Wanted; Legal Rule of Non-Excuse of Rent Payment Declared Obsolete*, N.Y. TIMES, Jan. 2, 1964, at 26. He elaborated in a style redolent of the 1955 *Fordham Law Review* article:

> On this point the general law of contracts is much more sensible and humane. We are indebted to the eighteenth-century jurist Lord Mansfield for the principle that failure of one party to render a material part of an agreed exchange excuses the other party' performance. Merchants, employers and ordinary consumers would be aghast were it otherwise. That payment need not be made for goods or services that have not been or will not be forthcoming is firmly established.
>
> The existence of the obsolete rule of real property law that requires tenants to pay for uninhabitable housing can only be explained historically—in that traditionally a lease was viewed as an immediate transfer of a property interest rather than as an installment contract under which both lessor and lessee had continuing and, by operation of law, dependent obligations.
>
> Whatever may originally have been the merits of this distinction, today it is unrealistic, useless, and has in fact been modified or abandoned for a number of other purposes.

Id.

[63] Davis, *supra* note 62, at 205 (citation omitted). Robert Martin Davis's work was soon cited by a U.S. District Judge in the Northern District of New York, Hon. James T. Foley, who swore the author into the bar of that court some 32 years later in 1988 (the proof of which is an Admission Certificate which is yet displayed in the author's faculty office). See Butler v. General Motors Corp., 143 F. Supp. 461 (N.D. N.Y. 1956), where Judge Foley observed:

> The actions were based upon the famed doctrine of *MacPherson* . . . and each action had the common thread of

> responsibility and liability based upon the principles of that authority. Much has been written on the *MacPherson* doctrine and I have no intention to paint the lily further in this practical situation of disposition of legal motions in reference to a jury trial and jury verdicts. *An interesting and most comprehensive article on the subject by Robert Martin Davis with a review of all the New York authorities has been reprinted from the Fordham Law Review, Summer 1955*, and it refers to a standard treatise on the subject by Professor Bohlen, 45 L. Q. Rev. 343, 361 (1929). The doctrine has recently met with the approval of the Court of Appeals, Second Circuit. Fredericks v. American Export Lines, 2 Cir., 227 F.2d 450; Dimas v. Lehigh Val. Railroad Co., 2 Cir., 234 F. 151. The most recent decision in New York by the Court of Appeals which emphasizes and clarifies the approach to be taken and the test to be used as to the sufficiency of evidence in situations of this kind is Swensson v. New York, Albany Dispatch Co., Inc., 1956, 309 N.Y. 497, 131 N.E.2d 902.
>
> From the viewpoint of these authorities, and particularly the writing in the Swensson Case, and from the established position that the evidence must be viewed in the most favorable light for the plaintiffs, I deny the motions for directed verdicts in each of the actions.

Id. at 462 (emphasis added). In affirming, the Second Circuit panel's per curiam ruling made specific mention of "Judge Foley's able opinion" and of the *MacPhersion* precedent. *See* 240 F.2d 92, 92-93 (2d Cir. 1957) ("Under the doctrine of *MacPherson* . . . , the appellant was held liable to each of ten plaintiffs for personal injuries sustained in an automobile accident caused, according to the jury's verdict, by a defect in the steering mechanism of a Chevrolet chassis truck manufactured by the defendant and purchased from a dealer in Hoosick Falls, New York, by one Richard Hanson on February 27, 1950," who "had a rack body constructed on the chassis and was using the truck to transport his employees to work" when an accident occurred "caused by negligence in the manufacture and inspection of the truck at the defendant's factory."). Judge James T. Foley (Albany '34) was appointed by President Truman in 1949 and served forty-one years until his passing in 1990. *See Foley, James Thomas*, FED. JUD. CTR., https://www.fjc.gov/node/1380801 (on file with the Touro Law Review) (last visited Jan. 20, 2026); Hon. Roger J. Miner, *Memorial Service: Judge James T. Foley*, N.Y. L. SCH., 1990, https://digitalcommons.nyls.edu/judges/8. At his investiture, Judge Foley was 38 years old—the youngest federal judge at that time in the nation. *Id.* at 5. The federal post office and court house in Albany has been named in his honor in 1988. *Id.* at 9; *see also* U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/real-estate/historic-preservation/explore-historic-buildings/find-a-building/all-historic-buildigs/james-t-foley-us-post-office-and-courthouse-albany-ny (on file with the Touro Law Review). That Judge Foley had noted and cited Robert Martin Davis's article is no surprise; as his friend and colleague Judge Roger Miner remembered him, Judge Foley "was an avid reader of everything, and would always admonish young lawyers to keep up on their reading." Miner, *supra*, at 7. "He always gave the same

Indeed, the commentator's survey of *MacPherson*'s pained journey as precedent in the Appellate Division of New York was cited by another writer as proof that rebuts any contention that "it does not take more than one case to establish a rule of law, and once a rule is established, counsel on both sides will simply refer to it, and litigation will be unnecessary" and therefore "a lack of cases simply indicates a condition of legal certainty."[64] To the contrary, the writer noted that over the courses of succeeding cases, "the rule of law will still be changed or at least modified, since so many qualifications will have been added."[65] But those modifications can be retrograde—not merely progressive. And it is indeed such a mixed fate that *MacPherson* endured at the hands of Appellate Division Justices, who had not the imagination or breadth of vision as their future Chief Judge in Albany. In fact, the general direction that New York's mid-level appellate courts seemed to set for *MacPherson* was, in sum, often more retrograde than progressive because of "the frequent inaccurate statement and consequent improper application of[,] or failure to apply[,] the doctrine of *MacPherson*" by those courts.[66] Even almost forty years after *MacPherson* was decided, the commentator could still but pine for "the proper application of the doctrine formulated by Judge

---

admonition to his fellow judges" as well, Judge Miner recalled, "but they didn't seem to listen as well." *Id.* at 7-8.

[64] William C. Jones, *Merchants, the Law Merchant, and Recent Missouri Sales Cases: Some Reflections*, 1956 WASH. U. L.Q. 397, 410 n.95. Jones continued:

> In answer to this, it is perhaps enough to say that probably most cases turn on disputed questions of fact rather than law, hence certainty as to law does not prevent litigation. Furthermore, rules of law are, after all, just conditional statements of fact, hypothetical or actual—if A is true then B will follow; if the defendant negligently struck plaintiff with his automobile, then the plaintiff can recover. Rarely will the protasis exactly agree with the facts in the particular case, hence, under the impact of new cases or fact situations, it will be necessary to complicate it—if the defendant struck the plaintiff with his automobile, and was negligent, and the plaintiff was not also negligent, and the plaintiff suffered injury, the plaintiff may recover, etc. One may even change the apodosis (the plaintiff may not recover, or may recover to the extent that he was not negligent), or, if one does not, *the rule of law will still be changed or at least modified, since so many qualifications will have been added.*

Id. (emphasis added).

[65] *Id.*

[66] Davis, *supra* note 62, at 233.

Cardozo in *MacPherson v. Buick*" because the proper application "would have certain salutary effects":

> It would provide an additional incentive for the manufacturer to produce an article without defect. Further, the manufacturer is better able to bear the responsibility for injury caused by his negligently manufactured article, through products liability insurance, than the consumer is able to bear the losses consequent upon his injury. And the slight increase in premium rate for products liability insurance which might result from proper application of the doctrine would be a cost that the manufacturer might pass on, in whole or in part, to the consuming public as a method of distribution of the risk involved. Considerations of public policy dictate more careful judicial attention to the full meaning of the doctrine with the objective of avoiding its conservative, restricted application as the result of failure to comprehend its meaning and scope.[67]

In terms of "fail[ing] to comprehend" *MacPherson's* "meaning and scope," the Appellate Divisions made a number of significant, retrograde contributions. In surveying these decisions, we see at least four "major failings":

1. Cardozo's opinion spoke of imposing liability upon the manufacturer of an article which *became* "inherently or imminently dangerous" *because* it was negligently constructed. "Many courts . . . misinterpreted this ruling by stating it as one imposing liability upon manufacturers *of inherently or imminen*tly dangerous articles *when* such articles are negligently constructed."[68] This is not mere semantics. The two phraseologies import very different analyses. The second phraseology proved fatal to many otherwise meritorious complaints, and thus became "the source of most of the frequent, judicial misunderstandings of the import of the doctrine."[69]

---

[67] *Id.* at 234 (footnotes omitted).

[68] *Id.* at 207.

[69] *Id.* Indeed, as Professors Abraham and White have elucidated, risk, not privity, was the real point of Cardozo's *MacPherson* opinion—the focus on risk indeed made privity irrelevant. *See* Kenneth S. Abraham & G. Edward White, *Recovering* Wagner v. International Railway Company, 34 TOURO L. REV. 21, 54 (2018) ("The risk in

2. "[W]hen plaintiffs have failed to make out prima facie cases of negligence in the manufacture of the particular articles in question, the courts, instead of dismissing the complaints for failure of proof of negligence, often" painted with such a broad brush that they purported to "rule that the doctrine of *MacPherson*" was "not applicable to the articles involved," thus creating the misimpression that particular items, irrespective of the situation in which they caused injury, could never be the subject of redress in negligence when the victim was not in the fold of privity.[70]
3. In "often dismissing" complaints before trial "on motion for failure to state a cause of action . . . on the ground that *MacPherson*" did not apply "to the articles in question," the courts treated the question as an issue of law.[71] Yet, much more often (and in many of these cases), the question presented an issue of fact for the jury. The courts thus rode roughshod over Judge Cardozo's express admonition in *MacPherson* that "[w]hether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury."[72]
4. The courts engrafted at least one major new element onto *MacPherson* that further enhanced the judge versus-jury option to a point that further degraded the efficacy of Judge Cardozo's opinion, by arrogating even more power unto courts to take cases from juries and instead to dismiss them as a matter of law: a "requirement that a latent defect be proved, before there c[an] be a recovery against a manufacturer in a negligence action," that in practice "amount[ed] to an assumption of risk defense as a matter of law 'with the added disadvantage that the defendant was relieved of the burden of proving that

question [in *Wagner*] was the risk to potential rescuers of persons endangered by a party's negligence. This concern with risk was also evident in *MacPherson*, in which the risk [Judge Cardozo] identified was to users of a product from negligent manufacture of the product.").

[70] Davis, *supra* note 62, at 209.

[71] *Id.* at 210.

[72] *Id.* at 217. Of course, "in cases in which Cardozo was . . . invested," the Judge himself "was willing to substitute his judgment for the jury's when he felt strongly enough about the matter." Michael D. Green & Ashley DiMuzio, *Cardozo and the Civil Jury*, 34 TOURO L. REV. 183, 212 (2018) (additionally observing that "Cardozo was willing to adjust the facts to suit his purposes, regardless of what the jury might have been justified in finding.").

> plaintiff had subjectively appreciated a known risk,'" and which was nothing more than "'a vestigial carryover from pre-*MacPherson* days when deceit was needed for recovery.'"[73]

The following survey of cases rendered in the four Appellate Divisions exposes each of these four faults in more detail.[74]

A. *MacPherson* in the First Department

In terms of "fail[ing] to comprehend" *MacPherson*'s "meaning and scope," the First Department[75] made major, retrograde contributions. The Appellate Division and Supreme Courts within that Division dispatched a number of cases on the misreading of *MacPherson* as requiring the product be "an inherently dangerous" or "imminently dangerous device"—and thereby disregarded out of hand claims based on defective flushing handles, vacuum cleaners, heels of shoes, cigarettes, and beds while allowing claims arising from coffee urns and women's dresses.[76]

---

[73] Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 348 N.E.2d 571, 576-77 (N.Y. 1976) (overruling Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950)).

[74] Judge Cardozo might very well have seen the actions of the Appellate Divisions somewhat less critically. In a famous passage, he described what might have been his view of the intermediate appeals cases that denied relief to product-injury victims even after *MacPherson*:

> Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence.

George M. Cohen, *The Uncertainty of* Sun Printing, 34 TOURO L. REV. 83, 83 & n.1 (2018) (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 66 (1924)). Passages such as this fall prey to the criticism that Cardozo "could turn a phrase, but his prose was often overwrought." Winter, *supra* note 50, at 359. His prose, as in *MacPherson*, could also at times "obscure thought '[b]ehind a cloud of words.'" *Id.* at 359 (quoting Judge Andrews' dissent in *Palsgraf*). As explored below, the cloud of words around privity created by Cardozo in *MacPherson* left many openings for the Appellate Divisions to fulfill Alphonse Karr's sardonic prophecy, "*plus ça change, plus c'est la même chose.*" *Cf.* Van Detta, *supra* note 8, at 154 n.194.

[75] The New York State Supreme Court—Appellate Division, First Department "holds jurisdiction over the Counties of New York and the Bronx." *See Court History*, N.Y. CTS., https://www.nycourts.gov/courts/AD1/courtinfo/aboutthecourt.shtml (on file with the Touro Law Review) (last visited Jan. 20, 2026).

[76] Greenberg v. Advance Furniture Co., 193 N.Y.S. 935 (App. Div. 1st Dep't 1922) (beds not inherently or imminently dangerous products) (order affirmed "on the

1. Byers v. Flushovalve Co.

The retrograde started almost immediately, with a memorandum affirmance of a trial court decision that did not measure up to the standard that Cardozo had aspired to set in *MacPherson*.

Byers v. Flushovalve Co.[77] involved a product-injury claim brought by a mechanic for "injuries to his hand through the breaking of a knob at the end of the handle of a valve used to flush toilets," where the mechanic "alleged that the knob was made of defective and unfit material."[78] Justice Giegerich's opinion got straight to the issue before the court on plaintiff's motion for judgment on the pleadings: "The question is whether the case comes, as a matter of law of course, within the principle of *MacPherson*."[79] The subtlety of Cardozo's comment about the shifting factual-legal nature of the determination did not deeply impress Justice Giegerich. Instead, continuing the old distinctions that haunted the law after *Winchester* and seeing no change upon them worked by *MacPherson*, Justice Giergerich wrote:

> In this case it seems to me the article in question should be held as a matter of law *not* to be a thing of danger within the principle stated. *The difference is manifest, without any attempt at argument, between poisons, and defectively made scaffolds and elevators and steam boilers and automobiles, on the one hand, and such harmless things as valve handles on the other hand.* It cannot be said that a valve handle is any more

authority of" *Field v. Empire Case Goods Co.*, 166 N.Y.S. 509 (App. Div. 2d Dep't 1917)); Byers v. Flushovalve Co, 160 N.Y.S. 1050 (Sup. Ct. 1916), *aff'd mem.*, 164 N.Y.S. 1088 (App. Div. 1st Dep't 1917) (*see* discussion *infra* Section IV.A.1); Galvin v. Lynch, 241 N.Y.S. 479 (N.Y. City Ct. 1930) (vacuum cleaner not a thing of danger); Cook v. A. Garside & Sons, Inc., 259 N.Y.S. 947 (Sup. Ct. N.Y. Cty. 1932) ("An ordinary heel of a shoe is not an article that is reasonably certain to place life and limb in peril when negligently constructed."); *cf.* Noone v. Fred Perlberg, Inc., 49 N.Y.S.2d 460 (App. Div. 1st Dep't 1944), *aff'd mem.*, 60 N.E.2d 839 (N.Y. 1945) (*see* discussion *infra* Section IV.A.4).

[77] 160 N.Y.S. 1050 (Sup. Ct. 1916), *aff'd mem.*, 164 N.Y.S. 1088 (App. Div. 1st Dep't 1917).

[78] *Id.* at 1050.

[79] *Id.*

> 'reasonably certain to place life and limb in peril when negligently made' than a broom or a shovel or any one of a thousand ordinary implements. Of course, any of those things, if negligently made, may under *exceptional* conditions place life or limb in peril, *but that is not the test*. The result must be reasonably certain, not merely possible. If the case were a border line one, they the complaint might be sustained and the question as to the dangerous character of the thing left for the jury to determine; but I do not regard it as near the border line.[80]

In 1917, the First Department affirmed this erroneous construction of *MacPherson* without so much as even offering an opinion to explain the perplexity that the bar would experience at such holdings.[81]

2. Block v. Liggett & Myers Tobacco Co.

In 1937, the First Department misapplied *MacPherson* in ruling that a manufacturer of a cigarette was not liable to a consumer injured by a piece of cutting blade that was concealed in the tobacco.[82] The court once again relied on the misunderstanding that *MacPherson* applied only to "inherently dangerous" products among which—and this in retrospect drips with irony—cigarettes were not enumerated. Eighteen months later, the same court upheld a consumer's product injury claim against a cigarette manufacturer—but not because of a newly achieved enlightenment about the real rule of *MacPherson*. Instead, the Appellate Division approved the trial court's embrace of the old "inherently dangerous" language and, fixing on the fact that the product injury was the result of an exploding cigarette, rather than a cutting cigarette bearing a foreign object, because an exploding cigarette could be considered "a thing of danger."[83] To his credit, Justice Ryan in the City Court of New York at least surveyed decisions

---

[80] *Id.* (emphases added).

[81] *Byers*, 164 N.Y.S. 1088.

[82] Block v. Liggett & Myers Tobacco Co., 296 N.Y.S. 922 (App. Div. 1st Dep't 1937) (reversing the Municipal Court of the City of New York's judgment in favor of the consumer and remanding for entry of judgment in favor of the manufacturer as a matter of law).

[83] Meditz v. Liggett & Myers Tobacco Co., 3 N.Y.S.2d 357 (N.Y. City Ct. 1938), *aff'd mem.*, 25 N.Y.S.2d 315 (App. Div. 1st Dep't 1938).

both in New York and elsewhere that focused on product injuries caused by cigarettes.[84] But in the end, he hitched his wagon to the older jurisprudence, even as he acknowledged that such a case "presents an interesting proposition in view of the manner in which the doctrine laid down in the *MacPherson* Case . . . is being extended by the courts."[85]

3. Hoenig v. Central Stamping Co.

In *Block*, Justice Ryan noted the dissent from the Court of Appeals memorandum affirmance of a Second Department decision, *Hoenig v. Central Stamping Co.*,[86] that had allowed a consumer injured by a defective coffee urn to hold liable at trial the manufacturer of the urn. For the majority in *Hoenig* not to write an opinion here was a real disservice to the bench, the bar, and product-injury plaintiffs for some years to come, since the six Judges who voted to affirm might better have picked one of their number—including the legendary Judge Irving Lehman[87]—to write in a strong voice that *MacPherson* was, in fact, broader than many of the Appellate Division decisions had treated it. Instead, they remained mum. That left another Chief Judge—

---

[84] *Id.*

[85] *Id.* at 359 (citation omitted). Justice Ryan also made note of a very recently issued Court of Appeals decision which he described as follows:

> Following and extending the doctrine of the MacPherson Case let us refer to another one in the Court of Appeals decided quite recently (December 31, 1936) where a coffee urn with a defective handle was held to be a 'thing of danger.' The facts in which were that the plaintiff bought a coffee urn from a retailer which had been manufactured by the defendant and as he was taking it off the stove filled with a boiling liquid the handle broke and his hand was severely burned. The court at Trial Term directed a verdict in his favor for $3,000. The extent of his injuries and the time of his incapacitated condition were corroborated at the trial. The judgment of the Appellate Division, affirming the court below, was affirmed by a divided court, writing no opinion. Crane, J., dissenting in a memorandum.

Id. at 360 (citing Hoenig v. Cent. Stamping Co., 287 N.Y.S. 118 (App. Div. 2d Dep't 1936), *aff'd mem.*, 6 N.E.2d 415 (N.Y. 1936).

[86] Hoenig v. Cent. Stamping Co., 287 N.Y.S. 118 (App. Div. 2d Dep't 1936), *aff'd mem.*, 6 N.E.2d 415 (N.Y. 1936).

[87] *See generally, e.g.*, Edmund H. Lewis, *The Contribution of Judge Irving Lehman to the Development of the Law,* 51 COLUM. L. REV. 734 (1951).

Frederick Crane[88] this time, not Willard Bartlett as in 1916—to again signal to the Appellate Divisions what they risked if they read too much into the affirmance:

This proposed decision carries the doctrine of *MacPherson . . . entirely too far*.[89]

> *It would make the manufacturer of every coffee pot or dishpan liable for the consequences of a broken handle, no matter how far removed the injured person might be from the original purchaser. There must be a limit somewhere.* There must be something more than a possibility of danger, at least a probability. An exploding coffee urn or glass jar or breaking wheel will almost certainly cause serious injury. The manufacturer alone can guard against such defects. Not so with handles to receptacles which may be safely used.[90]

---

[88] *See Frederick Evan Crane*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/biography/frederick-evan-crane/ (on file with the Touro Law Review) (last visited Jan. 20, 2026).

[89] Professor Roger Traynor, then a faculty member teaching law at Boalt Hall, might have justly said to Chief Judge Crane, "you ain't seen nothin' yet, Mister!" *See* Traynor's opinions in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462 (1944) (Traynor, J., concurring) and *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62 (1963). *See also Justice Roger Traynor: Public Service (1900-1983*), CAL. MUSEUM, https://californiamuseum.org/inductee/justice-roger-traynor/ (on file with the Touro Law Review) (last visited Jan. 20, 2026) (6th Class of California Hall of Fame).

[90] *Hoenig*, 6 N.E.2d at 416 (Crane, C.J., dissenting) (emphasis added). Turning to the facts of the case before the Court of Appeals, Chief Justice Crane complained that

> This coffee urn was so heavy when filled that the plaintiff himself says that they first lifted it upon the stove and then filled it with hot water from the pail. Nowhere does he explain why it could not have been left upon the gas stove and coffee served from there or poured out into other receptacles. If it went in from a pail at one end, there is no reason stated why it could not come out in a pail at the other end. Instead of that the plaintiff, knowing it was too heavy to lift when filled, attempted to remove it from the stove after the contents had been heated. This is his testimony. There is nothing in the evidence to show that coffee urns of this weight were usually carried around by the handles or that the manufacturer had any reason to suppose that they would be when filled with boiling substance.

Quantifying the impact of Chief Judge Crane's opinion is not as easy as one might hope. But like Chief Judge Bartlett's dissent in *MacPherson*, it certainly could very well have provided inspiration to the Justices of New York's Appellate Divisions to pull back on, rather than push forward, how they applied *MacPherson* to future cases.

4. Noone v. Fred Perlberg, Inc.

The product-injury plaintiff in *Noone v. Fred Perlberg, Inc.*,[91] however, scored a rare litigation win in a case against a textile manufacturer involving a flammable dress purchased from a department store.[92] The key passage in the First Department's opinion reads like a terrifying scene from an Alfred Hitchock script of the 1940s. The plaintiff wore the dress—

> [F]or the first time that evening at a New Year's Eve party in the Ethan Allen Club, Burlington, Vermont, attended by a considerable number of people. The guests were sitting, walking about or standing, and people were smoking. While walking across the cocktail lounge of the club, plaintiff heard a crackling sound, and saw her dress was aflame. Two gentlemen who were present testified at the trial. They heard the crackling sound, saw the flame, and threw their tuxedos over plaintiff's head. Plaintiff and her witnesses testified that the flame flashed up in one blaze, almost

---

Id. Judge Crane had offered a similarly restrictive view of *MacPherson* in one of his earliest decisions on the Court of Appeals. *See* Rosebrock v. Gen. Elec. Co., 140 N.E. 571 (N.Y. 1923). Of course, the kind of "blame the victim" jurisprudence evidenced in Judge Crane's *Hoenig* dissent has continued throughout the history of products liability law, right down to this very day in the 21st century. *See, e.g.*, Robert S. Adler & Andrew F. Popper, *The Misuse of Product Misuse: Victim Blaming at Its Worst*, 10 WM. & MARY BUS. L. REV. 337 (2019); *see also* Hon. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965) (alluding to the problem of victim-blaming so as to shift liability away from the manufacturer and towards the consumer in product-injury claims).

[91] 49 N.Y.S.2d 460 (App. Div. 1st Dep't 1944), *aff'd mem.*, 60 N.E.2d 839 (N.Y. 1945).

[92] At trial, the jury returned a $5,000 verdict against the manufacturer to compensate plaintiff for her injuries. At that point, however, "the trial court granted defendant's motions to set aside the verdict, and for a directed verdict in its favor, on the ground that there was a fatal deficiency in plaintiff's proof that the dress as manufactured and delivered to the purchaser was inherently dangerous." *Id.* at 460.

> instantaneously enveloping plaintiff. Concededly, she was seriously burned on the back, shoulders, and under the left arm, necessitating her confinement to a hospital for about two months wherein she secured treatment for second and third degree burns.[93]

After stating the rule it had synthesized from several cases, including *MacPherson*—

> The rule in this State is now settled that when a manufacturer sells an inherently dangerous article for use in its existing state, the danger not being known to the purchaser and not patent, and notice is not given of the danger or it cannot be discovered by reasonable inspection, the manufacturer is legally liable for personal injuries received by one who uses the manufactured article in the ordinary and expected manner.[94]

—the First Department moved to the theory of the case and the evidence adduced at trial:

> Underlying the manufacturer's liability is the danger reasonably to be foreseen from the intended use of the article. Clothing is worn to cover, adorn and protect the human body. Ordinarily, as the witness Alexander testified, when clothing is brought into contact with a lighted cigarette or direct heat, the damage is slight, consisting of a small hole in the cloth or a slow burning easily extinguishable. Plaintiff's proof showed this to be true of the black slip of the dress, which remained practically untouched by the flames that consumed the netting which ballooned out in a burst of fire, causing the severe injuries for which plaintiff seeks damages.[95]

"After reviewing the evidence," the Appellate Division wrote, "we reach the conclusion that plaintiff established a prima facie case, and that the issues were for the jury."[96] The court was particularly impressed by the testimony of "an expert having forty years of

---

[93] *Id.* at 461.
[94] *Id.* at 462.
[95] *Id.* at 463.
[96] *Id.*

experience with sizings … that the composition which produced the glazed and shiny appearance on the netting in question and the instantaneous flash of flame was some form of nitro-cellulose, a highly dangerous explosive."[97] From that alone, the appellate panel was easily persuaded that the jury could reasonably have found that "[t]he manufacturer knew or should have known that such an evening gown would be worn to dinners and cocktail parties where large numbers of persons gather and many indulge in smoking"[98] and that, therefore, "that plaintiff's injuries were proximately caused by the inherently dangerous substance used by defendant in the manufacture of the gown."[99] At the end of the day, *had* the First Department *not* been persuaded that the "composition which produced the glazed and shiny appearance on the [dress's] netting" was "inherently dangerous," *then* the privity bar would have roared back to life and suffocated the product-injury claim in the tattered shards of *Winchester*.[100]

5. Two "Restatements": Ultramares Corp. v. Touche, *and Section 395*

a. *Ultramares v. Touche*

Ultramares Corp. v. Touche[101] will seem an odd entry in the chronicle of cases from the First Department in which *MacPherson* figured in a significant way. For one thing, it is *not* a product-injury case. For another thing, the First Department's opinion in the case does *not* even mention *MacPherson*, let alone (mis)apply that precedent. *But* the First Department's opinion occasioned an appeal to Albany that provided Chief Judge Cardozo with his last opportunity to restate his holding in *MacPherson* as part of a broader review of the evolving law of privity. After *Ultramares*, Cardozo left Albany to take the seat

---

97 *Id.*
98 *Id.*
99 *Id.* at 464.
100 And as Robert Martin Davis further observed, "the corrective influence of the decisions in the *Noone* case in 1944 and 1945 was not felt in one of the high-heeled shoe cases that was decided subsequently in 1950, nor in the recent Court of Appeals opinion in *Campo v. Scofield*." *See* Davis, *supra* note 62, at 215 (citations omitted); *see also* discussion *infra* notes 197-202 and accompanying text.
101 243 N.Y.S. 179 (App. Div. 1st Dep't 1930), *rev'd*, 174 N.E. 441 (N.Y. 1931).

on the U.S. Supreme Court to which President Hoover appointed him.[102]

And Chief Judge Cardozo did not miss an opportunity to restate the law of privity and to include a clarified statement of his own view of the true holding in *MacPherson*.

In the First Department, Justice McAvoy boldly opened the opinion with the declaration that

> The defendants, public accountants, have been held liable to the plaintiff, to whom they owed no contractual duty through any contract of employment which the plaintiff entrusted to them. Whether a duty arises here, in the absence of direct contractual relation, out of the situation shown by the evidence, is the problem for solution.[103]

In this case, banking institutions that relied on financial audits prepared by the accountants of their own clients were adversely impacted by the accountants' gross negligence. The Appellate Division majority saw this as actionable, despite the lack of privity between the banks and the accountants, because "[b]anks and merchants, to the knowledge of these defendants, require certified balance sheets from independent accountants, and upon these audits they make their loans. Thus, the duty arises to these banks and merchants of an exercise of reasonable care in the making and uttering of certified balance sheets."[104]

---

[102] Cardozo clearly lamented giving up the work he had done since *MacPherson* on the New York Court of Appeals, including tending to his precedents as they catalyzed progress in the law, though he did not hesitate in accepting Hoover's nomination during his telephone call from the 31st President. KAUFMAN, *supra* note 32, at 467, 469. Some years later, now Justice Cardozo exchanged correspondence with future Justice Robert H. Jackson about an opportunity Jackson thought he might have for appointment to the New York Court of Appeals. Cardozo minced no words:

> Jackson, if you have a chance to go on the New York Court of Appeals, [then] go on the New York Court of Appeals. That's a lawyer's court. Those are the kind of problems that you'll enjoy. Over on this [C]ourt there are two kinds of questions—statutory construction, which no one can make interesting, and politics.

Clyde Spillenger, *Cloistered Cleric of the Law*, U. CHI. L. REV. 507, 507 & n.1 (1998) (quoting The Reminiscences of Robert H. Jackson 1109 (1955) (unpublished manuscript) (on file with the Oral History Research Office, Columbia University)).

[103] *Ultramares*, 243 N.Y.S. at 182.

[104] *Id.* at 182-83.

On the appeal from the Appellate Division First Department, Chief Judge Cardozo authored a lengthy opinion on many subtleties of the problems raised by the facts there. The portion, however, that concerns us is his round-up of the state of privity law as it existed in 1931:

> The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion. . . . *In the field of the law of torts a manufacturer who is negligent in the manufacture of a chattel in circumstances pointing to an unreasonable risk of serious bodily harm to those using it thereafter may be liable for negligence though privity is lacking between manufacturer and user*. [MacPherson] . . . We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words.[105]

This remarkably clear restatement of *MacPherson*—shorn of the "inherent danger" and "imminently dangerous" phraseology that had proven so troublesome—should have been heeded by the four Appellate Divisions and followed closely by the Justices serving within them. However, it was left for later commentators to note the significance of this clarification, made out of context as it was.[106]

---

[105] Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931).

[106] *See* Prosser, *supra* note 56, at 1099 & n.1; *Manufacturers' Liability in Tort*, 46 YALE L.J. 709, 710 & n.7 (1937) (citing *Ultramares* to clarify *MacPherson*). In lectures, Cardozo himself stated his own view of *MacPherson*'s holding in the same way as he had when he wrote for the Court of Appeals in *Ultramares*. *See* BENJAMIN N. CARDOZO, *Faith and a Doubting World*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 99, 105 (Margaret E. Hall ed., 1947) (Annual Address to N.Y. County Lawyers Ass'n, Dec. 17, 1931) ("[L]et me take my own opinion in *MacPherson v. Buick Manufacturing Co.* . . . , where the manufacturer of a car was held liable to some one other than the buyer for the negligent construction of the wheels resulting in damage to the person."); BENJAMIN N. CARDOZO, *The Growth of the Law*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra*, at 185, 203 (same point, more expansively explained as the best inference from an extant "mass of judgments" and "body of particulars" yielding "equivocal" implications, such that "[w]hether the law can be said to have existed in advance of the decision, will depend upon the varying estimates of the nexus between the conclusion and existing principle and precedent."); *see also* BENJAMIN N. CARDOZO, *Jurisprudence: An Address Before The New York State Bar Association Meeting, January 22, 1932*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra*, at 21 (writing of *Ultramares* that "[p]ronouncements which if applied in their uttermost length and

b. Restatement (First) of Torts § 395 (1934)

Another "restatement" of the *MacPherson* rule followed just three years after Cardozo's own in *Ultramares*. This restatement, however, was the real McCoy—the *Restatement (First) of Torts*, whose reporter, as noted earlier, was Professor Francis Bohlen, the most famous American torts scholar before William Prosser.[107] Bohlen crafted Section 395 of that Restatement to conform to his own vision of the proper ambit of the tort responsibility to be borne by modern manufacturers. Its black-letter articulation stated:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.

Bohlen's Section 395 shed the troublesome portions of Cardozo's *MacPherson* language that, as shown in the decisions of all the Appellate Division decisions that cited *MacPherson*, bedeviled its proper application and development. Bohlen's commentary for Section 395 was equally illuminating. "The exercise of reasonable care in selecting raw material and parts to be incorporated in the finished article usually requires something more than a mere inspection of the material and parts," Bohlen's commentary for Section 395 proclaimed. "A manufacturer," Bohlen insisted "should have sufficient technical knowledge to select such a type of material that its use will secure a safe finished product."[108] What this duty of care required of a manufacturer Bohlen conceptualized as a sliding scale:

---

breadth might put the law in shackles to an unworkable doctrine, were confined to the situations of fact that brought them into being," which "was made comparatively easy in the particular case in view because of the cautious and tentative terms in which the formulas had been phrased. I conceive, however, that the result would have been the same if the phrases had been somewhat firmer.").

[107] *See supra* discussion accompanying note 33; *see also* Kelley, *supra* note 33, at 93-98.

[108] RESTATEMENT (FIRST) OF TORTS § 395 cmt. (1934).

> [T]he amount of care which the manufacturer must exercise is proportionate to the extent of the risk involved in using the article if manufactured without the exercise of these precautions. Where, as in the case of an automobile or high-speed machinery or high-voltage electrical devices, there is danger of serious bodily harm or death unless the article is substantially perfect, it is reasonable to require the manufacturer to exercise almost meticulous precautions in all of these particulars in order to secure substantial perfection. On the other hand, it would be ridiculous to demand equal care of the manufacturer of an article which, no matter how imperfect, is unlikely to do more than some comparatively trivial harm to those who use it.[109]

Bohlen's commentary further sought to free *MacPherson* from its roots in *Winchester*:

> *b. Not necessary that chattel be intended to affect, preserve or destroy human life.* In order that the manufacturer of a chattel shall be subject to liability under the rule stated in this Section, it is not necessary that the chattel shall be one the use of which is intended to affect, preserve or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do if it is imperfect.[110]

---

[109] *Id.* § 395, cmt. c. As examples, Bohlen gave:

> It is reasonable to require those who make or assemble automobiles to subject the raw material, or parts, procured from even reputable manufacturers, to inspections and tests which it would be obviously unreasonable to require of a product which, although defective, is unlikely to cause more than some comparatively slight, though still substantial, harm to those who use it. A garment maker is not required to subject the finished garment to anything like so minute an inspection for the purpose of discovering whether a basting needle has not been left in a seam as is required of the maker of an automobile or of high-speed machinery or of electrical devices, in which the slightest inaccuracy may involve danger of death

Id. § 395, cmt. a.

[110] *Id.* § 395, cmt. b.

The duty of the manufacturer extended, according to Section 395, widely:

> The words "those who lawfully use the chattel" include, therefore, all persons whom the vendee or his sub-vendee or donee permits to use the article irrespective of whether they do so as his servants, as passengers for hire or otherwise, to serve his business purposes or as gratuitous licensees permitted to use a car purely for their own benefit. They also include any person to whom the vendee sells or gives the chattel or to whom such sub-vendee or donee sells or gives the chattel ad infinitum, and also all persons whom such sub-vendee or sub-donee permits to use the chattel or to share in its use. Thus, they include a person to whom an improperly prepared drug is hypodermically administered by a physician who has bought it from a drug store which has purchased it from a wholesaler or jobber.[111]

In his "explanatory notes" to the original version of Section 395, Professor Bohlen told the American Law Institute that "while *MacPherson* may not have been the majority rule, liberal interpretations of what constituted an imminently dangerous product had led the courts to practically the same results as those that would have been reached by applying the *MacPherson* rule."[112]

Of course, as the entirety of Section IV of this article demonstrates, Bohlen did not account for the ingenuity of the four Appellate Division Departments in finding ways not "to [reach] practically the same results as those that would have been reached by

---

[111] *Id.* § 395, cmt. d.

[112] Kelley, *supra* note 33, at 98 (summarizing Bohlen's explanatory note to Tentative Section 265, "which became Section 395"). As Professor Kelly elaborated,

> Bohlen noted that the proposed restatement section follows *MacPherson*, that a "large number of states" [from Bohlen's extensive list, seemingly a majority] still formally followed the … rule that one not in privity of contract with the manufacturer could not recover for harm caused by a negligently manufactured product, but that the exception for "imminently dangerous" articles "intended to preserve, destroy, or affect human life" had been so liberally construed as to reach, in practice, to virtually the same results as would be reached under *MacPherson*.

Id. at 98 n.32 (citing Explanatory Notes, Restatement of Torts Tentative Draft No. 5 at 62-67 (Feb. 17, 1930)).

applying the *MacPherson* rule." Nor did the Restatements themselves seem to hold the same cache with the workaday judges and lawyers of the 1930s and 1940s as they would later. In fact Section 395 (and its predecessor, Tentative Section 265) were cited in *only two* Appellate Division opinions before 1955–the First Department's *Noone* decision,[113] discussed above, and the Fourth Department's 1933

[113] *See supra* notes 91-100 and accompanying text. *Noone* cites RESTATEMENT (FIRST) OF TORTS § 395, but does not correctly state its rule, clinging to the very terminology and concepts that Professor Bohlen sought to sweep away with the new Section. *See Noone v. Fred Perlberg, Inc.*, 49 N.Y.S.2d 460, 462 (App. Div. 1st Dep't 1944) ("The rule in this State is now settled that *when a manufacturer sells an inherently dangerous article* for use in its existing state, the danger not being known to the purchaser and not patent, and notice is not given of the danger or it cannot be discovered by reasonable inspection, the manufacturer is legally liable for personal injuries received by one who uses the manufactured article in the ordinary and expected manner." (emphasis added)). The court's clinging to the "inherently dangerous article" language is unsurprising, since its first citation is neither to *MacPherson* nor to Restatement § 395, but rather, to *Winchester. See id.* In 1938, however, Justice Mathew Levy of the City Court of New York, Borough of Bronx, did outright cite Restatement § 395 to the exclusion of *MacPherson* or any other New York case in ruling for a consumer against a bread manufacturer on a contaminated product claim. *See* Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 920 (Mun. Ct. 1938) ("It is the clear rule that a manufacturer of food products is liable to an ultimate consumer for injuries sustained by the consumer while eating such food product, if such injuries resulted from harmful ingredients negligently manufactured into the food. RESTATEMENT OF THE LAW OF TORTS [sic] § 395; *see* [*id.*] cmt. 'd' on 'Ambit of Liability.'"). Justice Levy, however, was quite an enquiring mind; the child of Polish immigrants whose watchmaker father brought the family to Savannah, Georgia in 1904, young Levy skipped school as a child to watch proceedings "in the Chatham County [Georgia] courtroom of Judge Peter Meldrim, later a president of the American Bar Association" and "after graduation from the University of Georgia in 1919 with Phi Beta Kappa honors he entered the Harvard Law School, where he edited The Law Review and received his degree in 1922." *Matthew M. Levy, Justice, 72, Dead*, N.Y. TIMES, Sep. 5, 1971, https://www.nytimes.com/1971/09/05/archives/matthew-m-levy-justige-72-dead-se-rved-on-state-supreme-cout-bench.html. It is no surprise he—of all New York judges—would have been first to proffer Restatement § 395 as *the* rule of law to decide a product-injury case. His obituary observed, that following his short stint in 1938 on the City Court (to which Mayor LaGuardia had appointed him), "Justice Levy became known as an outstanding trial judge" after his election to the New York State Supreme Court in 1950, where he displayed "a touch of Southern courtliness along with his slight Georgia accent, and was well liked on and off the bench" *Id.* "Among his fellow judges, Justice Levy was credited with 'a good record uptown'—meaning that, the Appellate Division, situated on Madison Square, of the Supreme Court, on Foley Square, rarely reversed his decisions." *Id.*

decision in *Kalinowski v. Truck Equipment Co.*,[114] discussed in Section IV.D.[115] The Restatements were still a new venture,[116] not necessarily looked upon with favor by all judges and practitioners, and the volumes were expensive—too expensive for the average practitioner's office shelf, and perhaps too expensive even for county and bar association and school and university libraries outside of the great metropolis of New York City.[117] This was about as "closed-access"

---

[114] 261 N.Y.S. 657 (App. Div. 4th Dep't 1933). Here, the Fourth Department cited two provisions of the Tentative Draft of the Restatement in support of finding duty and liability from manufacturer to remote consumer. First, the court observed that "[t]he defendant Truck Equipment Company, upon the alleged facts, is without doubt in the same situation as was the defendant Buick Motor Company in the cited case," with a "[s]ee Amer. Inst. of Law, Restatement of the Law of Torts, Tentative Draft, No. 5 § 274." citation. *See id.* at 658. The court went on to say, "[t]he MacPherson and Smith opinions have announced an extension of the applicability of proximate causation beyond those having contract relations with the offender to those whose use of the article causing injury is fairly to be foreseen." *Id.* Then the court invoked the predecessor of Restatement (First) of Torts § 395:

> We are asked to go further—to say that it is a fair jury question whether this truck repairing company was bound to appreciate that a broken truck axle resulting from the company's failure to use proper material or to do proper work or to make proper inspection was reasonably likely to cause injury to lawful users of the streets, those whose presence "in the vicinity of the proper use" of the truck was a matter of reasonable anticipation, and whether the repairer can be held liable for injurying such person "in the vicinity." An affirmative answer is indicated in section 265 of the "Restatement" . . . .

Id. at 658.

[115] *See infra* Section IV.D and accompanying text.

[116] And one whose practical purposes were still elusive to the average member of the 1930s bench and bar, as evidenced by Professor Havighurst's observation:

> There is one question, however, that is troubling to one attempting to evaluate the effect of the Restatement. How will it fit into the system of law administration? Is its language to be used in charging juries ? Is it to be used by the trial judge as a basis for testing instructions phrased in simpler terms? Is it to be used exclusively by appellate courts? In every section are to be found concepts which present opportunities for differences in their application?

Harold C. Havighurst, *Restatement of the Law of Contracts*, 27 ILL. L. REV. 910, 920 (1932) (footnotes omitted).

[117] As an example, we have as witness Dean—later Second Circuit Judge—Charles E. Clark's damned-by-faint-praise review of the Restatement (First) of Contracts. Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643 (1933). In the midst of the Great Depression, Dean Clark made a point of providing a florid

description of that Restatement as a high-end consumer product, describing it as "[b]eautifully bound in red leather in two volumes of clear type on a small page with 609 sections and 1129 pages, exclusive of index and table of contents, *and with a price appropriate to its sumptuous setting*." *Id.* (emphasis added). Dean Clark continued his assessment with the same sense of irony:

> Its appearance is an important event in our law, deserving of the most careful and intelligent appraisal of which the profession is capable. *The very magnitude of the project and the number and professional standing of its protagonists do, however, tend to prevent such appraisal.* One is tempted either to *embalm* it in words of general and fulsome praise *or to indulge in humor at the expense of its more ponderous phases, depending upon one's previous emotional stimuli*. In what follows I shall pay the endeavor the sincerest compliment in my power by giving to it the best thought that is in me. Particularly am I anxious to approach it in this spirit because *the first official volumes confirm a sincerely held opinion which I have shared with others, that in spite of significant accomplishment*s (of which the Chief Justice of the United States rightly selects as the most important the collaboration of all members of the profession in joint endeavor for law improvement)' *the Institute*, by reason of the narrow limits of an artificial formula of expression which it has chosen to respect, *is rendering its main product of less value than its many important by-products and of less significance than its careful fabrication deserves.*

Id. at 643-44 (emphasis added). Dean Clark was unsparing in the twenty-three pages of critique that followed. *See id.* at 644-67; *see also* Havighurst, *supra* note 116, at 910, 922 ("Thus far the public pronouncements and comments about the restatements and especially about the Restatement of Contracts have been made largely with a view to educating the profession and making it restatement conscious," but concluding ironically that "[a]lthough we may question whether it will accomplish all that has been hoped for it, perhaps we should feel, as Bagehot felt about the English constitution, that 'we ought to venerate where we are unable presently to comprehend.'"). For Sections like Bohlen's 395, there was an even more uphill battle:

> How can there be innovations in a Restatement? Is this a contradiction in terms? If one takes the Restatement to be merely a reportorial description of the weight of authority, innovation is inaccuracy in the report, perversion of the data or gap-filling without data. But if one recognizes that such a descriptive conception of the Restatement was doomed from the outset, the innovation becomes merely expert opinion which goes beyond, or contrary to, the established precedent.

Edwin W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 414 (1933). Suspicion of the various Restatements' efforts to push boundaries continues among leading jurists of the early 21st century, especially Mr. Justice Thomas and the late Justice Scalia. *See, e.g.*, Shyamkrishna Balganesh, *Relying on*

and reserved resource as one might imagine, particularly given the technologies of a century ago. Yet, even if the first Restatements had been more affordable and accessible, that was only half of the contemporary battle. As Professor Harold Havighurst[118] of Northwestern observed in 1932, Restatements cut hard against the grain of the profession's approach to legal research and development of argumentation a century ago:

> One of the objects of the Restatement as stated in the Introduction is to meet the difficulties occasioned by the ever growing mass of case material. The thought seems to be that the looking up of law will be greatly facilitated. This would suggest the danger of technological unemployment for young lawyers

---

Restatements, 122 COLUM. L. REV. 2119, 2121, 2127 (2022); Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part) ("I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution."); *id.* at 483-84 (Thomas, J., dissenting) (characterizing Restatement (Third) of Restitution & Unjust Enrichment § 39 as "lack[ing] support in the law," supported by "few courts," and suffering from "sheer novelty" that "counsels against applying it here"). As Professor Balganesh observes:

> A second ambiguity surrounding the authoritativeness of Restatements is also one that has received a significant amount of attention in recent times, albeit based on a misunderstanding. This is the question of whether Restatements are merely descriptive of the existing law as stated and developed by courts or are instead overtly normative in offering not just an account of existing law but also a statement of how the law should be understood. Indeed, this formed the core of Justice Scalia's critique of the Restatements, when he noted that "[o]ver time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be" such that "it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."

Balganesh, *supra*, at 2136 (footnotes omitted). Interestingly—and relevant to the point about the seeming novelty to judges of Bohlen's Section 395—Professor Balganesh demonstrates that Justice Scalia erred in his belief that the current approach differs in any meaningful way from the original sets of Restatements in the 1930s. *See id.* at 2140 ("Justice Scalia was therefore grossly incorrect to suggest that only 'modern' Restatements contain 'novel extensions' that were absent in the 'original' ones. To the contrary, such extensions were an intrinsic part of the Restatement enterprise from its very inception.").

[118] *See, e.g.*, Willard H. Pedrick, *Light of Reason: A Tribute to the Late Professor Harold C. Havighurst*, 77 NW. U. L. REV. 253 (1982).

> recently turned out. But it is doubtful if they have cause to worry. The Anglo-American lawyer is too thoroughly steeped in the tradition of using cases in building his arguments ever easily to relinquish his search for precedent before exhausting the field. No matter how perfect and authoritative his general principle, the better lawyer will feel on firmer ground if he has one supporting case with similar facts or furnishing an apt analogy.[119]

This devotion to precedent as opposed to principled progress served both to increase the retrograde treatment of *MacPherson* in the Appellate Divisions and to decrease the effectiveness of the Restatement in moving the intermediate appellate court beyond its own blinders, particularly given Cardozo's insistence in dressing his *MacPherson* holding in the raiment of *Winchester*. Thus, while Section 395 of the Restatement (First) of Torts sweeps away all the detritus and accretions that the Appellate Division decisions laid upon *MacPherson* for years, it had little practical effect, overall, in stopping the two steps back those courts seemed to take for every step forward.

B. *MacPherson* in the Second Department

In terms of "fail[ing] to comprehend" *MacPherson's*, "meaning and scope", the Second Department[120] also made major, retrograde contributions, and wasted no time in doing so.[121]

---

[119] Havighurst, *supra* note 116, at 914 (footnotes omitted).

[120] "The Second Department includes just over 8% of New York's land area and contains slightly more than one-half of the State's population," and encompasses "the 10 downstate counties of Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam." *See About the Court*, N.Y. CTS., https://www.nycourts.gov/courts/ad2/aboutthecourt.shtml (on file with the Touro Law Review) (last visited Jan. 20, 2026). Court is held in the Brooklyn Heights Historic District of Kings County. *Id.*

[121] *See* Field v. Empire Case Goods Co., 166 N.Y.S. 509 (App. Div. 2d Dep't 1917); Sherwood v. Lax & Abowitz, 259 N.Y.S. 948 (Sup. Ct. 1932), *aff'd mem.*, 262

1. Field v. Empire Case Goods Co.

A mere year after the Court of Appeals handed down *MacPherson*, the Second Department rendered a retrograde opinion in *Field v. Empire Case Goods Co.*,[122] where the plaintiff sued "to recover for personal injuries alleged to have been sustained through the negligence of [the manufacturer]" in the improper and negligent construction of a bed, "which collapsed while plaintiff was lying on it and about to be delivered of a child," in the quaint phraseology of a century ago.[123] "The plaintiff bases her right of recovery solely upon defendant's negligence, and relies upon *MacPherson v. Buick Motor Co*. . . . to sustain the contention of defendant's liability"; in turn, the Appellate Division characterized *MacPherson* as "involv[ing] the negligent construction of automobiles designed and intended to travel through public streets and roads at great speed—in the MacPherson Case 50 miles an hour . . . ."[124] In rejecting the entirety of plaintiff's suit as a matter of law, the Appellate Division continued:

> It is clear therefore that an action cannot be maintained upon the facts alleged in the complaint, *which do not remove the case from the general rule that an action for negligence cannot be maintained by a third person against the manufacturer of an article not in and of itself imminently and inherently dangerous*. An ordinary bed is not an article that is reasonably certain to place life and limb in peril when negligently constructed, or which of itself, in the use to which it is intended to be put, gives any warning of dangerous consequences attending to its use, and the manufacturer is not charged with knowledge of danger in its

N.Y.S. 909 (App. Div. 2d Dep't 1933); *cf.* O'Connell v. Westinghouse X-Ray Co., 24 N.Y.S.2d 268 (App. Div. 2d Dep't 1940), *rev'd mem.*, 41 N.E. 2d 177 (N.Y. 1942) (discussed in Davis, *supra* note 62, at 215 n.44). There are also decisions that greenlighted plaintiffs' product-injury claims to proceed on the express basis of *MacPherson*, but no facts or reasoning were provided to illuminate the rulings. *See, e.g.*, Connolly v. Halliwell-Shelton Elec. Corp., 248 N.Y.S. 538 (App. Div. 2d Dep't 1931).

[122] 166 N.Y.S. 509 (App. Div. 2d Dep't 1917).

[123] *Id.* at 510.

[124] *Id.* at 510.

> contemplated use, "not merely possible, but probable."[125]

Thus,

> An ordinary wooden bed is such a common article and in such universal use, its manner of construction and method of use having remained the same for generations, that we may take judicial notice of its construction . . . and of the fact that the strips of wood on the inner sides of sidepieces which form a support for slats laid crosswise, but a short distance from the floor, sometimes give way,

but "[t]he drop to the floor, however, is so slight, and the body of the occupant usually so well surrounded by protecting bedding, that bodily injuries cannot be reasonably expected to result therefrom."[126] From this ratiocination, the Appellate Division opined that "[s]uch a bed is not inherently or imminently dangerous to life or limb, and it is shown in the case at bar by the fact that this bed had been in use for nearly a year preceding the accident, without indication of weakness or defective construction."[127] Only three of the five Justices endorsed these hampering hamstrings upon *MacPherson*; two dissented, but did little to advance the proper understanding of *MacPherson* because they did do *without* opinion.[128] Intermediate appellate courts hardly well serve the valuable percolation function[129] when opposing points of view are not elaborated in written opinions by dissenting judges.[130]

---

[125] *Id.* at 512 (emphasis added).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 512 (noting that "STAPLETON and MILLS, JJ., concur" in the opinion of Justice Rich while "JENKS, P. J., and THOMAS, J., dissent.")

[129] For the discussion of the percolation function, see *supra* notes 18-25 and accompanying text.

[130] Hon. Michael Musmanno of the Pennsylvania Supreme Court decried the practice of dissents without opinion, labeling that approach "the argument of the lazy man, and no judge," and declaring that no one who "appreciates his high office and the duties devolving upon him because of it, can conscientiously be thus indifferent to results." Michael A. Musmanno, *Dissenting Opinions*, 6 U. KAN. L. REV. 407, 407-08 (1958). Indeed, he once filed a petition for a writ of mandamus against his own court to force it to publish one of his dissenting opinions! *See id.* "America would not be America without dissenting opinions," Justice Musmanno wrote because "[it] is by constant and critical supervision that the leak in the roof is discovered, the break in the dam is revealed, the rent in the garment of justice is

2. Cullem v. M.H. Renken Dairy Co.

The Second Department continued undeterred in misapplying *MacPherson* in its 1936 decision in *Cullem v. M.H. Renken Dairy Co.*[131] A consumer injured by a foreign object in the milk that he poured from one of the Dairy's bottles was left legally high and dry by an appeals court majority that continued to rely on the "dangerous instrumentality" classification to determine whether the privity rule ended the remote consumer's quest for justice to remedy the manufacturer's negligence. To the majority who reversed a plaintiff's verdict, "[a] milk bottle is a simple appliance in ordinary use not

---

exposed." *Id.* at 408-09. Justice Musmanno further elaborated in terms that show why the failure of Appellate Division Justices who did not publish their reasons for dissents from misapplication of *MacPherson* did bench, bar, and public such a disservice:

> If there were no dissenting opinions, court opinions would bear the imprimatur of infallibility which no one would dare to criticize. This would mean that court decisions would be immune from the principle of government which controls every American institution, namely, that of checks and balances. Without the checks and balances of dissenting opinions, error could be exalted, mistakes glorified, indifference encouraged and eventually injustice become commonplace. Without dissenting opinions, court pronouncements would be accepted as the ultimate perfection of wisdom, and if that should happen, a system would be established which would paralyze progress in the law, which is intended to not only command respect, but to fit the ever-changing needs of today.

Id. at 416; *accord* Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962); DAVID OPPENHEIMER & ALLAN BROTSKY, THE GREAT DISSENTS OF THE "LONE DISSENTER": JUSTICE JESSE W. CARTER'S TWENTY TUMULTUOUS YEARS ON THE CALIFORNIA SUPREME COURT (2010); *see also* Felix Frankfurter, *Letter to the Editor: The Supreme Court's Tradition Of Dissent*, 9 A.B.A. J. 536 (1923); Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 MO. L. REV. 120, 131 (1938); Ben W. Palmer, *Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents*, 34 A.B.A. J. 677 (1948); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUD. SOC'Y 104, 106 (1948). One of the most celebrated common-law opinions from an antebellum state appellate court, *Kirksey v. Kirksey*, 8 Ala. 131 (1845), which lay the foundation for the modern doctrine of promissory estoppel, was an opinion filed by the dissenting justice John Ormond who explained the basis for the Court's majority ruling *and then* provided his own dissent from it. In that dissent lay the origins of the modern promissory estoppel doctrine. *See* William R. Castro & Val D. Ricks, *"Dear Sister Antillico": The Story of* Kirksey v. Kirksey, 94 GEO. L.J. 321 (2006).

[131] 285 N.Y.S. 707 (App. Div. 2d Dep't 1936).

inherently dangerous" and, in words cherry-picked from *MacPherson*, "does not involve 'the potency of danger' nor is it 'imminently dangerous.'"[132] It is interesting, however, that in the same year, the federal district court in Buffalo was distinguishing the same Appellate Division cases that *Cullem* relied upon and finding that *MacPherson* removed the interposition of privity for a claim by a consumer against Ford for a windshield that shattered during a routine two-car collision.[133]

3. Boyd v. American Can Co.

Just as it did with a bed in *Field* and a milk bottle in *Cullem*, the Second Department categorically excluded from *MacPherson*'s reach a defective can and key opener.[134] Giving only the tersest of per curiam opinions, the Second Department simply decreed that "[n]either the can nor the key is inherently or imminently dangerous within the rule laid down in *MacPherson*."[135] The Second Department, relying heavily on its own precedent in *Cullem*, merely elaborated:

> Each is an appliance in ordinary use and not an article which, if imperfectly constructed, is reasonably certain to cause injury to a person using it. The appellant-

---

[132] *Id.* at 708 (citations omitted).

[133] Bird v. Ford Motor Co., 15 F. Supp. 590, 593-94 (W.D.N.Y. 1936). In that decision, Judge Knight observed that "[t]he purpose of shatterproof glass was to protect against conditions arising out of the ordinary use of an article, and it may be urged with considerable force that in this day accidents arise out of the ordinary use of an automobile. As has been pointed out in one case, the record from collisions by automobiles is 30,000 deaths and over 100,000 injuries in 1935. This glass was made to lessen the danger from collision. The implied representation is that the use will aid in preventing damage under a collision." *Id.*

[134] Boyd v. Am. Can Co., 291 N.Y.S. 205 (App. Div. 1936), *aff'd mem.*, 10 N.E.2d 532 (N.Y. 1937). For a description of this now obsolete and defunct technology that caused injury in the *Boyd* case, see Doris Montag, *The History Of Ordinary Things: Opening Cans Over Time*, 50 PLUS LIFE, https://50pluslifepa.com/lifestyle/history/2840-the-history-of-ordinary-things-opening-cans-over-time [https://web.archive.org/web/20230925205032/https://50pluslifepa.com/lifestyle/history/2840-the-history-of-ordinary-things-opening-cans-over-time] (last visited Jan. 20, 2026) ("Other types of can openers include a metal 'key' that came with the container. The key was hooked on a 1/8-inch metal strip along the top and rotated around the can to remove the lid. This was popular for sardines, canned ham, coffee, and tobacco.").

[135] *Boyd*, 291 N.Y.S. 205.

> manufacturer may not be charged with negligence where some unusual result occurs that cannot reasonably be foreseen and is not within the compass of reasonable probability. It is not enough that in the intended use injury is possible.[136]

Of course, as anyone injured by a sharp can lid or by the process of removing a can lid can attest, the per curiam court's assertion is nothing less than nonsense on stilts[137]—as well as a fundamental misapplication of *MacPherson*. No more illuminating was the Court of Appeals' per curiam affirmance.[138]

4. Smith v. Peerless Glass Company

In *Smith v. Peerless Glass Co.*,[139] the Second Department got to answer the question that Judge Cardozo explicitly left open in *MacPherson*:

> We are not required, at this time, to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of

---

[136] *Id.*

[137] *See, e.g.*, Jenny Eagle, *Tin Can Is Worst Packaging Offender For Injuries*, BAKERY & SNACKS (Mar. 18, 2017), https://www.bakeryandsnacks.com/Article/2013/08/23/Which-report-25m-people-hurt-themselves-opening-packaging/ (on file with the Touro Law Review); *Metal Can Defects: Identification and Classification*, CANADIAN FOOD INSPECTION AGENCY, https://inspection.canada.ca/en/preventive-controls/controls-food/metal-can-defects (on file with the Touro Law Review) (last visited Jan. 20, 2026).

[138] Boyd v. Am. Can Co., 10 N.E.2d 532 (N.Y. 1937). The Synopsis provided by the Reporter of Decisions at least reveals the factual background and explains the obsolete technology of key-opening devices supplied with cans ninety years ago. *Id.* ("The complaint alleged that defendant American Can Company manufactured metal cans or containers for a product known as 'Maxwell House Coffee' which had as part of their equipment an opening device including a metal key also manufactured by such defendant" and that co-plaintiff's wife "was in the act of opening such can when she was severely injured when the key broke.").

[139] 251 N.Y.S. 708 (App. Div. 1931), *aff'd*, in part, *rev'd*, in part, 181 N.E. 576 (N.Y. 1932).

> imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong . . . We leave that question open. We shall have to deal with it when it arises.[140]

In the context of a manufacturer of the glass bottles which it sold to soft-drink bottlers for purposes of dispensing their cola products, the Second Department found that a waitress whose eye was put out by fragments of an exploding soda bottle did not need privity to sue the manufacturer, as well as the cola's bottler, for negligence. Surprisingly, in this instance, the Second Department did not see this bottle as being innocuous as the milk bottle in *Cullem*. In fact, it did not discuss imminent and inherent danger. Instead, it adopted a surprisingly advanced outlook on the situation. After reviewing the extensive expert testimony from a bottling engineer about the state of the art and craft of bottling, the panel ruminated in a way well beyond the average for a product-injury case for that era:

> According to some concepts, negligence, like risk, is a term of relation, and does not become a tort until a determinable wrong results. We think those fundamental elements are here present. A manufacturer makes and sells a defective bottle, knowing its intended use. It knew or might readily have foreseen how others, without new tests, may come in contact with it in the course of trade. On extensive use and sale depend its profits. It is known that the bottle will be filled with a highly charged beverage; and for ready sale this must be placed on ice to make it cool and palatable. Bottles properly manufactured will withstand the sudden changes of temperature. Only those of defective quality contain potentialities of danger. Science and custom have provided methods of inspection to discover those unfit to go into the channels of trade with risks inherent in their structure. So the manufacturer stands in a relation of duty to those who may become subject to the

[140] *Id.* at 710 (quoting *MacPherson*, 111 N.E. 1050 (N.Y. 1916)).

> danger arising from improper manufacture and inadequate inspection. The duty is left unperformed; a wrong and injury result. The original negligence carried the potency of peril, without warning, to the feet of this plaintiff.[141]

When the appeal was taken to Albany, the Court of Appeals affirmed the Appellate Division's ruling on the bottle manufacturer's liability in an opinion that is as unmemorable as *MacPherson* itself is memorable.[142] One line, however, in Judge Crouch's opinion is worth noting—for the Appellate Divisions do not seem to have taken heed of it: "There emerges, we think, a broad rule of liability applicable to the manufacturer of any chattel, whether it be a component part or an assembled entity," which, "[s]tated with reference to the facts of this particular case . . . is that, if either defendant was negligent in circumstances pointing to an unreasonable risk of serious bodily injury to one in plaintiff's position, liability may follow though privity is lacking."[143] Gone are the distracting phrases of "inherently dangerous" or "imminently dangerous." Alas, however, as seen in our review of other cases, this gleam of light did not enlighten those mired in the limiting phraseology of old. The next case surveyed is the eating that provides the proof of that proverbial pudding.

5. Liedecker v. Sears, Roebuck & Company

Peerless's proper pronouncement of *MacPherson*'s primary purpose did not seep into the consciousness of the Second Department bench, which was back to its old tricks of limitation in *Liedeker v. Sears, Roebuck & Co., Inc.*[144] The case arose from an accident when a when the footrest of a collapsible beach chair, manufactured by the

---

[141] *Id.* at 712-13. Given the injury to the plaintiff's eye, the metaphor involving her feet is unfortunate. The tenor of that entire paragraph strikes one as a not entirely successful effort by Justice Davis to emulate Cardozo the Stylist. Judge Jerome Frank warned against such risky endeavors. *See* Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 625 (1943).

[142] Smith v. Peerless Glass Co., 181 N.E. 576 (N.Y. 1932) (opinion of Crouch, J.).

[143] *Id.* at 577.

[144] 292 N.Y.S. 541 (App. Div. 2d Dep't), *aff'd*, 10 N.E.2d 586 (N.Y. 1937).

impleaded defendant (the Telescope Folding Furniture Company[145]), "collapsed as [the plaintiff] sat in the chair in the store of defendant Sears, Roebuck & Co., Inc., where it was on display."[146] She sought to hold the manufacturer of the chair, as well as the retailer, liable for negligence. Overturning a plaintiff's verdict, the per curiam opinion summarily dispatched plaintiff's argument for holding the manufacturer liable, because, the court conclusorily asserted, "the chair was not inherently dangerous, and the manufacturer is not liable because of the fact that it is possible for one using the chair to be injured. All that the manufacturer is required to do is to guard against injury that is reasonably probable." Justice Edward Lazansky, however, dissented, because "[t]he experiences of the trial justice with the chair and an examination of it by this court indicate that the trial court was fully justified in finding that the chair was not reasonably safe for use by a customer."[147]

Did Lazansky's brief, but pointed, dissent awaken the Judges in Albany from their generally indifferent supervision of the Appellate Divisions' routine mangling of *MacPherson*? Alas, no; like Washington Irving's Rip van Winkle,[148] those who once sat with Cardozo remained at repose and affirmed with a per curiam order that said only, "Judgment affirmed, with costs."[149] But the plaintiff's lawyers were not so readily deterred. After all, they held a Lazansky dissent in hand. So they petitioned the Court of Appeals for re-argument. And for their trouble, the lawyers got yet another per curiam order five months later, but one that this time said, "Motion for reargument denied with $10 costs."[150]

---

[145] Founded in 1903, this enterprise, now known as the Telescope Casual Furniture Company, continues to operate in Granville, New York, near the Vermont border. *About*, TELESCOPE CASUAL, https://www.telescopecasual.com/about (on file with the Touro Law Review) (last visited Jan. 20, 2026).

[146] *Liedeker*, 292 N.Y.S. at 542.

[147] *Id.* at 543 (Lazansky, P.J., dissenting). Justice Lazansky was a well-known jurist of the era and a confidante of Cardozo. *See* John Q. Barrett, *Justice Lazansky on "Repose" at Chief Judge Cardozo's New York Court of Appeals*, JUD. NOTICE, 2023, at 49-55.

[148] WASHINGTON IRVING, WASHINGTON IRVING'S RIP VAN WINKLE ILLUSTRATED BY ARTHUR RACKHAM (Dover Publications 2005) (1905); *see* Sarah Wyman, *Washington Irving's Rip Van Winkle: A Dangerous Critique of a New Nation*, ANQ: Q.J. SHORT ARTICLES, NOTES, & REVS., Oct.-Dec. 2010, at 216.

[149] Liedeker v. Sears, Roebuck & Co., 10 N.E.2d 586 (N.Y. 1937) (per curiam).

[150] Liedeker v. Sears, Roebuck & Co., 11 N.E.2d 745 (N.Y. 1937) (per curiam).

C. *MacPherson* in the Third Department

The mistreatment of *MacPherson* in the Third Department raises particularly interesting issues, since it is in the Third Department[151] itself that all the proceedings in *MacPherson* occurred before and after Judge Cardozo rendered his opinion for the Court of Appeals in *MacPherson*.

1. MacPherson *in the Third Department Appellate Division*

We begin the evaluation of the Third Department's contributions to making the *MacPherson* precedent "one step forward, two steps back," by asking the simple question: But what of the humble craftsmen whose disposition Cardozo's celebrated opinion in *MacPherson* affirmed?[152] *MacPherson* has a special relationship with the Third Department, for the case was filed and tried in one of its trial courts, the State Supreme Court for Saratoga County, and it was the Third Department's disposition of an appeal from a plaintiff's verdict in that trial which the New York Court of Appeals affirmed in Judge Cardozo's opinion in *MacPherson*.[153]

No ordinary craftsman, however, wrought the Appellate Division decision in *MacPherson*; rather it was Justice John M. Kellogg, an Albany Law School alumnus (Class of 1873) and a Justice

---

[151] "The Appellate Division, Third Department, which is located in Albany, is one of four Appellate Division Departments. Each Department exercises appellate jurisdiction in a separate geographic region. There are 28 counties in the three judicial districts making up the Third Department, which stretches from the Canadian border in the north to the lower Catskills in the south and from the Vermont and Massachusetts borders in the east to the Finger Lakes in the west. The Third Department includes just over half of New York's land area and contains about one seventh of the State's population." *About the Appellate Division Third Department*, N.Y. CTS., https://www.nycourts.gov/ad3/about/about-the-court.shtml (on file with the Touro Law Review) (last visited Jan. 20, 2026). On January 14, 1896, the Third Department issued its first decision. THE HISTORY AND JUSTICES OF THE APPELLATE DIVISION, THIRD DEPARTMENT: 1896 TO THE PRESENT 4 (Nov. 2025), https://www.nycourts.gov/ad3/about/ad3-court-history.pdf.

[152] MacPherson v. Buick Motor Co., 145 N.Y.S. 462 (App. Div. 3d Dep't 1914), *aff'd*, 111 N.E. 1050 (N.Y. 1916).

[153] *Id.*

of the Appellate Division since 1905.[154] What is most striking about Judge Kellogg's opinion is just how little law he cites in it.

First of all, there is explicit no reference to *Thomas v. Winchester*, though its language is clearly the basis of the trial judge's jury charge which Judge Kellogg paraphrases in detail.[155] This, however, is not as surprising as it might seem. As Robert Sugarman pointed out in his own archaeological expedition through the record in *MacPherson*, "[r]egarding the privity rule, the court's willingness to disregard it was a foregone conclusion in light of the same court's decision just two years earlier remanding MacPherson's claims for trial."[156]

Second, citing to just two cases only in the entirety of the opinion,[157] Justice Kellogg took a decidedly homespun, largely non-

---

[154] *See John M. Kellogg*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/biography/john-m-kellogg/ (on file with the Touro Law Review) (last visited Jan. 20, 2026).

[155] *MacPherson*, 145 N.Y.S. at 463 ("The trial justice charged the jury in substance that the defendant was not liable unless an automobile equipped with a weak wheel was, to the defendant's knowledge, a dangerous machine, in which case the defendant owed the plaintiff the duty to inspect the wheel and see that it was reasonably safe for the uses intended; that if the machine, in the condition in which it was put upon the market by the defendant, was in itself inherently dangerous, and if the defendant knew that a weak wheel would make it inherently dangerous, then the defendant is chargeable with knowledge of the defects to the extent that they could be discovered by reasonable inspection and testing.").

[156] Henderson, *supra* note 3, at 49. Justice Betts authored the earlier *MacPherson* decision, and he devised an entirely elegant end-run around the privity rule—so much so that his opinion for the Third Department barely even mentions *Thomas v. Winchester* by name. Instead, the Third Department appeared to discern a duty of care owed by the manufacturer to a broader class of persons likely to be affected by the product, relying upon an earlier Fourth Department decision involving a defective coffee-brewing urn. "'In such case the negligence is based upon a failure to perform a duty owed to all persons in whose presence the boiler is to be used, not upon a duty owed to the purchasers only,'" the Fourth Department ruled and Justice Betts quoted. *See* MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 227 (App. Div. 1912) (quoting Statler v. George A. Ray Mfg. Co., 109 N.Y.S. 172 (App. Div. 4th Dep't 1908), *rev'd on other grounds*, 88 N.E. 1063 (N.Y. 1909)).

[157] *See* Shannahan v. Empire Eng'g Corp., 98 N.E. 9, 11 (N.Y. 1912) (holding, *inter alia*, that "[w]hen such a question of negligence is involved,"—"the plaintiff claimed that the defendant was guilty of negligence at common law"—"general usage and practice is competent to show ordinary care, just as one may show the purchase of a standard article from a reputable dealer," but that although "[t]he common usage of the business is a test of negligence" it is "not a conclusive or controlling test," recognizing nonetheless that "[w]hile it is not always true that what everybody does anybody may do without the imputation of negligence, still it is competent to show

legalistic approach, which sounds nascent notes of consumer protectionism:

> In the old days, a farmer who desired to have wheels made for an ox-cart would be apt to inspect the timber before it was painted, before the wheel was ironed and the defects covered up, in order that he might know what he was buying. He would realize that the oxen, in case of an accident or fright, as he would say, 'might go pretty fast,' and that if a wheel broke serious damage might occur to him or to others. He would know that a painted wheel, fully ironed, rendered it more difficult for him to form a good judgment as to the quality or kind of wood used. An ordinary man, in buying a pitchfork, a golf club, an axe helve, or an oar for a boat, will look at the timber, 'heft it,' and otherwise endeavor to ascertain whether it is made of suitable material. He is not satisfied with the fact that he is buying it of a reputable maker. It is not unreasonable to expect that the manufacturer of an automobile will give some attention at least to the material which enters into a wheel which he has purchased for use thereon.[158]

Justice Kellogg then examined the practical methods available to the modern manufacturer of doing the same kinds of due diligence that he described of the "farmer" in "the old days":

> If the defendant had purchased its wheels unpainted, a wood expert would have been of great assistance in determining the quality of the wood used. If it purchased the wheel painted, some of the paint could

---

the general habit of mankind in the same kind of business as tending to establish a standard by which ordinary care may be judged"), *aff'g* 125 N.Y.S. 1144 (App. Div. 3d Dep't 1910) (mem.); Croghan v. Hedden Const. Co., 132 N.Y.S. 548, 550 (App. Div. 3d Dep't 1911) (holding that "the learned trial court erred in its charge to the jury in instructing them that: 'If a manner of operating the hoist was one in common general use at the time in the locality where such operations were going on by many contracting concerns, then it must be held to have been a proper one'" because "[w]hat other contractors were doing might be some evidence of what constituted a proper hoisting device, but a hoisting device which was in fact dangerous to life and limb beyond the reasonable necessities of the work could not as a matter of law be regarded as a proper device simply because others were using the same style of apparatus").

[158] *MacPherson*, 145 N.Y.S. at 464.

> have been removed, the wheel could have been weighed, and an expert could have formed some judgment as to the quality of the wood used. There is some evidence of other tests, and it must be there is some way of determining the quality of the wood in such a wheel; if not, it must be negligence to purchase a wheel in such a forward state of construction that it is impossible to determine what it is made of. It is common knowledge that a wagon maker of reasonable experience and care could determine what quality of timber is suitable or unsuitable to put in a wheel and, by examining a wheel before painting, could form a reasonably accurate judgment as to the quality of the wood. All workers in wood examine and throw aside defective material, using only that which, upon examination, proves satisfactory. He is not satisfied with the fact that the material was purchased of a reputable manufacturer. It is not clear that the manufacturer in this case exercised the care which was required under the circumstances, or that the defendant was informed or believed that such care had been exercised. It is clear, however, that the defendant made no reasonable effort to determine as to the safety of the wheels which it used.[159]

This is not the soaring rhetoric of Cardozo's majority opinion in *MacPherson*. This is not the careful and judicious marshalling of precedent to reconstitute a citadel of privity as Chief Judge Bartlett sought to do in his strong dissent from Cardozo's majority opinion in *MacPherson*. This, instead, is the common-sense voice of the common man faced with the new industrial age of goods created by masses of both capital and persons with whom he has never dealt, and can ever deal.

There was, however, one rhetorical moment in the sun. Judge Kellogg's most memorable line was deployed to swat back the "industry standard" defense:

> The evidence indicates quite clearly that many other automobile manufacturers, prior to 1909, exercised no greater care as to wheels bought by them than the

[159] *Id.* at 464-65.

> defendant exercised with reference to its wheels, and that no accident had resulted therefrom. *This evidence indicated, not that the defendant was careful, but that the manufacturer had been very lucky*.[160]

The cradle, therefore, in which *MacPherson* was born in the opinion of the Third Department was a rather humble and somewhat homely one. Although of a mind to affirm, Cardozo and the three Judges who completed his four-Judge majority had to do much more, given their apparent desire to curb privity head on—without so much as appearing to do so. Thus, they had to add Cardozo's special way[161] with words of "gold, frankincense and myrrh"[162] to the case, to raise it above its comparatively lowly origins.

Thus, although the Court of Appeals affirmed the result reached by the Third Department in *MacPherson*, the Third Department did not necessarily comprehend the full import of Judge Cardozo's *MacPherson* opinion. In terms of "fail[ing] to comprehend" *MacPherson's* "meaning and scope," the Appellate Division Third Department made a step forward, but also took steps back in subsequent cases.[163]

---

[160] *Id.* at 463 (citing Shannahan v. Empire Eng'g Corp., 98 N.E. 9 (N.Y. 1912), *aff'g* 125 N.Y.S. 1144 (App. Div. 3d Dep't 1910) (mem.); Croghan v. Hedden Const. Co., 132 N.Y.S. 548 (App. Div. 3d Dep't 1911)). The point is reminiscent of Learned Hand's celebrated articulation of it in *The T.J. Hooper*, 60 F.2d 737 (2d. Cir. 1932) ("[A] whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages.").

[161] *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION, 111-12 (1990) (discussing "the 'value added' by Cardozo's opinions to the lawyers' briefs . . . [n]ot only in style, but in the order of issues and in the facts and arguments empashized . . . it shows a master's touch").

[162] BAS Staff, *Why Did the Magi Bring Gold, Frankincense and Myrrh?*, BIBLE HIST. DAILY (Dec. 2, 2025), https://www.biblicalarchaeology.org/daily/people-cultures-in-the-bible/jesus-historical-jesus/why-did-the-magi-bring-gold-frankincense-and-myrrh/ (on file with the Touro Law Review). As discussed *infra* Section VII.B, while the glittering prose of Cardozo could attract the attention of bench and bar to one of his opinions, that prose could prove to be a practical impediment to the correct implementation of the opinion by the courts, however.

[163] *See, e.g.*, Henry v. Crook, 195 N.Y.S. 642 (App. Div. 3d Dep't 1922); Jaroniec v. C.O. Haselbarth, Inc., 228 N.Y.S. 302 (App. Div. 3d Dep't 1928). About *Jaroniec*, Robert Martin Davis trenchantly observed:

> It should be noted that, although the court writing here in 1928 refers to the Court of Appeals, the quotation from the *Kueling* case is from an opinion of the Appellate Division, Fourth Department in 1903, thirteen years before *MacPherson v. Buick*. When the

2. Henry v. Crook

> *Kuelling* case reached the Court of Appeals that court ruled, for reasons not relevant to this discussion, that the law of negligence was no longer involved in the case and that, "We express no opinion as the liability of the manufacturer or seller of a machine or vehicle to third parties in case of negligence, in the absence of fraud or deceit, whether the machine or vehicle be in its original state imminently dangerous to human life or made so by the subsequent act of the manufacturer or seller."

Davis, *supra* note 62, at 212 n.32 (quoting Kuelling v. Roderick Lean Mfg. Co., 75 N.E. 1098, 1100 (N.Y. 1905)). In support of its erroneous position, the three-judge majority in *Jaroniec* invoked *Field v. Empire Case Goods Co.*, 166 N.Y.S. 509 (App. Div. 2d Dep't. 1917). In contrast to *Jaroniec*, a judge of the City Court of New York, a court within the First Department, imposed liability in *La Frumento v. Kotex Co.*, 226 N.Y.S. 750 (N.Y. City Ct. 1928), under circumstances similar to those in which the Third Department majority declined to do so in *Jaroniec*. As commentator Robert Martin Davis noted of the tension between the law and reasoning in *Jaroniec* versus that in *LaFrumento*:

> There is no distinction from the standpoint of legal liability between an injury sustained by placing the body upon an object from which a sharp point unnoticeably protrudes (the mattress in the *Jaroniec* case) and an injury sustained by placing such object upon the body. But liability was imposed upon the manufacturer in the latter situation by the City Court of the City of New York in *LaFrumento v. Kotex Company*. There the plaintiff alleged that she purchased from a retailer a Kotex pad manufactured by the defendant and that in using the pad she was injured by a large manifold pin concealed in it. The court denied the defendant's motion to dismiss the complaint for failure to state a cause of action. Although the result is correct, the opinion is an aberration of the doctrine of *MacPherson v. Buick* which was cited as precedent.
>
> The court said that the *Field* case (bed) is not applicable because it did not deal with an inherently and imminently dangerous article. The court made no reference to the *Jaroniec* case (mattress). Then, ignoring the fact that the alleged thing of danger was a defective Kotex pad and not the manifold pin which was the defect in the alleged thing of danger, the court found that, "The manifold pin so placed, in an article to be used on the human body, could in all probability cause injury, and was, therefore, inherently and imminently dangerous. So that there is a clear distinction between the *Field* case and the case at bar."

Davis, *supra* note 62, at 213 (footnotes omitted) (citing Field v. Empire Goods Co., 166 N.Y.S. 509 (App. Div. 2d Dep't 1917)).

A step forward was made in *Henry v. Crook*, where the Third Department affirmed a verdict favorable to the parents of a child injured by sparklers manufactured by the defendant. After a jury returned a nearly $2,600 verdict against the manufacturer, the manufacturer sought a new trial on various grounds. Of the product the child purchased, the appellate court wrote,

> Plaintiff, a child then 7 years of age, purchased a package of sparklers. The sparkler consists of a small wire about 12 inches long, upon one end of which is a combustible substance which, upon being lighted, burns and throws off glowing particles. The sparklers so purchased were contained in a wrapper, on which the defendants had caused to be printed a . . .

message to the customer, which stated:

> International Sparklers. Light at end. The sparks are harmless. Do not touch glowing wire. Safe and sane. Smokeless and odorless. International Sparklers, the perfectly harmless article for indoor and outdoor celebrations, picnics, street parades, lawn and coach parties, Mardi Gras and other celebrations. Beautiful sun wheel is produced by bending wire handle sufficient to swing in circle—A harmless and delightful amusement for children. Are known the world over as cold fire. Approved by the various state authorities where fireworks are prohibited. Manufactured by International Sparkler Co., Bellville, N.J.[164]

"The child," Justice Van Kirk tells us, "purchased this package of sparklers from a merchant. She took the sparklers to her home and showed the package to her mother. She then took one of the sparklers out on the porch, ignited it, and after it was burning went into the room where her mother was. Thereafter she went again out on the porch."[165] At that point, the child's dress ignited, and she was seriously injured.[166]

Acknowledging that the "[p]laintiff invokes the rule or principle of liability announced in *MacPherson*,"[167] Justice Van Kirk wrote:

---

[164] *Henry*, 195 N.Y.S. at 642.
[165] *Id.* at 643.
[166] *Id.*
[167] *Id.* at 643.

> These rules were made to apply to articles which were inherently dangerous, or which were imminently dangerous when used for the purposes intended. It is not necessary for us in this case to hold, and we do not hold, that the sparkler itself was inherently or imminently dangerous. They are not more dangerous in themselves than the small firecracker or the ordinary match.[168]

This view of *MacPherson* is a step back from the broader rule that Cardozo intended to articulate. Normally, at such a finding of lack of inherent or imminent danger in the injurious product, the liability claim would founder. However, Justice Van Kirk and his Third Department brethren took a step forward that saved the verdict from their too-constrained understanding of *MacPherson*. While not departing from the view that a finding that products for which privity had been waived—including an "automobile case, aerated water bottle case, and coffee urn case"—involved goods that were *first* deemed "inherently dangerous" *before* applying the rule that the "negligence of the manufacturer or seller depended upon the failure to use ordinary care to avoid a defect in the article or to inspect to discover an existing defect," the court *inaugurated a new class of actionable cases* where privity was waived—even though the product had *not* been deemed "inherently dangerous"—because, in this new class of cases, "the essential element of liability is the failure of the manufacturer to give the necessary instructions and warning in the use of the article."[169]

---

[168] *Id.*

[169] *Henry*, 195 N.Y.S. at 644. Justice Van Kirk then elaborated:

> All the above-named articles were intended to be used by mature people of ordinary understanding. These sparklers, however, were intended for the use of children of tender years, immature, who are not chargeable with understanding, sense of danger, and prudence—young children, who must be warned of danger. The legend upon the package was more a recommendation than a warning. A parent could very naturally get the impression that these were entirely harmless 'safe and sane' pieces of fireworks, to be used indoors or outdoors, and no danger could be suffered from their use, except, if one touched the glowing end, a burn would follow. The statement that they may be used indoors, where are usually rugs and carpets and other inflammable materials during the holiday time, would give one the impression that a fire could not be ignited by their use. The clothing of children is often sheer and easily inflammable. We think that a duty rested upon the

3. Jaroniec v. Haselbarth, Inc.

By the time that *Jaroniec v. Haselbarth, Inc.*[170] came before the Third Department, Justice John M. Kellogg was gone.[171] In his absence, three judges of that court did real violence to the legacy Justice Kellogg had started in *MacPherson*'s pre-Cardozo proceedings.

Jaroniec involved "[t]he sufficiency of the complaint to state a cause of action" where that pleading

> [A]llege[d] that the defendant is engaged in the business of manufacturing mattresses; 'that . . . the plaintiff purchased a mattress made by the defendant and bearing the mark or stamp of the defendant and used said mattress for its proper purpose, that is to lie on; * * * that said mattress manufactured by the defendant was improperly and negligently made in that it contained sharp points of metal such as are used on the carding machines which pick the filling for such mattress * * * that because of such negligence and carelessness of the defendant, its servants, or agents, the plaintiff sustained injuries in the nature of lacerations and cuts together with infection;' that because of such injuries plaintiff was damaged for which she demands judgment against the defendant."[172]

> manufacturer of such an article intended for the use of children to give a reasonable warning of those dangers which would naturally follow, and which a person of ordinary sense and understanding would apprehend would be likely to follow, the use of the article for fireworks. In the above-cited automobile case, aerated water bottle case, and coffee urn case, negligence of the manufacturer or seller depended upon the failure to use ordinary care to avoid a defect in the article or to inspect to discover an existing defect. Here the essential element of liability is the failure of the manufacturer to give the necessary instructions and warning in the use of the article."

Id. at 643-44.

[170] 228 N.Y.S. 302 (App. Div. 3d Dep't 1928).

[171] *See John M. Kellogg*, *supra* note 154. Justice Kellogg retired in 1921 and died in 1925. *Id.*

[172] *Jaroniec*, 228 N.Y.S. at 303.

The three-judge majority in a split five-judge panel ruled that the complaint failed to state a claim. First, the majority noted, "[t]he complaint before us does not involve the purchase of an article not imminently dangerous in and of itself, but the use whereof is made dangerous by a defect fraudulently concealed by the manufacturer and sold as sound and safe," but "[t]here is no allegation of fraud or deceit," and thus "[t]he charge upon which liability is alleged to rest is not contract or fraud but negligence alone."[173] The majority saw *MacPherson* as a case in the mold of *Winchester*—a narrow exception to the general rule that, absent direct privity between manufacturer and consumer, the consumer could not pursue a negligence claim for product defect against the manufacturer. "If the mattress was not purchased directly from the defendant, but from an intervening dealer, there is a general rule of law established in this state that a manufacturer is liable for negligence only to those in privity of contract," the panel asserted, and although "[e]xceptions to this general rule have been recognized under certain specific sets of facts," those were narrow. "The Court of Appeals has uniformly sought to maintain this distinction, and to safeguard the principle that the manufacturer is not liable to third persons, irrespective of privity of contract, 'where the article is not in and of itself imminently dangerous, and where the entire danger results because of some latent defect,'" the majority declared and then glossed, "[t]he article must be 'of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people, if not carefully and properly constructed.'"[174] The majority even quoted Cardozo's words from *MacPherson* back at the plaintiff, recasting that opinion as more of a narrowing than an expansive one:

> In the MacPherson Case, *supra*, it was held that an automobile is a thing not inherently dangerous, as is an explosive, but one which is imminently dangerous when put to the uses intended. "Imminent" means "threatening, menacing, perilous." When a maker puts out such an article, he knows the danger; he also knows that the thing will go out to the trade and be used as intended, without further testing and information.

[173] *Id.* at 304.

[174] *Id.* at 304-05 (citing and quoting the pre-*MacPherson* cases of *Kuelling v. Roderick Lean Mfg. Co.*, 84 N.Y.S. 622 (App. Div. 4th Dep't 1903), and *Statler v. George A. Ray Mfg. Co.*, 88 N.E. 1063 (N.Y. 1909).

> When such conditions appear, "then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."[175]

The majority then proceeded to cherry-pick, contort, and brandish further passages from Judge Cardozo's *MacPherson* opinion back in the plaintiff's face:

> 'If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected.'

This would not and could not have been said, and the holding in that case would not have been made, if the thing referred to had been a horse-drawn wagon, although a horse-drawn wagon might, if negligently made, cause serious injury. The court further said in the *MacPherson* case:

> 'There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous, if defective. That is not enough to charge the manufacturer with a duty independent of his contract.'[176]

The three-judge majority then essayed on the nature of inherent danger, and why a mattress categorically does not pose one:

> The facts disclosed in the complaint before us do not bring the case within such exceptions to the general rule. 'An ordinary bed is not an article that is reasonably certain to place life and limb in peril when negligently constructed, or which of itself, in the use to which it is intended to be put, gives any warning of dangerous consequences attending its use, and the manufacturer is not charged with knowledge of danger in its contemplated use, 'not merely possible, but probable." This reasoning is applicable to a mattress alleged to have been 'improperly and negligently made, in that it contained sharp points of metal, such as are used on the

---

[175] *Jaroniec*, 228 N.Y.S. at 304 (internal citation to *MacPherson* omitted).
[176] *Id.* at 305 (internal citations to *MacPherson* omitted).

> carding machines which pick the filling for such mattress.'
>
> A mattress is in no sense a thing inherently or imminently dangerous.[177] 'The nature of the thing' is not such as to be reasonably certain to imperil life or limb when negligently made. Its nature suggests no warning. Unless it contains something foreign to its use or to its nature, its use threatens no danger to any one. There is no danger at all in the mattress itself; nothing about it which would convey 'knowledge of a danger, not merely possible, but probable.' In itself it is as free from any possible danger as a suit of clothes, although that might contain a piece of a broken needle, which would pierce the skin and make a port of entry for infection.[178]

This strikes the reader as pure sophistry bordering on disingenuousness.[179] It appeared to strike the two dissenting Justices the same way, although they did avoid the tit-for-tat name-calling of some 21st Century courts, and instead, stuck to the law. Citing *MacPherson*, Justice David wrote,

> I disagree with the conclusion, implied by a dismissal of the complaint, that no cause of action can be stated. There was a duty on the part of the defendant to use care in the manufacture of an article which in its nature

---

[177] Of this assertion, commentator Robert Martin Davis was most scornfully dismissive:

> Then the court clearly announced its irrelevant holding that, "A mattress is in no sense a thing inherently or imminently dangerous? *The crucial point of the doctrine of MacPherson v. Buick, that a test of liability is whether the defective mattress is a thing inherently or imminently dangerous, was lost and then, finally, masked beyond recognition* by the statement that, '[u]nless it contains something foreign to its use or to its nature, its use threatens no danger to any one.'"

Davis, *supra* note 62, at 212-13 (emphasis added) (footnotes omitted).

[178] *Jaroniec*, 228 N.Y.S. at 305-06 (citing and quoting *Field v. Empire Case Goods Co.*, 166 N.Y.S. 509 (App. Div. 2d Dep't. 1917)).

[179] Even in more genteel times some seventy years ago, commentator Robert Martin Davis noted sharply the *Jaroniec* majority's "flagrant misstatement of the meaning of *MacPherson v. Buick*." Davis, *supra* note 62, at 212.

> might be reasonably certain to put the user in peril of injury when negligently made.[180]

Thus, the two Justices in dissent understood the rule of *MacPherson* more accurately than their brethren.[181]

D. *MacPherson* in the Fourth Department

In terms of fail[ing] to comprehend" *MacPherson's* "meaning and scope," courts in the Fourth Department[182] also made major, retrograde contributions, after an early, more promising start.[183]

1. Sider v. General Electric Co.

The Fourth Department's first reported decision citing *MacPherson* used more auspicious language to describe Judge Cardozo's precedent than many other courts of the era.[184] Thirteen electricians died in a fire caused by a short circuit in a transformer supplied by the manufacturer to the power utility because wooden packing blocks (placed by the manufacturer for shipping the transformers) had not been removed before the transformers were powered up.[185] Citing *Winchester* and *MacPherson*, the panel opined,

> [I]t has been held in many cases that where the article manufactured, when used by third persons, is accompanied with danger, there is a duty on the part of

---

[180] *Jaroniec*, 228 N.Y.S. at 306 (Davis & Hill, JJ., dissenting in part). Commentator Robert Martin Davis succinctly observed that "[w]ith respect to the possibility of alleging a cause of action, the dissenting opinion stated the proposition of law correctly." Davis, *supra* note 62, at 213.

[181] *Jaroniec*, 228 N.Y.S. at 306 (Davis & Hill, JJ., dissenting in part).

[182] The Fourth Judicial Department consists of the Fifth, Seventh and Eighth Judicial Districts, and includes twenty-two counties located in Central and Western New York, extending "from the St. Lawrence River in the north to the Pennsylvania border in the south and from the Mohawk Valley in the east to Lake Erie and the Province of Ontario to the west." *Overview of the Appellate Division*, N.Y. CTS., https://www.nycourts.gov/courts/ad4/Court/overview.html (on file with the Touro Law Review) (last visited Aug. 2, 2025).

[183] *See* Timpson v. Marshall, Meadows & Stewart, 101 N.Y.S.2d 583 (Sup. Ct. Oswego Cnty. 1950); Kalinowski v. Truck Equip. Co., 261 N.Y.S. 657 (App. Div. 4th Dep't 1933).

[184] Sider v. Gen. Elec. Co., 197 N.Y.S. 98 (App. Div. 4th Dep't 1922), *aff'd*, 143 N.E. 792 (N.Y. 1924).

[185] *Id.* at 100-02.

> the manufacturer to use care, and if there is negligence in manufacturing, which results in injury to third persons, the manufacturer may be liable for the damages caused.[186]

Although "[t]he General Electric Company d[id] not question the principle established by those cases," it sought "to escape liability upon the ground that the purchaser, by failing to inspect and test the transformers, was negligent, and to ingraft [sic] upon the principle the limitation that the manufacturer is not liable for negligence to a third person, if the purchaser is negligent in failing to inspect and test."[187] The Fourth Department refused General Electric's invitation to hold that "the manufacturer is relieved as a matter of law from liability because of the negligence of the purchaser in failing to make a proper inspection and test of the transformers before using them."[188] The panel elaborated:

> It would be strange if a manufacturer could place in a completed machine, to be used in an extremely hazardous business, an unusual foreign substance, which would have the effect of making the machine an engine of destruction, and fail to give the purchaser notice or warning of the presence of such foreign substance, and then escape liability upon the ground that the purchaser was also liable for negligence, because it failed to inspect and remove the foreign substance. The manufacturer should not be relieved, in an action brought by a third person, from the effect of its negligence in making the machine dangerous and failing to notify the purchaser of such fact, by the fact that the purchaser also owed a general duty to such third person to use care, and that the use of such care required the purchaser to inspect and test before using the machine. If the manufacturer had given to the purchaser notice that the packing blocks had been placed in the machine, a different question would be presented; but the jury has found that the notice was not given. The manufacturer created a dangerous situation, failed to

---

186 *Id.* at 103.
187 *Id.*
188 *Id.*

> give notice to the purchaser of that situation, but relied upon the general duty of the purchaser to use care to so handle the machine as not to injure others; the purchaser failed to perform its duty, then both are liable, one for delivering a machine in a dangerous condition without notice of such condition, and the other in failing to use reasonable care in inspecting and testing after it received the machine.[189]

The danger thus was part and parcel of the *circumstances* here, rather than an inexorable element of the *rule*—i.e., the rule as articulated did not require the estates of the injured workers to prove as a prerequisite to being relieved of the privity bar that transformers were categorically "inherently dangerous" or "imminently dangerous."

2. Kalinowski v. Truck Equip. Co.

The parents of an infant injured by a flying truck wheel that came off a truck rebuilt by defendant sued defendant for her injuries. The complaint alleged that the truck's "rear axle broke, a wheel came off, ran up [some 150 feet] over a curb to the sidewalk and against plaintiff Rita Kalinowski, causing her physical injuries."[190] The court had to wrestle with *two* Cardozo precedents—*MacPherson* and *Palsgraf v. Long Island Railroad Co*.[191] More enlightened than many

---

[189] *Id.* at 103-04.

[190] Kalinowski v. Truck Equip. Co., 261 N.Y.S. 657, 657-58 (App. Div. 4th Dep't 1933).

[191] 162 N.E. 99 (N.Y. 1928). G. Edward White saw both connection and tension between *MacPherson* and *Palsgraf*. WHITE, *supra* note 47, at 126-27. He attempted to reconcile them in this way: "Mr. MacPherson bore a relationship to the Buick Company that such that he was a 'foreseeable' victim of a defective wheel," while "Mrs. Palsgraf's relationship to the Long Island Railroad suggested that she was an 'unforeseeable' recipient of an injury from scales felled by an explosion set off by fireworks dislodged from the possession of a person boarding a train." *Id.* at 126. Of course, Ms. Palsgraf was a paying passenger of the railroad, in the railroad's station, and awaiting the railroad's train; as such, she was not only owed a duty of care, but the highest possible duty of care. William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 7 n.24, 29-30 (1953) ("Is it proper, in *Palsgraf* itself, so utterly to ignore the fact that the plaintiff was a passenger, a person to whom the defendant had undertaken an unusual obligation of protection, requiring the highest care and perhaps extended liability? It may be that it makes no difference, but until the question is decided, is *Palsgraf* really definite authority even for *Palsgraf*? Might not

Appellate Division panels proved to be, this Appellate Division bench in *Kalinowski* refused the temptation to take the case away from the jury on a motion to dismiss either on a *MacPherson* or *Palsgraf* play that might have allowed the court to dispatch the case as a matter of law. As to the *MacPherson* issue, the court did nothing to improve prevailing misunderstanding of the precedent, but at least it properly kept the procedure where it belonged:

> Paragraph eighteenth alleges that the "truck was an inherently dangerous article or mechanism." Perhaps, as appellant claims, such a vehicle would not ordinarily be thus characterized. It may well be, however, that this allegation refers to the truck after it had been negligently reconstructed. At any rate, a motion on the pleadings, not the merits, is here involved and we shall not limit the pleader by drawing subtle distinctions "between things inherently dangerous and things imminently dangerous," nor make the case turn now "upon verbal niceties."[192]

As to the proximate cause argument (since little Rita Kalinowski was as "remote" to the negligence as poor Mrs. Palsgraf had been), the Fourth Department echoed a sentiment felt by generations of law students—"That 'proximate causation' is difficult to define may be ascertained by reading the prevailing and dissenting opinions in the Palsgraf Case."[193] Pulling on more firmly the cap of wisdom this court displayed in addressing the *MacPherson* issue, the panel perspicaciously observed that "[w]e will not attempt to amplify here, or even to specify, all that has been said on this subject by judges, text-writers, juridical philosophers, and students in the law schools," but instead, "[h]aving carefully considered the question, we decline to hold that a jury may not be permitted to find that a mishap of this character was within the reasonable apprehension of this appealing defendant, that it was a natural result of the negligence alleged."[194]

---

another court, confronted by some miracle with a repetition of the facts, go off on the point that was ignored?").

[192] *Kalinowski*, 261 N.Y.S. at 661 (quoting MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054-55 (N.Y. 1912)).

[193] *Id.* at 659.

[194] *Id.* at 660. In a subsequent trial and appeal, the results were decidedly mixed for little Rita Kalinowski's recovery. *See* Kalinowski v. Ryerson Son, Inc., 272 N.Y.S. 759 (App. Div. 4th Dep't 1934). She appears, however, to have grown to adulthood,

3. Creedon v. Automatic Voting Machine Corp.

The Fourth Department was much less sympathetic to the claim of a disappointed political candidate who contended that negligence in the manufacture of a voting machine resulted in the recordation of votes actually cast for him as votes cast for his opponents.[195] The court rejected the candidate's attempt to bring a negligence claim on the authority of *MacPherson* and cases that followed it.

> There is no analogy between these cases and the one now before us. The principle there enunciated relates only to appliances which are inherently beset with danger and are reasonably certain to imperil life or limb if carelessly made or negligently put on the market. Danger was not inborn in these voting machines.[196]

While the court may well have been correct that *MacPherson* didn't preserve this as a tort claim, it surely isn't because the voting machine was not "inherently beset with danger," but rather, because the rule of *MacPherson* had not yet been extended to financial or other damage not rooted in personal injury.[197]

---

married, had children, and lived to a ripe old age in her native Western New York. *See* Obituary, *WILLIAMS, Rita Frances (Kalinowski)*, BUFFALO NEWS, May 7, 2016; *see also Rita Kalinowski*, ANCESTRY, https://www.ancestry.com/genealogy/records/rita-kalinowski-24-j9qn4c (on file with the Touro Law Review) (last visited Aug. 2, 2025) (records of Rita Kalinowski (1928-2016)).

[195] Creedon v. Automatic Voting Mach. Corp., 276 N.Y.S. 609 (App. Div. 4th Dep't 1935), *aff'd mem*., 198 N.E. 415 (N.Y. 1935).

[196] *Id.* at 611. The panel was emphatic:

> It cannot be said that the defendant owed the plaintiff any duty of a general character, in relation to the manner in which these machines should be adjusted and made ready for use, upon which plaintiff could rely, and could regulate his course of conduct. Plaintiff cannot recover upon any such theory of negligence.

Id. The Appellate Division also rejected Mr. Creedon's efforts to sue in contract as a third-party beneficiary of a contract between Automatic Voting Machine Corporation and the municipality. *Id.* at 612-14 (citing Lawrence v. Fox, 20 N.Y. 268 (1859) and Seaver v. Ransom, 120 N.E. 639 (N.Y. 1918)).

[197] *See* Karl's Shoe Stores, Ltd. v. United Shoe Mach. Corp., 145 F. Supp. 376, 377 (D. Mass. 1956) (citing, *inter alia*, *Creedon*, 276 N.Y.S. 609) ("No case has been found in which a manufacturer has been held liable where no personal injury or physical injury to property was involved, and the plaintiff's only complaint was of financial damage such as loss of business, revenue and goodwill. In New York such an extension of the *MacPherson* rule has been rejected."). An appeal from a Fourth

4. Timpson v. Marshall, Meadows & Stewart

In this case, State Supreme Justice Clifford H. Searl[198] repeated a misapprehension of *MacPherson* that had afflicted other courts in earlier cases. A Mrs. Timpson had purchased from a retail store "a pair of ladies' high-heeled shoes for ordinary use and wear in the usual and customary manner," manufactured by the defendant.[199] On the fateful day of April 20, 1949, while Mrs. Timpson "was descending a flight of stairs, the heel of the left shoe broke off and became detached, causing her to lose her balance and to suffer certain injuries."[200] She sued the manufacturer for negligence. Justice Searl ruled that "[a]s to the manufacturer, the complaint must clearly be dismissed" because (1) "[t]he breaking of a heel is a possible consequence of a defective condition, but not a probable result; and (2) "[t]he heel of a shoe is not such an article that is reasonably certain to place life or limb in peril, even when negligently constructed," and thus, Justice Searl asserted, "was not within the exception to the general rule as set forth in *MacPherson*."[201] Robert Martin Davis expressed particular disdain for this kind of reasoning:

> Three times complaints in negligence in reported cases have been dismissed for failure to state a cause of action where the plaintiffs alleged that they purchased from retailers women's high-heeled shoes manufactured by the defendants and they were injured when heels of the shoes broke. In each of the three opinions failure to

---

Department decision gave the Court of Appeals the chance in 1928 to extend *MacPherson* to cases of property damage without injury to the person, which the Court declined to decide and dispatched the case instead on a statutory ground. *See* Pine Grove Poultry Farm v. Newtown By-Prod. Mfg. Co., 162 N.E. 84 (N.Y. 1928), *rev'g* 226 N.Y.S. 88 (App. Div. 2d Dep't 1928) ("fine particles of steel wire" contaminated duck feed that killed "several thousand" ducks on plaintiff's duck farm). Notably, Harold R. Medina, future federal district and appeals court judge, was lead counsel for the appellant in the Court of Appeals. *Id.*; *see* J. Woodford Howard, Jr., *Judge Harold R. Medina: The "Freshman Years"*, 69 JUDICATURE 127, 127 (1985); *see also* J. Woodford Howard, Jr., *The Amateurs Win: Harold R. Medina's Appointment as a Federal District Judge*, 61 N.Y. ST. B.J. 14 (1989).

[198] *See New York State Supreme Court: 1925–1949*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/figure/supreme-court-1925 (on file with the Touro Law Review) (last visited Jan. 20, 2026).

[199] Beck v. Carter, 101 N.Y.S.2d 580, 584 (Sup. Ct. Westchester Cnty. 1950).

[200] *Id.*

[201] *Beck*, 101 N.Y.S.2d at 585.

> comprehend the basis of the doctrine of *MacPherson v. Buick* is revealed by the statement that the heel of a shoe is not an article that is reasonably certain to place life and limb in peril when negligently constructed. The courts in these opinions failed to realize that they were concerned with the question as to whether the shoe alleged to be negligently constructed was a thing of danger, and were not concerned with the heel of the shoe as a thing of danger.[202]

Indeed, "[i]n two of these cases involving women's high-heeled shoes the plaintiffs fell down a flight of stairs at the time the heels of their shoes broke," so that it must be admitted that "[d]anger there is probable, not merely possible."[203]

5. Campo v. Scofield

This unhappy case started on a Western New York farm in the first Autumn that the country had known for five years without a raging world war. The plaintiff "was assisting in harvesting a crop of onions on the farm of his son, Samuel Campo, and while he was dumping a crate of onions into the said machine, his hands became caught in the rollers of the machine and were so injured that it thereafter became necessary to amputate both hands."[204] Mr. Campo argued

> [T]hat the machine was negligently designed and manufactured and was not equipped with guards, shut-offs or safety devices, although it was entirely practical and feasible to have installed guards that would prevent the user of said machine from coming in contact with the swiftly revolving rollers and to have installed a

---

[202] Davis, *supra* note 62, at 214 (citing Cook v. A. Garside & Sons, Inc., 259 N.Y.S. 947 (Sup. Ct. N.Y. Cnty. 1932); Sherwood v. Lax & Abowitz, 259 N.Y.S. 948 (Sup. Ct. N.Y. Cnty. 1932), *aff'd mem.*, 262 N.Y.S. 909 (App. Div. 2d Dep't 1933) (with Kapper, J., dissenting and voting for reversal, "being of opinion that an inference of negligence can be drawn by the triers of fact"); Timpson v. Marshall, Meadows & Stewart, 101 N.Y.S.2d 583 (Sup. Ct. Oswego Cnty. 1950)).

[203] Davis, *supra* note 62, at 214.

[204] Campo v. Scofield, 95 N.Y.S.2d 610, 611 (App. Div. 3d Dep't 1950), *aff'd*, 95 N.E.2d 802 (N.Y. 1950).

> shut-off device by which the machine might have been stopped, lessening the injury to [Mr. Campo].[205]

The Fourth Department, unlike the trial court, found that privity barred Mr. Campo's claim. First, the appellate court gave a familiar recitation of the rule of *MacPherson* and its predecessors:

> The question therefore is whether plaintiff has pleaded a cause of action based upon negligence. Under the early common law a manufacturer's liability for negligence did not extend beyond those with whom there was a privity of contract (Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Reprint 402). Since the time of the Winterbottom decision, however, many decisions in this state, as well as is other jurisdictions, have established numerous exceptions to the early common-law rule so that now it is authoritatively stated that "where a manufacturer supplies an article or preparation, for immediate use in its existing state, which is inherently dangerous, the danger not being known to the purchaser and the danger not being patent, and where notice is not given of the danger or it cannot be discovered by a reasonable inspection, the manufacturer is legally liable for personal injuries received by one who uses the same in an ordinary, expected manner."[206]

---

[205] *Id.*

[206] *Id.* at 612. Before addressing the negligence claim, the court observed that plaintiff did not, and could not, plead a contractual breach of warranty claim, since he did not allege "that he was the purchaser of the machine or that there is any privity of contract between the plaintiff and the defendant." *Id.* Thus, "[t]he plaintiff apparently c[ame] within the category sometimes referred to as a 'remote user.' Under such circumstances there can be no cause of action here on the theory of implied warranty." With New York's adoption of Article 2 of the Uniform Commercial Code, and specifically, U.C.C § 2-318's more generous and realistic privity rule for warranty claims, holdings such as this one lapse. *See* N.Y. U.C.C. § 2-318 ("Third Party Beneficiaries of Warranties Express or Implied") (providing that "[a] seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty," and that "[a] seller may not exclude or limit the operation of this section."). For the history of § 2-318 in New York from its original, somewhat more modest form enacted in 1962, see Donald M. Miehls, Note, *N.Y. U.C.C. § 2-318: In an Action for Personal Injuries*

Further synthesizing the foregoing, the Fourth Department next asserted that

> Underlying the manufacturer's liability as declared in all of these cases is the danger to be reasonably foreseen by the manufacturer from the intended use of the article where such danger is unknown to the user or where the defect creating the danger is a latent defect unknown to the user and not a patent defect.[207]

Having fashioned this ruthless judicial scalpel, the Fourth Department sliced Campo's complaint to proverbial ribbons.[208]

Based Upon Breach of an Implied Warranty of a Product Sold After 1975, Privity Between Plaintiff and a Third-Party Defendant Manufacturer Is Not Required, 57 ST. JOHN'S L. REV. 832, 832 n.94 (1983).

[207] *Campo*, 95 N.Y.S.2d at 612.

[208] Specifically, the Fourth Department first laid out its view of the complaint—

> The allegations of this complaint to the effect that the machine was negligently designed and manufactured and was in a defective and imminently dangerous condition are, standing alone, conclusions. The factual allegations offered to support such conclusions are (1) that the machine was not equipped with guards to prevent one using it from allowing his hands to come in contact with the revolving rollers; and (2) that it was not equipped with a stopping device by which one whose hands became caught in the rollers could readily stop the machine and thus lessen the extent of the injury.

—and then proceeded to slice it to ribbons:

> The plaintiff does not allege that the absence of guards and a stopping device was unknown to him. Nor does he allege that he was unaware of the injury to be expected upon allowing his hands to come in contact with the revolving rollers. It will be noted that the complaint does not allege any latent defect in the material or any mechanical flaw or weakness as in *MacPherson v. Buick*, supra. It does not allege that the machine or any part of it broke or gave way or behaved in any unexpected or unusual manner. The act causing the injury was the plaintiff's act in allowing his hands to come in contact with the revolving rollers. The complaint does not allege any facts constituting a danger reasonably to be foreseen by the manufacturer from the intended use of the machine and unknown to the plaintiff, as in *Liedeker v. Sears, Roebuck & Co.*, supra and *Noone v. Perlberg, Ins.*, supra. The cause of action which the plaintiff has attempted to plead rests solely upon the breach of the alleged duty of the defendant to attach either a guard or stopping device to the machine. If such failure constituted a defect which created a danger to one using the machine, then both

When taken to the Court of Appeals in Albany, one might have hoped this case would fare better. But the author of the affirming opinion, the usually perspicacious Judge Stanley Fuld,[209] was not having one of his best days. First, rather than clearing off the detritus that Appellate Division decisions had imposed on *MacPherson*, Judge Fuld added to it by "us[ing] language that requires a finding that an article must be dangerous in and of itself, aside from defective construction, before the doctrine of *MacPherson v. Buick* may be applied."[210] Furthermore, Judge Fuld used his creative mind not to advance the law, but rather, much as Chief Judge Crane had done in 1936, to come up with yet other ways to limit the impact of *MacPherson*. First, Judge Fuld recharacterized Mr. Campo's claim (almost to the point of *reductio ad absurdum*), accusing Mr. Campo of arguing that "since the development of mechanical contrivances has created so many new dangers, manufacturers should be compelled to equip complicated modern machinery with all possible protective guards or other safety devices" and thereby seeking "[t]o impose upon a manufacturer the duty of producing an accident-proof product."[211] Second, Judge Fuld dismissed these notions as both *improvident* and beyond the *judicial* ken. "To impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been or, in our view, may be imposed by judicial decision."[212] In case any trial or intermediate appellate judge might have missed the point, Judge Fuld doubled down on his best impersonation of the then-late, long-gone Chief Judge Willard Bartlett: "If, however, the manufacturer's liability is to be so extended, if so

---

> the defect and the danger must have been obvious and patent and known to the plaintiff. The plaintiff does not allege otherwise.

Id. At the end of the day, the Fourth Department ruled "[t]he order appealed from should be reversed without costs and the motion to dismiss should be granted without costs with leave, however, to the plaintiff to file an amended complaint within twenty days if so advised." *Id.* at 613.

[209] *See, e.g.*, Sidney H. Stein, *Stanley H. Fuld: A Life Lived in the Law*, 104 COLUM. L. REV. 258 (2004); Michael I. Sovern, *Chief Judge Stanley H. Fuld*, 71 COLUM. L. REV. 545 (1971) (introducing a volume of tribute articles exploring Judge Fuld's accomplishments on the bench, his contributions to the progress of New York state's law, and his national influence) ("The comparison with Cardozo is inevitable."); Charles D. Breitel, *Chief Judge Stanley H. Fuld*, 25 SYRACUSE L. REV. 1 (1974).

[210] Davis, *supra* note 62, at 215-16 (citing Campo v. Scofield, 95 N.E.2d 802, 803 (N.Y. 1950)).

[211] *Campo*, 95 N.E.2d at 803, 805.

[212] *Id.* at 804.

fundamental a change is to be effected, we deem it the function of the legislature rather than of the courts to achieve that change."[213] Yet, the New York legislature *had* done something—something that in fact denoted a *policy* that Judge Fuld refused to see in 1950 because he chose to hide behind the figleaf of the particular *rule* that embodied the policy he professed not to see:

> In Wisconsin, for instance, such a course has been adopted with respect to "corn shredders;" a statute requires such machines to be provided "with safety or automatic feeding devices" in order to protect their operators from "accident by the snapping rollers, husking rollers, and shredding knives." *The legislature of this state, however, has not acted in the field, having chosen to impose a duty only upon employers to furnish guards for certain types of machinery and appliances used in factories*.[214]

It is truly sad to see (apparently) willful myopia of this kind displayed by a jurist as gifted as Fuld. This lapse was not mentioned in the many encomiums that have been bestowed upon him. And the lapse is all the more befuddling when one considers what the California Cardozo,[215] Judge Roger Traynor, was doing with products liability law during the same time period.[216] *Campo* is an unworthy decision of a great judge; it set the progress of *MacPherson* back materially; Second Circuit Chief Judge Charles E. Clark, the former Dean of Yale Law School,[217] confessed that he was "puzzled" by the harm that courts had allowed

---

[213] *Id.*

[214] *Id.* at 805 (emphasis added).

[215] *See, e.g.*, Elizabeth Roth, *The Two Voices of Roger Traynor*, 27 AM. J. LEGAL HIST. 269 (1983).

[216] *See, e.g.*, Edmund Ursin, *Roger Traynor, the Legal Process School, and Enterprise Liability*, 71 HASTINGS L.J. 1101, 1130-31 (2020); Fleming James Jr., *A Tribute to the Imaginative Creativity of Roger Traynor*, 2 HOFSTRA L. REV. 445 (1974); *see also* Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability*, 50 S.D. L. REV. 537 (2013).

[217] Judge Clark was a most formidable intellect. *See, e.g.*, Michael E. Smith, *Judge Charles E. Clark and the Federal Rule of Civil Procedure*, 85 YALE L.J. 914 (1976); Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323 (1965).

Campo needlessly (and illogically) to inflict on *MacPherson*;[218] and the New York Court of Appeals itself finally disavowed *Campo* some twenty-six years later after what that Court acknowledged had been "sustained attack."[219]

V. *MACPHERSON* IN THE FEDERAL COURTS OF THE SECOND CIRCUIT

The Second Circuit U.S. Court of Appeals had laid an unfavorable groundwork for the reception of *MacPherson* in state-law cases brought in the Circuit's district courts under its diversity-of-citizenship subject matter jurisdiction by handing down a case in 1915 that reached an opposite result. *Cadillac Motor Car Co. v. Johnson*[220] presented a factual scenario that Cardozo's biographer, Professor Andrew Kaufman, described as "virtually identical to" the one in *MacPherson*.[221] Judge Henry Galbraith Ward[222] introduced the 2-1 majority opinion memorably by succinctly painting the picture of a product-injury case from the automobile's earliest days, writing

> In March, 1909, Johnson, the plaintiff below, bought of a dealer an automobile known as the Cadillac motor model 30, manufactured by the defendant. In July of the same year, while driving at from 12 to 15 miles an hour,

---

[218] Messina v. Clark Equip. Co., 263 F.2d 291, 293 (2d Cir. 1959) (Clark, C.J., dissenting) ("Since the majority concede that *MacPherson* . . . is still a correct statement of New York law, I am puzzled by their suggestion that the *Campo* decision sweepingly relieved manufacturers from liability for defects or dangers discoverable by a reasonable inspection.").

[219] Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 348 N.E.2d 571, 576 (N.Y. 1976); *see, e.g.*, Patricia Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1079-81 (1973).

[220] 221 F. 801 (2d Cir. 1915).

[221] KAUFMAN, *supra* note 35, at 649 n.39.

[222] Judge Ward was notable not only for being, like Oliver Wendell Holmes, appointed by President Theodore Roosevelt, see *Henry Galbraith Ward*, FED. JUD. CTR., https://www.fjc.gov/node/1389351 (on file with the Touro Law Review) (last visited Aug. 31, 2025), but also for having had the celebrated American painter John Singer Sargent immortalize his wife on canvas. *See* John Singer Sargent, *Mabel Marquand, Mrs. Henry Galbraith Ward*, PUBHIST, https://www.pubhist.com/w23758 (on file with the Touro Law Review) (last visited Aug. 31, 2025).

> the front right wheel broke, the car turned over, and Johnson sustained most serious injuries.[223]

Thus, Johnson "brought this suit to recover damages therefor, charging the defendant with simple negligence in respect to the wheel," Judge Ward wrote, and was quick to point out "[t]here can be no question that the wheel was made of dead and 'dozy' wood, quite insufficient for its purposes."[224] But Judge Ward quickly cut to the problem that would—for now—snuff out Mr. Johnson's case: "There was no contractual relation between the plaintiff and the defendant."[225] Judge Ward emphatically rejected the trial judge's view

> [T]hat, though an automobile is not inherently a dangerous thing, it becomes so if fitted with a weak and insufficient wheel, and if the defendant knew, or ought to have discovered, that the front right wheel was such, then, especially in view of its prospectus, it was liable

---

[223] *Cadillac Motor Car Co.*, 221 F. at 802.

[224] *Id.*

[225] *Id.* Judge Ward elaborated:

> The defendant bought the wheels it used of the Schwarz Company and in its prospectus stated:
>
> > "The Cadillac Company manufactures Cadillac cars almost in their entirety. It operates its own foundries, both iron and brass, its pattern shops, sheet metal shops, machine shops, gear cutting plant, painting, finishing, and upholstering departments. It makes its own motors, its own transmissions, its own radiators, hoods, and fenders. It makes even the small parts, cap screws, bolts, and nuts. There is not one of the millions of pieces manufactured annually which does not pass the scrutiny of trained inspectors—trained in accordance with the high ideals of the Cadillac organization."
> >
> > *"Wheels. The wheels are the best obtainable and equal to those used on the highest priced cars. They are of the artillery type, made from well-seasoned second growth hickory, with steel hubs. The spokes are of ample dimensions to insure great strength."*
>
> The plaintiff said of this prospectus that he had "looked it over" before he bought the car.

Id. at 802.

> in damages to the plaintiff, although it had no contractual relations with him.[226]

Instead, Judge Ward said, the law, as laid down in *Winchester*, is that negligence in the manufacture of things "inherently dangerous" is the only avenue through the roadblock of privity, and he would not concede that an automobile or its components were "inherently dangerous."[227] Furthermore, Judge Ward was "not persuaded to the contrary"[228] by the Appellate Division Third Department's decision in *Macpherson*.[229]

But Judge Ward's majority opinion drew a sharp dissent from Judge Roscoe Conklin Coxe, Sr., another appointee of President Theodore Roosevelt.[230] Echoing the consumer-protection approach of Appellate Division Justice John T. Kellogg's opinion in *MacPherson*,[231] Judge Coxe declared in tones that ring from the page that "[i]f the law, as stated in the prevailing opinion, is sustained, the owner of an automobile entirely free from fault may be injured for life by the collapse of a decayed wheel occurring a few months after its purchase, and be absolutely without redress."[232] "If this be so" Judge Coxe continued, "it follows that an injury may be occasioned by the grossest negligence and no one be legally responsible. Such a situation would, it seems to me, be a reproach to our jurisprudence."[233] Judge Coxe's elaboration of these opening salvos might have improved Cardozo's own opinion in *MacPherson* if Cardozo had deigned to admit any hint of a *real* world of *real* litigants into his opinion for the New York Court of Appeals. First, Judge Coxe gave the reader a reality check of how times had changed since the age of *Winterbottom* and *Winchester*:

> The principles of law invoked by the defendant had their origin many years ago, when such a delicately organized machine as the modern automobile was

---

226 *Id.*
227 *Id.*
228 *Id.* at 804.
229 MacPherson v. Buick Motor Co., 145 N.Y.S. 462 (App. Div. 3d Dep't 1914), discussed *supra* Section IV and accompanying text.
230 *Coxe, Alfred Conkling, Sr.*, FED. JUD. CTR., https://www.fjc.gov/node/1379591 (on file with the Touro Law Review) (last visited Aug. 6, 2025).
231 *See supra* notes 151-60 and accompanying text.
232 *Cadillac Motor Car Co.*, 221 F. at 805 (Coxe, J., dissenting).
233 *Id.*

> unknown. Rules applicable to stage coaches and farm implements become archaic when applied to a machine which is capable of running with safety at the rate of 50 miles an hour. I think the law as it exists to-day makes the manufacturer liable if he sells such a machine under a direct or implied warranty that he has made, or thoroughly inspected, every part of the machine, and it goes to pieces because of rotten material in one of its most vital parts, which the manufacturer never examined or tested in any way. If however, the law be insufficient to provide a remedy for such negligence it is time that the law should be changed. "New occasions teach new duties;" situations never dreamed of 20 years ago are now of almost daily occurrence.[234]

Second, Judge Coxe proceeded to talk about how the law needs to respond to the economic and technological realities that were in his day driving change in the marketplace at a pace never before seen in human history:

> The law should be construed to cover the conditions produced by a new and dangerous industry, and should provide redress for such injuries as the plaintiff has sustained. My own judgment is, considering the dangers to be encountered from passenger automobiles, that the manufacturer is under an implied obligation to build such cars of materials capable of doing the work required of them. He may purchase the parts of makers of high reputation, but this does not absolve him from the obligation of a personal inspection, which at least will discover obvious defects, such as decayed and "dozy" spokes. If it be impossible for the manufacturer to inspect the wheels at his own place of business he should have a representative skilled in the business at the wheel factory to make such inspection. In other words, where the lives and limbs of human beings are at stake it is not enough for the manufacturer to assert that he bought the wheel, which collapsed four months after it was sold, from a reputable maker and thought it was made of sound material. Such an excuse might be

[234] *Id.*

> sufficient in the case of a farm wagon or a horse drawn vehicle of any kind, but in my opinion, it is wholly insufficient in the case of a wagon propelled by gasoline, which is capable of making 50 miles an hour. What would be regarded as sufficient care in the former case might be gross negligence in the latter.[235]

Third, Judge Coxe seized the opportunity to recharacterize the entire enquiry away from privity towards a restatement of duty that society's needs must impose on a manufacturer of goods in the 20th century economy—the first inklings, perhaps, of the realizations that blossomed 30 years later into Judge Roger Traynor's nascent theory of enterprise liability,[236] as he articulated in his famous *Escola*[237] concurrence in the California Supreme Court:

> The ultimate question is—can a manufacturer of motor cars escape liability for an injury occasioned by a grossly defective wheel by proving that he purchased the wheel from a reputable manufacturer? I think this question must be answered in the negative. The law imposes the duty of constructing a safe machine upon the manufacturer. He cannot avoid that duty by buying his materials from others. He is responsible for the car sold as having been manufactured by him. In the present case the defendant's representative sold the car to the plaintiff under an implied warranty that the wheels were made of reasonably sound material. Instead of being sound and staunch, one wheel was rotten and wholly incapable of withstanding the strain put upon it. This condition could have been discovered by subjecting the wheel to the simplest tests.[238]

---

[235] *Id.* at 805-06.

[236] *See* Mark Geistfeld, Escola v. Coca-Cola Bottling Co.: *Strict Products Liability Unbound*, *in* TORTS STORIES, ch. 9 (Robert L. Rabin & Stephen D. Sugarman eds., Found. Press 2003).

[237] Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436, 461 (Cal. 1944) (Traynor, J., concurring). Of this concurrence, G. Edward White has said, "[l]ike *MacPherson*, [*Escola*] was one of those moments in the history of Torts when a judge is given the opportunity to assemble some emerging ideas and apply them to an actual case in a manner that results in significant doctrinal change." WHITE, *supra* note 47, at 197.

[238] *Cadillac Motor Car Co.*, 221 F. at 806.

Finally, Judge Coxe reminded the reader of how things would be left if Judge Ward's opinion were to hold sway despite the challenges of the day: "If the rule contended for by the defendant be the law, a manufacturer can sell a machine which menaces the lives and limbs of those who use it, and escape all liability by asserting that he bought the materials from dealers whom he supposed to be careful and prudent."[239]

Audentis Fortuna iuvat—"fortune favors the bold,"[240] however, as it did here. Having lost the benefit of the first favorable jury verdict and having been dispatched on remand back to the U.S. District Court for the Northern District of New York, Mr. Johnson tried his case again, only once more to see defeat snatched from the jaws of victory.[241] This time tried to the bench, Mr. Johnson's claim succumbed, despite U.S. District Judge George Washing Ray's having "found as a fact that the injuries were occasioned by the negligence of defendant, and that plaintiff was free from any contributory negligence, and that the damages amounted to $10,000," because Judge Ray felt constrained to "dismiss[s] . . . the complaint . . . based on the decision of" the Second Circuit "upon the former writ of error, when [Judge Ward] held that no contractual relation existed."[242] But, on appeal from Judge Ray's ruling, the 2-1 vote from the first appeal "flipped"—and *this* time the majority favored the plaintiff because it *now* had Cardozo's opinion in hand to abandon the earlier ruling. *This* time, Judge Henry Wade Rogers, the second Dean of Yale Law School and a Wilson appointee from 1913,[243] wrote the two-judge majority opinion. It is not an inspiring effort. It reads as if it were dictated to a clerk and transcribed without being further revised. It is discursive and has no rhetorical flourish whatsoever. It spends inordinate time ruminating over law of the case, res judicata, and stare decisis,[244] before deciding what seems to us today a common-sense

---

[239] *Id.*

[240] P. VERGILIUS MARO, AENEID bk. 10, ln. 284.

[241] Johnson v. Cadillac Motor Car Co., 261 F. 878 (2d Cir. 1919).

[242] *Id.* at 879. For biographical information, see *George Washington Ray*, FED. JUD. CTR., https://www.fjc.gov/node/1386736 (on file with the Touro Law Review) (last visited Aug. 6, 2025).

[243] *Henry Wade Rogers*, FED. JUD. CTR., https://www.fjc.gov/node/1387081 (on file with the Touro Law Review) (last visited Aug. 6, 2025).

[244] And it is on these procedural points that Judge Ward, author of the majority opinion in the previous appeal in the case, became a dissenter on this second iteration. *See Johnson*, 261 F. at 887 (Ward, J., dissenting).

proposition—that since the New York Court of Appeals had clarified its view of privity in the interim by means of Judge Cardozo's *MacPherson* decision, the earlier result was now wrong and Mr. Johnson was at last to have his (now) $10,000 in damages from Cadillac:

> Since this court decided this case, when it was here before, the New York Court of Appeals has decided MacPherson v. Buick Motor Co. . . . (1916). That court affirmed the court below in holding, in a case similar in its facts to the instant case, that the manufacturer of an automobile is not at liberty to put his product on the market without subjecting its component parts to ordinary and simple tests, and is not absolved from the duty of inspection because it buys the wheels from a reputable manufacturer. The court held the manufacturers liability was not confined to the immediate purchaser, but extended to third persons not in contractual relations with it.[245]

Of course, in this pre-*Erie* era,[246] Judge Rogers also had to put the final touch on the new outcome by reference to a Circuit precedent setting forth the general federal common law to be applied in diversity cases.[247]

---

[245] *Id.* at 882. Judge Rogers also noted and quoted from Judge Coxe's "vigorous dissenting opinion" in the original appeal to the Second Circuit. *See id.* at 882 (citing and quoting Cadillac Motor Car Co. v. Johnson, 221 F. 801, 805 (2d Cir. 1915) (Coxe, J., dissenting)). As Professor John C.D. Goldberg has observed, because "the federal court had gone so far as to pronounce itself unpersuaded by the contrary interpretation of those precedents that had been provided by New York's intermediate appellate court when deciding the initial appeal of the *MacPherson* case," we should "suspect[t] that Cardozo took some satisfaction in demonstrating to the Second Circuit that his Appellate Division brethren had got the common law right (thank you very much) and that *Johnson* had gotten it wrong." Goldberg, *supra* note 55, at 150 & nn.21-22.

[246] John C. P. Goldberg & Benjamin C. Zipursky, *The Myths of* MacPherson, 9 J. TORT L. 91, 104-05 n.26 (2016) ("Of course, under another 1842 decision—*Swift v. Tyson*, 41 U.S. 1 (1842)—the Second Circuit in *Johnson* was not strictly bound by New York precedents . . . .").

[247] *Johnson*, 261 F. at 887 ("The liability of a manufacturer of food products was considered by this court at length in *Ketterer v. Armour & Co.*, 247 Fed. 921 (2d Cir. 1917). In that case we laid down the rule that one who puts on the market an imminently dangerous article owes a public duty to all who may use it to exercise care in proportion to the peril involved, and we declared that the liability does not

After "Johnson II," the federal courts in the Second Circuit were not quite as cabined in applying *MacPherson's* "meaning and scope" as the New York State Appellate Division courts were.[248] In a

---

grow out of contract, but out of the duty which the law imposes to use due care in doing acts which in their nature are dangerous to the lives of others."). Indeed, in a subsequent case, Judge Rogers reflected upon what transpired in the two *Johnson* appeals, and explained:

> After the first decision in *Johnson v. Cadillac Motor Car Co.*, it transpired that the New York Court of Appeals decided MacPherson . . . , which established the law of the state in a manner contrary to the rule first announced. While we arrived at our conclusion quite independently of that decision, which was not controlling upon this court, the attitude of the New York court was of great importance.

Cromwell v. Simons, 280 F. 663, 675 (2d Cir. 1922). Twenty years later, *Erie* had radically changed this perspective. *See, e.g.*, Hastings v. Chrysler Corp., 3 F.R.D. 274, 275 (E.D.N.Y. 1943) (stating that *MacPherson* "establishes the substantive law of the State which is binding upon this court").

[248] *See, e.g*, Employers' Liab. Assurance Corp. v. Columbus McKinnon Chain Co., 13 F.2d 128, 128-29 (W.D.N.Y. 1926) (noting that Judge Cardozo's opinion stated the applicable rule "as adopted by the Circuit Court of Appeals of this circuit, Judge Rogers writing the opinion, in *Johnson v. Cadillac Motor Car Co.*, 261 F. 879," in which "it was substantially held that, where a manufacturer of an automobile fails to use reasonable care in inspecting and testing wheels, he is responsible to a buyer who sustains injuries by the breaking of a defective wheel, even though the automobile was bought from a dealer"); Schfranek v. Benjamin Moore & Co., 54 F.2d 76, 77 (S.D.N.Y. 1931) ("But when a thing is not dangerous per se and does not, in order that the ultimate user may get the benefit of it, have to be used in any way in which the alleged defect would probably cause injury, the ultimate user buying it from a retail dealer cannot maintain an action against the manufacturer, unless, of course, he can make out a case of a willful attempt to trap him; an effort so rare in ordinary commercial matters as to be negligible."); Bissonette v. Nat'l Biscuit Co., 100 F.2d 1003 (2d Cir. 1939) (citing *MacPherson* and affirming judgment for plaintiff injured by foreign matter in bread baked by defendant and distributed through retail stores, where plaintiff purchased the offending loaf). Not every federal judge, however, was consistently on the cutting edge. *See, e.g.*, Lee v. Walworth Co., 1 F.R.D. 569, 571 (S.D.N.Y. 1940) ("That rule might be extended and probably does extend to an article which is not inherently dangerous itself, but if it is reasonably to be anticipated that it will be used for a purpose which is likely to imperil the life or limb of anybody, the manufacturer would be liable in that instance. But that is not the situation here. The manufacturer might anticipate that if this elbow was defective that steam might escape and water might escape and that property might be damaged or something of that character, but he could not have anticipated that a person standing on a stepladder would be injured as a result of falling off that stepladder when a pipe that he was working on broke. A cast-iron elbow of this character is not an inherently dangerous article; one in which, if there was a defect in it, would be likely to cause injury to a person, at least in the manner which has been described here."); Dumbrow v.

manner that reminds one of Robert Jackson's famous quip about Judges (and cousins) Learned and Augustus Hand ("Quote B.; but follow Gus"),[249] Judge Augustus Hand declared a broad view of *MacPherson* as extending liability, "irrespective of privity of contract, to the negligent manufacturer of an instrumentality likely to endanger the public."[250] By 1949, his cousin Judge Learned Hand was comfortable in observing that—

> The liability in such cases is in principle that which is imposed upon a manufacturer who puts in general circulation—so to say—a thing which, if improperly constructed, is likely to cause injury to others. He is charged with reasonable care in the circumstances to see that it is properly constructed. As to things which, like the rigging of "Pole 1422" were "inherently dangerous," or could be found so, there has never been doubt about this since *Thomas v. Winchester*; and, if there still persist any doubts that after *MacPherson v. Buick Motor Co.*, the liability is not limited to "inherently dangerous" things, we need not be concerned to answer them. They do not exist in New

Ettinger, 44 F. Supp. 763, 764 (E.D.N.Y. 1942) (misciting *MacPherson* for the proposition that because "[t]here was no privity of contract between the plaintiff and the defendant" manufacturer, "there can be no recovery by plaintiff against the defendant" manufacturer). And then there is Judge Jerome Frank's somewhat weird invocation of *MacPherson* while discussing how a "tentative analysis of the factors which affect upper court decisions helps to reveal the extent to which the judges of those courts, when deciding cases, often interest themselves in the future at the expense of the present," such as "[t]he 'prophylactic' factor, bred of a desire of judges 'to fashion rules for a healthy future,'" which sees judges acting as "'inveterate prophets and legislators;' they 'scale their penalties, they impose damages, both punitive and exemplary, not merely for the individual offender's lesson, but as a preventive of future harms;' they 'spend much time fashioning prophylactic rules both of substantive and procedural design in their efforts to purify the social stream through the judicial process.'" Aero Spark Plug Co. v. B. G. Corp., 130 F.2d 290, 296 & n.19 (2d Cir. 1942) (Frank, J., concurring).

[249] *See* Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future from the Roberts Court to Learned Hand - Context and Congruence*, 12 BARRY L. REV. 53, 130-31 n.318 (2009).

[250] Gen. Accident, Fire & Life Assurance Corp. v. Goodyear Tire & Rubber Co., 132 F.2d 122, 125 (2d Cir. 1942).

> York; and if they did, they would not protect the defendants here.[251]

By 1959, the Circuit's Chief Judge could clear away the detritus that had formerly impeded *MacPherson*'s path and declare, "[o]bviously the basic inquiry in *MacPherson* and all such cases is what dangers the manufacturer foresaw or reasonably should have foreseen to users of its product."[252]

Similarly, that same breadth of vision is revealed in a major ruling from the Southern District of New York, in which *MacPherson* was rather effortlessly extended from its manufacturing-defect roots to control a design defect case.[253] The plaintiff had been injured when a fork-lift truck, manufactured by Hyster, tipped over on him, allegedly because of faulty design. Hyster moved at the close of evidence to strike the testimony of plaintiff's expert witness and to direct a verdict for defendant, which the district court reserved ruling on. Then, after the jury returned a verdict for plaintiff, defendant moved the district court to set aside that verdict and to grant a new trial. The District Court held that, "in view of facts that defendant's expert witnesses testified a priori on the basis of their calculations that the machine could not have overturned under" the conditions claimed," and that defendant did not controvert the testimony by plaintiff's expert on the negligent design of the machine and did not deny that machine did in fact overturn, "the question of defendant's fault was properly left to the jury with instructions on applicable standard of care which have long since been established."[254] In so ruling, rookie District Judge Thomas Murphy[255] confidently invoked *MacPherson* without limitation or

---

[251] Person v. Cauldwell-Wingate Co., 176 F.2d 237, 241 (2d Cir. 1949) (Hand, C.J.).

[252] Messina v. Clark Equip. Co., 263 F.2d 291, 293 (2d Cir. 1959) (Clark, C.J., dissenting).

[253] Hyatt v. Hyster Co., 106 F. Supp. 676 (S.D.N.Y. 1952), *rev'd & remanded on parties' joint stipulation*, 205 F.2d 421 (2d Cir. 1953). Indeed, some of the Circuit Judges even extrapolated liability rules from *MacPherson* into admiralty law. *See* Cannella v. Lykes Bros. S.S. Co., 174 F.2d 794, 797 (2d Cir. 1949) (Frank, J., concurring) (agreeing "unequivocally with Judge Hand's opinion," and "think[ing] it well to add that his conclusion as to the liability in personam of appellant is in line with the doctrine of" *MacPherson*, because "[t]he owner here seems to me to be in much the same relation to appellant as is the manufacturer of an automobile to a purchaser from a dealer who is an independent contractor.").

[254] *Id.* at 681-82.

[255] Warren Moscow, *Truman Promotes Medina; Murphy Named a U.S. Judge, Will Quit as Police Head*, N.Y. TIMES, June 12, 1951, at p. 1. Police Commissioner Murphy, a former U.S. Attorney who successfully prosecuted Alger Hiss, replaced

qualification.[256] Nonetheless, New York's federal judges remained well aware by the early 1960s of the difficult path *MacPherson* had been compelled to travel in reaching the fullness of Judge Cardozo's intentions almost a half century earlier.[257]

Medina, who in turn, replaced Judge Learned Hand on the Circuit after Hand had elected to take Senior Status at age 79. *Id.*

[256] *Hyatt*, 106 F. Supp. at 682. Other courts later cited *Hyatt* (and implicitly by reference, *MacPherson*) as "authorities [that] tend to support the argument that a manufacturer may be guilty of negligence in the design of a machine which causes injury while being operated as designed." *See, e.g.*, Texas Bitulithic Co. v. Caterpillar Tractor Co., 357 S.W.2d 406 (Tex. Civ. App. 1962), writ refused NRE (Oct. 6, 1962). Moreover, *Hyatt* was one of the cases cited by Professor Dix Noel in 1962 to support his assessment that

> There are a few jurisdictions where the rule of *MacPherson v. Buick Motor Co.* that a manufacturer may be liable for negligence to remote users of his product is only now being accepted, but in most parts of the country it is evident that the MacPherson principle has long since been adopted and has received extensive development. Most of this development has occurred in the situation where the plaintiff alleges simply that the particular chattel involved in the accident was negligently and defectively manufactured. In an increasing number of recent cases, however, the plaintiff has undertaken to establish that the defendant's product as a whole—as distinguished from a particular item carelessly made—is so designed as to create an unreasonable danger.

Dix W. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 816, 831-32 (1962) (noting that cases such as *Hyatt* allow that "an unreasonable danger may be found by a jury in spite of extensive safe use, at least where a design which would have prevented the accident is shown to be quite feasible").

[257] As Judge Levet put it, the struggle of *MacPherson* for decades after its annunciation

> [T]races how the doctrine of nonliability crept into our law from a casual dictum in an English case decided in 1842 (which, to add to the delightful irony, did not even involve a manufacturer), and how many American courts quickly fell upon this ancient dictum and blew it up into a 'general rule' to relieve manufacturers of all liability; of how our courts then gradually grafted upon it a bizarre cluster of "exceptions," some of which we have already noted, which wondrously grew and grew until, in all truth—much like the boa constrictor swallowing itself—the exceptions devoured the rule; and how the English in due course sensibly scuttled their earlier dependence on this old dictum while many of our American courts remained tenacious in their devotion to the old "rule"—

VI. *MACPHERSON* IN TWO SISTER STATES WITHOUT INTERMEDIATE APPELLATE COURTS—THE (VERY DIFFERENT) MASSACHUSETTS AND MISSISSIPPI EXPERIENCES

We have seen that the New York intermediate appellate courts left a mixed-bag of a legacy in dealing with Judge Cardozo's subtle genius in *MacPherson*. It is thus natural to ask the next logical question: How did *MacPherson* fare in sister states where there was *no* intermediate appeals court, leaving the only dialogue to be between the trial courts and the state's high court, with intrusions from time to time by the rulings of regional federal courts?[258] Accordingly, we now

---

> many, indeed, even after Justice Cardozo's historic decision in *MacPherson* . . . .

Conlon v. Republic Aviation Corp., 204 F. Supp. 865, 866 (S.D.N.Y. 1960) (quoting Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873, 878 (Mich. 1958)). Judge Frank struggled with his colleagues as late as 1954 to get them to move beyond the Appellate Division's quagmire of "inherently dangerous" and "imminently dangerous" labels. *See* Hentschel v. Baby Bathinette Corp., 215 F.2d 102, 105, 111-12 (2d Cir. 1954) (Frank, J., dissenting), where Judge Frank protested as follows:

> The question here is this: Ought the judge have allowed the jury to determine whether or not defendants should reasonably have foreseen that the thin sheets of magnesium, covering the legs of the bathinette, might be ignited, should a fire break out in the dwelling of a purchaser of the bathinette? . . . [Yet] [m]y colleagues say that liability turns on whether or not the bathinette was "inherently dangerous." But, as a leading commentator remarks, "It is difficult to understand why a number of courts still cling to the distinction between 'inherently dangerous articles' and other articles in discussing the liability of both manufacturers and vendors," particularly when "Judge Cardozo [in] MacPherson . . . long ago showed the fallacy of it."

Id. (citations omitted).

[258] *MacPherson* was also cited in the 1930s in both the UK and Australia. *See, e.g.*, Donoghue v. Stevenson [1932] AC 562, 598-99 (HL) (opinion of Lord Atkin); *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387, 438 (Austl.) (Evatt, J., dissenting). Revealingly, Justice Evatt wrote in a letter to Lord Atkin soon after *Donoghue* was handed down, "'on all sides there is profound satisfaction that, in substance, your judgment and the opinion of Justice Cardozo of the U.S.A. coincide, and that the common law is again shown to be capable of meeting modem conditions of industrialisation, and of striking through forms of legal separateness to reality.'" Franz Werro & Claudia Hasbun, *Is* MacPherson *a Legacy of Civilian Views?*, 9 J. TORT L. 67, 79 & n.75 (2016) (quoting GEOFFREY LEWIS, LORD ATKIN 67 (1983)). At first when loosening privity, the English and Commonwealth courts cited

consider the influence of—and resistance to—*MacPherson* in the appellate courts of two other states in the mid-20th century, Massachusetts and Mississippi, neither of which had intermediate appellate courts at the time.

A. The Massachusetts Experience—Where the Supreme Judicial Court Got the Message While New York Yet Struggled with It

The appellate options available to litigants in Massachusetts from the earliest days of statehood were limited to the Supreme Judicial Court. An intermediate appellate court did not become a reality in Massachusetts until 1970.[259] Thus, while *MacPherson* was

---

MacPherson and referenced Judge Cardozo specifically. *See id.* at 76-78, 78-80. As time went on, the English courts let go of the *MacPherson* crutch and stood on their own precedents that had embraced *MacPherson*. *See id.* at 79-80. However, Australian courts, "[u]nlike English courts," *did* "see the value in continuing to cite *MacPherson*" because it brought "added historical and analytic value." *Id.* at 80 (citing *Esanda Fin Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 300 (Austl.); *Tarangau Game Fishing Charters v Eagle Yachts* (2013) QSCR 16, ¶ 81 (Austl.)). The Australian perspective is nicely summarized in a 1997 decision:

> [*Winterbottom v. Wright*] was overthrown in the United States as a result of *MacPherson v Buick Motor Co.* and subsequently in England as a result of *Donoghue v Stevenson*. In that case, Lord Atkin said that Judge Cardozo in *MacPherson* had stated the principles of the law as his Lordship should desire to state them. They fixed upon reasonable foreseeability of injury if proper care were not taken. In that way, as Judge Cardozo put it, there was nothing anomalous in imposing upon A who contracted with B a duty to C; "foresight of the consequences involves the creation of a duty."

Esanda Fin Corp Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241, 300 (Austl.). It appears that under a more extensive concept of duty in the civilian law codes, German jurists had essentially arrived at both the *MacPherson* and *Escola* positions before Cardozo and Traynor did, and as for French jurists, "an influence of *MacPherson* on French products liability law was inconceivable" because "French products liability law was in 1896 what U.S. products liability law became in 1916 with *MacPherson*." *See* Werro & Hasbun, *supra*, at 81-85.

[259] *Appeals Court History—Information About the History of the Appeals Court*, MASS.GOV, https://www.mass.gov/info-details/appeals-court-history# (on file with the Touro Law Review) (last visited Aug. 7, 2025). As the Massachusetts Court of Appeals has observed of itself:

> The Massachusetts Judicial Council, created by the legislature in 1924, initially proposed creating an intermediate appeals court in 1927, but the proposal was not acted upon. The Judicial Council's

tracing its way through the highs and lows of interpretation and misinterpretation, application and misapplication, among New York's four Appellate Divisions, Massachusetts waited for a bold stroke from the Supreme Judicial Court. While opportunities presented themselves to the Supreme Judicial Court on several occasions,[260] it was not until 30 years after *MacPherson* was decided that the bold stroke was delivered.

The Supreme Judicial Court of Massachusetts was one of the first state high courts to survey the cases in New York and elsewhere, citing *MacPherson*, and to grasp and declare the quiet revolution that Judge Cardozo had meant his opinion to work. A consumer received facial burns after using the manufacturer's perfume, which she had purchased from a retail store in Boston.[261] The trial judge set aside a jury verdict in her favor against the manufacturer. Reaching the Supreme Judicial Court in 1946, that court viewed "[t]he main question in this case [a]s whether the plaintiff is to be denied relief in this action of tort for negligence merely because she had no contractual relation to or privity of contract with the defendant."[262] The Supreme

---

> second proposal, made in 1967, was received more favorably. The Council reported that the interests of justice would be better served if the court of last resort (the Supreme Judicial Court) were given the time to decide cases of major importance, and that more time should be allotted to the Supreme Judicial Court (SJC) to consider improvements to procedures, rules and judicial administration. The Supreme Judicial Court's appellate caseload had greatly expanded through the late 1950s and 1960s. Expansion was fueled in part by a huge increase in criminal appeals; in 1958, the Supreme Judicial Court had adopted a rule mandating the appointment of counsel for indigent defendants in all felony cases in the Superior Court. Within several years, defendants' rights were further expanded by such landmark United States Supreme Court decisions as *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

Id. "From an initial bench of six justices, the MAC has grown to having twenty-five statutory justices and also currently has two retired appellate justices serving on recall." NAT'L CTR. FOR STATE CTS., MASSACHUSETTS APPEALS COURT EFFICIENCY AND OPERATIONAL STUDY—FINAL REPORT 1 (2011), https://ncsc.contentdm.oclc.org/digital/api/collection/appellate/id/1220/download (on file with the Touro Law Review). *See generally* Daniel J. Johnedis, *The Founding of the Massachusetts Appeals Court*, 1 SUP. JUD. CT. HIST. SOC'Y J. 44 (1995).

[260] *See, e.g.*, Farley v. Edward E. Tower & Co., 171 N.E. 639 (Mass. 1930).

[261] Carter v. Yardley & Co., 64 N.E.2d 693, 694 (Mass. 1946).

[262] *Id.* at 696.

Judicial Court conceded that "almost as soon as that asserted general rule had been laid down, the requirements of justice in particular cases impelled the courts to make exceptions to it, whereby various classes of things potentially dangerous were taken out of that general rule," such that

> All these exceptions as at first understood and applied in this Commonwealth left a large field for the application of the asserted general rule of nonliability in the absence of privity of contract. In a number of cases manufacturers invoking that general rule were absolved from responsibility for the consequences of their want of care. But there was constant pressure to expand the concept of "inherently dangerous" things and to narrow correspondingly the things covered by the asserted general rule of nonliability.[263]

The Supreme Judicial Court then addressed *MacPherson*, asserting that "[t]he doctrine of the *MacPherson* case is now generally accepted," and noting its incorporation into the Restatement (First) of Torts.[264] As a result, "all dangerous things" have been brought "into the same class as the 'inherently dangerous' things to which the principle already stated has always been applied."[265] Insightfully, the Supreme Judicial Court observed that "[t]he *MacPherson* case caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate," so that "[w]herever that case is accepted, that rule in truth is abolished, and ceases to be part of the law."[266] Although "some courts have continued to render lip service to it," the Supreme Judicial Court used this case to declare that "[t]ime has come for us to recognize that that asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."[267]

---

[263] *Id.* at 699 (footnotes omitted).

[264] *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 394-402 (A.L.I. 1939)).

[265] *Id.*

[266] *Id.*

[267] *Id.* at 700. Justice Robert Jackson later observed that "[w]here experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use

And with that, privity was dead in The Bay State.

B. The Mississippi Experience

No state provides a more effective contrast with New York's commitment to mid-level appellate courts, and the consequent experience in the development of the full doctrine of *MacPherson v. Buick*, than "the Mississippi experience."

By way of background, Mississippi became English territory after the French surrendered their colonial stake there under the terms of the Treaty of Paris that ended the war known as both "The French and Indian War" and "The Seven Years' War" in 1763.[268] After England's retreat from North America below Canada was finalized in the 1783 Peace of Paris, followed by the creation of the Mississippi Territory in 1798, the fledgling United States admitted the State of Mississippi into the Union on December 10, 1817, the twentieth State to join the Union.[269] Unlike Georgia, which waited 70 years after statehood to establish its Supreme Court,[270] Mississippi's 1817 Constitution created a Supreme Court[271]—but no intermediate appellate courts, as per the custom of the time.[272] Nor did Mississippi adopt an intermediate appellate court until 1995—178 years

---

foresight appropriate to his enterprise;" thus, "[f]orward-looking courts, slowly but steadily, have been adapting the law of negligence to these conditions," such as "Judge Lummus, for the Supreme Judicial Court of Massachusetts, [who] articulated this development in *Carter v. Yardley Co., Ltd*.," in an "opinion [which] contains what is perhaps a more decisive statement of the trend than does the earlier landmark opinion of Judge Cardozo for the New York Court of Appeals, *MacPherson*." Dalehite v. United States, 346 U.S. 15, 52, 22 & n.6 (1953) (Jackson, J., dissenting).

[268] *See, e.g.*, Michael H. Hoffheimer, *Mississippi Courts: 1790–1868*, 65 MISS. L.J. 99, 102-17 (1995).

[269] *See, e.g.*, WESTLEY F. BUSBEE, JR., MISSISSIPPI: A HISTORY (2d ed. 2015); 1 A HISTORY OF MISSISSIPPI (Richard McLemore ed., 1973); Hoffheimer, *supra* note 268, at 102-17.

[270] *See* Van Detta, *supra* note 8, at 104-11.

[271] A. B. Butts, *The Court System of Mississippi*, 3 MISS. L.J. 97 (1930).

[272] The history is discussed, *inter alia*, in Sunderland, *supra* note 26, at 54. *See also supra* notes 7-30 and accompanying text. Dean Roscoe Pound also confirmed that only fifteen states established new, intermediate appeals courts during the period 1865 through 1925. *See* Johnedis, *supra* note 259, at 44 n.3 (citing ROSCOE POUND, ORGANIZATION OF COURTS 200-01, 226-40 (1940)). Such a step is, for the period, considered "extraordinary." *Id.* at 44 n.4.

later—when the appeals workload simply became too much for its Supreme Court to manage.[273]

The Mississippi experience also invokes the complex interplay between state and federal courts when federal courts make predictions about how state courts will rule when the state courts have not seen fit to re-examine an issue—such as the fall of the house of privity in negligence actions for product injury—in a long time. Would the federal courts be justified in concluding that the State Supreme Court would change a rule that has changed virtually everywhere *but* there? This has been called "the *Erie* guess."[274] It has also been part-and-parcel of the new tug-of-war in developing state-law tort doctrine[275] since *Erie Railroad Co. v. Tompkins*[276] took away the federal courts' asserted authority under the Rules of Decision Act[277] to declare "general common law" independently of a state's courts.[278] To borrow a phrase from Dean Robert Schapiro, the post-*Erie* judicial dialogue

---

[273] *See generally* Leslie H. Southwick, *The Mississippi Court of Appeals: History, Procedures, and First Year's Jurisprudence*, 65 MISS. L.J. 593 (1996). "The Mississippi Legislature created the Court of Appeals to speed appeals and relieve a backlog of cases before the Supreme Court." *About The Courts: Court of Appeals*, ST. OF MISS. JUDICIARY, https://courts.ms.gov/aboutcourts/aboutthecourts.php (on file with the Touro Law Review) (last visited Aug. 8, 2025). "The Court of Appeals began hearing cases in 1995." *Id.* However, the precise legal mechanism for doing so was attended by significant complexities, rooted in the State's own Constitution and the Legislature's desire to organize the new intermediate appellate court without having to amend the Constitution. *See* Hoffheimer, *supra* note 268, at 101 n.1. Indeed, New York's Appellate Divisions could not have come into existence other than through amendment to the New York State Constitution. *See supra* Section II.B.

[274] Connor Shaull, Note, *An* Erie *Silence: Erie Guesses and Their Effects on State Courts, Common Law, and Jurisdictional Federalism*, 104 MINN. L. REV. 1133 (2019); *see also* Jeffrey A. Van Detta, Erie *Mistakes: The Eleventh Circuit Misconstrues Already Problematic Georgia Precedent on Choice of Law*, 79 U. MIA. L. REV. 644 (2025).

[275] *Compare, e.g.*, Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415 (1996), *with* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[276] 304 U.S. 64 (1938); *see generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

[277] An Act to Establish the Judicial Courts of the United States, ch. 20, § 34, 1 Stat. 73, 92 (1789), codified at 28 U.S.C. § 1652

[278] See, for example, a contemporary account of *Erie*'s significance written by future U.S. Supreme Court Justice Robert Jackson. Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, A.B.A. J., Aug. 1938, at 609.

can be part of what he has described as "the polyphony of federalism."[279]

The federal courts certainly tried to have such a polyphonic dialogue with the Mississippi Supreme Court over whether Mississippi continued—well into the 20th century—to hew to the privity doctrine in product-injury cases. The history of the dialogue starts with the first line, published by the Supreme Court of Mississippi in 1928 in a products liability case involving Ford Motor Company.

In *Ford Motor Co. v. Myers*,[280] Ford appealed from a plaintiff's judgment in a product-injury case where the claim of negligent manufacture of a truck was allowed to go to the jury even though the plaintiff's decedent was a purchaser remote from the manufacturer.[281] The jury rendered a plaintiff's verdict, and judgment was thereupon entered. The Mississippi Supreme Court, however, reversed the judgment and disdainfully dismissed the contention that there was any reason for it to change its law to meet recent trends then having

---

[279] *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); *see also* Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133, 156 n.124 (2020) (noting "the broader policy debate between federalization and devolution" which has considered the federal-state lawmaking relationship in a variety of terms, boils down to "[w]hether conceived, either descriptively or prescriptively, as cooperative, contextual, dynamic, adaptive, interactive, iterative, or polyphonic" finding "an appropriate balance between a centralized scheme and local authority."). Of particular relevance to our subject here, Professor Fox has observed that

> Within and around cooperative federalism, another category of federalism theory has emerged over the past several decades. Generally speaking, new theories of federalism in . . . [a variety of] context[s] and in other fields applaud the dynamism of the power relationship between national and subnational levels of government, and emphasize the elimination of the "zero-sum" nature of power allocations under dual federalism schemes.

Fox, *supra*, at 160 (footnote omitted). Fox also observes of Dean Schapiro's concept of polyphonic federalism that the important element of his theory of polyphonic federalism is the reality that "'neither the federal government nor the states can eliminate the independent lawmaking authority of the other.'" *Id.* at 172-73 (quoting SCHAPIRO, *supra*, at 96).

[280] 117 So. 362 (Miss. 1928).

[281] *Id*. at 363. The specifics of the complaint were that while the decedent was driving a truck—manufactured and sold by Ford to a dealer—loaded with lumber, "a cuff, constituting a part of such truck and being of defective material (which defect could have been detected by reasonable inspection), broke, causing the truck to become unmanageable and plunge into a ditch, resulting in the [decedent's] death." *Id.*

emerged elsewhere. Without even deigning to name or cite *MacPherson,* Justice Anderson dispatched the notion with a veritable wave of the judicial hand:

> [Plaintiff] relies on decisions of courts of other jurisdictions, which hold that the manufacture of appliances which will become highly dangerous when put to the uses for which they are intended, because of defects in their manufacture, *owes the public a duty, irrespective of any contractual relation* to use reasonable care in the manufacture of such appliances. As stated, our court has held to the contrary, as shown in the decisions above cited.
>
> If an automobile was a dangerous instrumentality per se, there would be more reason for the position of appellees. But our court held, in *Vicksburg Gas Co. v. Ferguson*, . . . that an automobile was not such an instrumentality.[282]

---

[282] *Id.* (citing Vicksburg Gas Co. v. Ferguson, 106 So. 258 (Miss. 1925)). The other Mississippi precedents to which Justice Anderson alluded are *Kilcrease v. Galtney Motor Co.*, 115 So. 193 (Miss. 1928); *W. T. Pate Auto Co. v. W. J. Westbrook Elevator Co.*, 107 So. 552 (Miss. 1926); and *City of Vicksburg v. Holmes*, 63 So. 454 (Miss. 1913). The Mississippi Supreme Court at least acknowledged *MacPherson* by name in the *Pate* case. *See Pate Auto Co.*, 107 So. at 553 ("There is a conflict in the authorities upon the question of whether or not a contractor, manufacturer, or vendor of an article is liable to third parties who have no contractual relations with him, for negligence in the construction, manufacture, or sale of such articles. The line of cases which hold that one who manufactures an article or machine, which is rendered imminently dangerous by reason of negligent construction, is liable to third parties for injuries or damage resulting from such negligence, is illustrated by the cases of *MacPherson v. Buick Motor Co*. . . ."). Not cited by Justice Anderson are mentions of *MacPherson* in (the confusingly captioned) *McPherson v. Gullett Gin Co.*, 100 So. 16, 17 (Miss. 1924), where Justice Sykes wrote that "[a]ppellant cites cases where the manufacturer of automobiles was held liable to third persons for defects in the construction of the automobile. *MacPherson v. Buick Motor Co.*" *Id.* "In the *MacPherson* Case," Justice Sykes continued, "the New York court rests the liability upon the following proposition":

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

After that, the issue disappeared from the Mississippi Supreme Court's docket for nearly a quarter century.[283]

Indeed, it was in faraway Boston, Massachusetts, that the cause of flipping Mississippi from a *Winterbottom v. Wright* fossil to the

---

Id. Justice Sykes was quick, however, to recharacterize the extent of the opinion's import, adding, "[i]n another place in this opinion the New York court is careful to say that it is dealing with the liability of the manufacturer of the finished product who puts it on the market to be used without inspection by his customers." *Id.* The Mississippi court found *MacPherson* to be inapposite:

> These cases while instructive upon the duty of a manufacturer to the ultimate purchaser of his article, are not directly in point. In this case there was a contract for the purchase of the gins between the parties to this suit. The undertakings of each party are stipulated thereon. Their rights and liabilities are therein fully stated. There was no necessity for making this contract. No public duty nor public policy required it to be made. It is simply a private contract between private parties that neither was compelled to make. This contract provides that the seller warrants the machinery to be of good material and to perform well.

Id. at 17-18. Justice Sykes, therefore, saw a claim in tort as categorically precluded in the kind of case before his court:

> In case of a private contract of this kind where the duties and liabilities of the parties are both stipulated in the contract, there is no implied or other duty owed by either party, but all of these duties and liabilities are contained, measured, and governed by the contract. *It is said that the suit is an action of tort. The relation, however, between these parties arises from the contract; it is a suit necessarily based upon the breach of a contract.* The bill shows that there has been no breach of the contract, or rather that by the terms of the contract the plaintiff is estopped to claim a breach. There then can be no liability on the part of the defendant. The contract precludes any recovery.

Id. at 18 (emphasis added).

[283] That's not to say that lawyers didn't cite *MacPherson* to the Mississippi Supreme Court; that court simply swept *MacPherson* to the side, often by means of recharacterization. *See, e.g.*, Burkett v. Globe Indem. Co., 181 So. 316 (Miss. 1938) (instructing the reader to "see" *MacPherson* after declare that "[i]t may be said that an automobile is not inherently dangerous but the repair made on this automobile, and the condition in which it was alleged to have been knowingly delivered to the owner, with a concealment from him of such facts, rendered the automobile highly dangerous from the moment it was thus delivered to all who might come in contact with it while it was in motion, whether as a guest riding therein or a pedestrian."). And in 1954, the Mississippi Supreme Court again came to the dance but did not name the Cardozo precedent nor take Progress home with it. *See* E.I. Du Pont De Nemours & Co. v. Ladner, 73 So. 2d 249, 254-55 (Miss. 1954) (still speaking in terms of general rule of privity, albeit with a widening litany of exceptions).

contemporary *MacPherson* doctrine was first taken up again by an unlikely court—the U.S. First Circuit Court of Appeals—and an unlikely jurist, the famed Harvard Law School professor, Calvert Magruder, whom President Franklin Roosevelt had appointed to the First Circuit in 1939.[284] In *Mason v. American Emery Wheel Works*,[285] a worker injured in Mississippi by an emery wheel sued the manufacturer at its Rhode Island place of business. The federal district court, applying the then still-prevalent choice-of-law rule for tort cases, *lex loci delicti*,[286] applied Mississippi law to the worker's claim, and granted the equivalent of a directed verdict at the close of the worker's trial evidence.[287] "The district court came to the conclusion 'reluctantly' that it was bound by the Mississippi law as declared in *Ford Motor Co. v. Myers*, 1928," wrote Judge Magruder, and

> [T]hat the "harsh rule" of Mississippi as so declared, "contrary to the great weight of authority" elsewhere, was that a manufacturer was not liable for negligence in the manufacture of appliances which could and would become highly dangerous when put to the uses for which they are intended, where there is no privity of contract between the user and the manufacturer.[288]

Judge Magruder, however, was neither impressed nor feeling deferential, writing that "*Ford Motor Co. v. Myers* . . . was the only Mississippi case relied upon, or even referred to, by the district court," a case in which

> [T]he Supreme Court of Mississippi, in a half-page opinion, did in fact apply what was at one time the prevailing rule, in holding that Ford Motor Company as

---

[284] *Calvert Magruder: Senior Circuit Judge—First Circuit*, A.B.A. J., July 1947, at 671; *see also* Felix Frankfurter, *Calvert Magruder*, 72 HARV. L. REV. 1201 (1959). Familiar to generations of (attentive) torts students is Judge Magruder's transcendental essay on the nuances of proximate causation in *Marshall v. Nugent*, 222 F.2d 604, 612 (1st Cir. 1955) ("Prince's negligence constituted an irretrievable breach of duty to the plaintiff. Though this particular act of negligence was over and done with when the truck pulled up alongside of the stalled Chevrolet without having actually collided with it, still the consequences of such past negligence were in the bosom of time, as yet unrevealed.").

[285] 241 F.2d 906 (1st Cir. 1957).

[286] *See* Jeffrey A. Van Detta, *A Primer and Update on Georgia's Conflict of Laws*, 17 J. MARSHALL L.J. 1 (2024-25).

[287] *Mason*, 241 F.2d at 907-08.

[288] *Id.* at 908.

> the manufacturer of a truck owed no duty of care to a remote subvendee of the truck who was injured when the truck collapsed and plunged into a ditch because of a defect which could have been detected by reasonable inspection by the manufacturer before the vehicle left the factory.[289]

However, Judge Magruder pointedly noted, "'Cardozo, J., in *MacPherson* . . . convincingly argued that these so-called exceptions were merely prime illustrations, and by no means the only ones, of the more basic principle of torts that actors generally, including manufacturers, have a duty of care not to create unreasonable risks of bodily injury to others within the zone of foreseeable danger.'"[290] Thus,

> *MacPherson* . . . started a new trend in this particular field of the law, and its substantive result has found favor in [Section] 395 of the American Law Institute Restatement of Torts. If the Supreme Court of Mississippi had recently reconsidered the rule it applied in *Ford Motor Co. v. Myers*, supra, and had decided to adhere to it on the ground of stare decisis, no doubt the federal courts would have had to accept the local law as so declared. But it would be gratuitous and unwarranted to assume that the Supreme Court of Mississippi would now so hold, when we bear in mind the readiness of other courts, in conservative jurisdictions at that, to overrule their earlier holdings and to bring their jurisprudence into accord with what is now the overwhelming weight of authority.[291]

And here, Judge Magruder cited to the Massachusetts Supreme Judicial Court's embrace of *MacPherson* in *Carter v. Yardley & Co.*,[292] discussed in Section VI.A. Indeed, after examining a 1954 decision in which the Mississippi Supreme Court did *not*, in fact, overrule its 1928 paean to privity,[293] Judge Magruder still insisted that

---

[289] *Id.*

[290] *Id.* at 908 (citation omitted).

[291] *Id.* at 908-09.

[292] 64 N.E.2d 693 (Mass. 1946).

[293] *See* E.I. Du Pont De Nemours & Co. v. Ladner, 173 So. 2d 249 (Miss. 1954). Judge Magruder also read a more into than the case itself seems to support:

"it is fair to infer from this latest expression by the Supreme Court of Mississippi that it is prepared to reconsider and revise the rule it applied in *Ford Motor Co. v. Myers* whenever it may have before it a case that squarely presents the issue," and, accordingly, "[w]e have no doubt that when this occasion does come to pass, the Supreme Court of Mississippi will declare itself in agreement with the more enlightened and generally accepted modern doctrine."[294] Thus, from that moment on—at least in diversity cases heard in the First Circuit where the substantive tort law to be applied was that of Mississippi—*MacPherson* had claimed another jurisdiction.

The Mississippi Supreme Court, however, was having none of it. In a 1962 decision once again declining the invitation to overrule its 1928 decision in *Ford Motor Co. v. Myers*, the Mississippi Justices stood firm that "[t]his Court has for many years consistently followed the common-law rule requiring plaintiff to come within the privity of

---

> Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction. And where, as in *Ford Motor Co. v. Myers*, the Supreme Court of Mississippi, twenty or thirty years ago, applied an old rule which has since been generally discredited elsewhere, it is relevant to consider what the Supreme Court of Mississippi has subsequently said on the point. We think that appellant herein rightly stresses the importance of [E.I. Du Pont De Nemours & Co. v. Ladner, 173 So.2d 249 (Miss. 1954)]. In that very recent case, the Supreme Court of Mississippi was able to dispose of the particular issue on another ground without the necessity of expressly overruling its earlier decision in *Ford Motor Co. v. Myers*. But the court did take occasion, in a long and careful opinion, to indicate its awareness of the modern trend in the area, including the decision of the Supreme Judicial Court of Massachusetts in *Carter v. Yardley & Co.*, supra; it stated that, whatever may have been the rule originally, "the principle seems now to be well established by the decisions of many courts that a person who has had no direct contractual relations with a manufacturer may nevertheless recover from such manufacturer for damages to property caused by the negligence of the manufacturer in the same manner that such a remote vendee or other third person can recover for personal injuries." And it quoted, with apparent approval, many more recent authorities in support of the "modern doctrine."

Mason, 241 F.2d at 908-09.

[294] *Id.* at 910.

contract rule," noting pointedly that "[t]here are numerous decisions by this Court based upon negligence, requiring privity of contract."[295] But the Court made a point of letting the country know that it did, indeed, keep abreast of rulings by Yankee judges—and federal ones at that:

> This Court is keenly aware of dictum in the opinion in *E. I. Du Pont De Nemours & Company v. Ladner* . . . We are also conscious of suggestion made in the decision of Justice [sic] Magruder in the case of *Mason v. American Emery Wheel Works* . . . . We have carefully reviewed the authorities on this subject, beginning with the opinion of Judge Cardozo in the case of *MacPherson v. Buick Motor Co.* . . . We find, however, that it is not necessary to pass upon or disturb the former opinions of this Court in order to reach a decision in this case.[296]

That did not stop the federal court whose jurisdiction actually embraced the State of Mississippi to expressly adopt Judge Magruder's *Erie* guess and declare that *MacPherson* should already be considered the law of Mississippi. In *Grey v. Hayes-Sammons Chem. Co.*,[297] the U.S. Fifth Circuit proclaimed that "[u]nder Mississippi law, as we read *E.I. du Pont de Nemours & Co. v. Ladner* and as the First Circuit held [in *Mason v. American Emery Wheel Works*], privity is not required when the action is against the manufacturer for breach of his duty of

---

[295] Harris v. Spencer-Harris Tool Co., 140 So. 2d 558, 560 (Miss. 1962).

[296] *Id.* at 561 (citations omitted). The court's *ratio decidendi* was the "even if" form of argument, so familiar to law students writing essay examination answers. "Assuming, arguendo, (but not deciding this point at this time), this Court may ultimately adopt the so-called modern concept that a person who has no contractual relations with a manufacturer may recover for injuries caused by negligence of the manufacturer," the court emphasized, "nevertheless, in this case, we would be required to affirm the trial court because the alleged defects are not considered to be latent or concealed. If we assume there were defects, we think they were apparent and obvious to a casual observer." *Id.* The court went on to lay the foundation for objecting to developments like the one proposed by Justice Traynor in his 1944 *Escola* concurrence: "One textwriter uses the following language: 'The principle *that a manufacturer or seller does not have the status of an insurer* as respects product design is illustrated by the proposition that since it is patent that virtually any article, or whatever type or design is capable of producing injury when put to particular uses (or misuses), a manufacturer has no duty so to design his product as to render it wholly incapable of producing injury.'" *Id.* (emphasis added) (citation omitted).

[297] 310 F.2d 291 (5th Cir. 1962).

due care."[298] Writing for the panel, Judge John Minor Wisdom was at his most sagaciously sanguine:

> It is, of course, unusual for a federal court to base an Erie decision on pure dicta in preference to a firm holding to the contrary. But we agree with the First Circuit [in *Mason v. American Emery Wheel Works*]. We must decide the case as if we were sitting as a Mississippi court. The court's strong language in *E.I. du Pont de Nemours & Co. v. Ladner*, the reference to recent authorities, and the court's consciousness of the fact that its discussion of the 'modern doctrine' was not necessary to the decision, compel us to say that the Mississippi Supreme Court was putting litigants on notice that it no longer considered *Ford Motor Co. v. Myers* to be the law of Mississippi.[299]

Despite the Mississippi Supreme Court's own 1962 refusal to abandon privity in *Harris v. Spencer-Harris Tool Co*.,[300] the Fifth Circuit continued to cling to Judge Magruder's coattails.[301]

---

[298] *Id.* at 297.

[299] *Id.* at 296-97 (footnotes omitted).

[300] 140 So. 2d at 561.

[301] *See* Necaise v. Chrysler Corp., 335 F.2d 562 (5th Cir. 1964); *see also* Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) (similar "*Erie* guess" regarding Texas Supreme Court). In *Necaise*, the Fifth Circuit waxed eloquently about why it was effectively reconfirming the forum-shopping opportunity it had created with the *Erie* guess in *Grey*, even in the face of 1962's *Harris-Spencer Tool*:

> We are not critical of the decision of the Mississippi Supreme Court in Ford rendered thirty-six years ago. When that decision was rendered the often mentioned "population explosion" was not a concept. At that time the age of limitless gadgets and appliances, currently used by almost everyone, had not been born. And now, thirty-six years later, mechanical devices and appliances touch the very vitals of society. As a result of enticing advertisements, a constant barrage of reassurances, and a continuous flow of attractive invitations to purchase, millions of people acquire and live close to moving machinery almost constantly. The two-car family is commonplace and there are literally millions of motor vehicles on the thoroughfares. Even with careful handling and operation, the record as to personal injuries is bad. Mechanical defects resulting from negligence cannot be tolerated. We do not speak of perfection, we only condemn negligence. Manufacturers of such powerful machinery are not insurers, but they should not be permitted to escape liability when they place on the market a

It was not until 1966—a full half century after *MacPherson* was handed down—that the Mississippi Supreme Court overruled *Ford Motor Co. v. Myers*.[302] And in so doing, it cited *neither* Judge Magruder's First Circuit opinion from 1957 *nor* any of the Fifth Circuit opinions from the 1960s.[303]

> defective motor vehicle, if the defect could have been avoided by the use of reasonable care. Since the famous case of *Macpherson* . . . the immunity of manufacturers has been undermined and eroded. Numerous exceptions have been established by the development of the law. To mention only a few, many courts no longer require privity when recovery is sought for negligence, instrumentalities that are inherently and imminently dangerous have been removed from the operation of the doctrine of no liability, and immunity based on privity is not allowed where the injury comes from food products. At this late date most courts will not permit manufacturers to hide behind a contractual carapace shielding them from liability for harm caused by powerful and swift, but defective machinery. The citadel of immunity and privity has crumbled to some extent before the transcendent importance of life and health, and those principles of tort law designed to elevate such values.

Id. at 569-70. The panel also asserted that

> The Vicksburg Gas case upon which the [Mississippi Supreme] Court relied is now almost forty years old. The construction and horsepower of motor vehicles have changed. High-speed expressways are in existence. The number of vehicles has multiplied beyond the 1925 imagination. Many types of vehicles, undreamed of forty years ago, have reached enormous numerical proportions. It is difficult for us to conclude that the Supreme Court of Mississippi would now hold that a defective automobile is not a dangerous instrumentality per se.

Id. at 572-73.

[302] State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss 1966).

[303] *Id.* The heart of the *State Stove* majority opinion finally embraced *MacPherson* the commercial and social developments in the 50 intervening years since *MacPherson* had been decided:

> Privity of contract between a consumer of a product and its manufacturer has not only been abandoned by every State in the Union, except Mississippi, but it has no rational basis for continuance in such an action in this jurisdiction. The manufacturer, by placing a chattel or product upon the market, assumes a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase, together with the foreseeability of harm if proper case is not used. Hence it is appropriate and necessary, in accord with the universal rule elsewhere, that we hold this duty is one imposed by the law

VII. CONCLUSION—AND A CONTEMPLATIVE CODA

A. "One Step Forward, Two Steps Back": New York's Fledgling Intermediate Appellate Court Played Its Role in Dealing with a Challenging Precedent

By 1963, the New York Court of Appeals seems to have finally worked privity out of the products-injury area to the point that not only was it no longer considered a bar to negligence claims, it also had been rolled back as to breach of implied warranty claims to such an extent that a regime of strict liability was emerging,[304] even before U.C.C. Section 2-318's broadly encompassing privity provision had gained

> because of the defendant's affirmative conduct, which he should know to be likely to affect the interest of another. The rule which we adopt extends to any product which, if in fact negligently made, may reasonably be expected to be capable of inflicting injury. Privity of contract is not necessary in a suit by a consumer against a manufacturer.

Id. at 116. The court then went much further—it then adopted Section 402A of the Restatement (Second) of Torts! *Id.* at 118 ("After careful consideration of the precedents in this and other States, the history of these issues, and the many considerations pertinent to them, which are discussed subsequently, we conclude that the appropriate standards of responsibility are well stated in Section 402A of the American Law Institute's Restatement of Torts (Second), which we adopt insofar as it applies to a manufacturer of a product and to a contractor who builds and sells a house with the product in it."). But for plaintiffs, the victory was a Pyrrhic one; a majority of the judges further held "that State Stove has no liability here, under Restatement section 402A, (1) because the water heater as manufactured was not in 'a defective condition unreasonably dangerous to the user or consumer or to his property'; and (2) because it was not expected to and did not reach the [plaintiffs] 'without substantial change in the condition in which it * * * (was) sold.' (3) Further, the negligent failure of [the retailers], through their agent [the installer], to follow the instructions of the manufacturer in installing the water heater, by failing to use a temperature relief valve, was the intervening, sole proximate cause of the explosion." *Id.* at 121. Talk about one step forward, *five* steps back!

[304] Thomas C. Mack, *Torts—Products Liability Cases—Privity No Longer Required*, 13 BUFF. L. REV. 270, 272-77 (1963) (discussing, *inter alia*, *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81 (N.Y. 1963)). After *Goldberg*, "[t]he rule [wa]s clear: strict liability to all intended users despite privity of contract between such users and the manufacturer." *Id.* at 277; *see Implied Warranty and the Defense of Privity in a Personal Injury Action*, 30 FORDHAM L. REV. 484 (1962) (discussing the erosion of privity as an element of implied, but not express, breach of warranty claims).

sway[305] and Section 402A of the Restatement (Second) of Torts had been promulgated. The road, however, had been a most rocky one. On the whole, the four New York Appellate Divisions played an important role in the dissemination and application of Judge Cardozo's most consequential precedent. In so doing, they proved the value of having a system of intermediate appellate courts, and effectively answered the contemporary critics of such courts such as University of Michigan's Professor Edison Sunderland, and confirmed the wisdom of Elihu Root and the delegates at New York's 1894 State Constitutional Convention. While more often than one might like, the Appellate Divisions' decisional law held back the *MacPherson* doctrine's full acceptance and application, denying an opportunity for justice to more than a few victims of product injuries,[306] the crucible of the cases in which the Appellate Division judges confronted and struggled with *MacPherson* provided the kind of "laboratory" (about which Justice Brandeis was later to write[307]) that is such an important part of the development and progress of American law in the 20th Century.[308]

---

[305] *See, e.g.*, Emanuel Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962).

[306] Writing in 1960, Professor William Prosser observed that:

> *Only two small islands of resistance continue to hold out, in subterranean chambers. New York* and three or four other courts *still talk the language of "inherent danger," and refuse to find liability for normally harmless and inoffensive objects, such as a bed, or a can with a key.* It is by no means clear, however, that these decisions mean to say more than that, upon the facts of the particular case, no harm could reasonably be expected to result, and there was simply no negligence. These same courts, in other cases, have upheld liability without privity for objects normally very innocuous.

Prosser, *supra* note 56, at 1102 (emphasis added) (footnotes omitted). Professor Prosser cited and contrasted many of the cases discussed in Section IV of this article. *See id.* at 1102 nn.24 & 26; *see also supra* Section IV..

[307] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Jessie Steffan, *Doing Brandeis Justice: The Development of the* Liebmann *Dissent*, 39 J. SUP. CT. HIST. 201, 204-207, 217-220 (2014) (discussing background and influence of the "laboratories" metaphor).

[308] Professor James Henderson argued that the reticence shown by courts to embrace fully the abolition of privity teed up by *MacPherson* may also have been due to their use of privity as a methodology of "screening factually unmanageable claims while

Yet, there is more to say about *MacPherson*'s trials and travails in the Appellate Divisions. Further reflection can reveal some startling features of the problem. That is the subject of the next subsection.

B. "One Step Forward, Two Steps Back"—How *MacPherson*'s Author and Its Dissenter in the Court of Appeals Appear to Have Impacted the Appellate Divisions Left to Deal with the Post-Privity World Where Privity's Obituary Had Not Been Fully Written

As we have seen, despite *MacPherson*, the privity doctrine lived on in New York product-injury law for several decades as a "sick man" of tort law, much like the Ottoman Empire was once perceived as the lingering "sick man" of Europe.[309] Judge Cardozo himself must ultimately shoulder some of the blame for the lackluster performance of the Appellate Divisions in implementing *MacPherson* in a consistent, progressive spirit. Indeed, as discussed earlier,[310] Cardozo's "reticence" often created a certain Delphic quality to the words he chose for expressing his judicial opinions, which in turn, could hinder, rather than help, the very improvements in the law he actually championed. Here, we are reminded of the distant words of an irreconcilable and merciless critic, that *enfant terrible* of the American legal thought from 1930 onwards, Judge Jerome Frank.[311] As Frank's

---

allowing factually manageable claims to go to trial." Henderson, *supra* note 3, at 59; *see also id.* at 51-58.

[309] *See generally* ASH ÇIRAKMAN, FROM THE "TERROR OF THE WORLD" TO THE "SICK MAN OF EUROPE": EUROPEAN IMAGES OF OTTOMAN EMPIRE AND SOCIETY FROM THE SIXTEENTH CENTURY TO THE NINETEENTH (2004). The phrase was coined by Tsar Nicholas I in 1853. *See* HILMI OZAN ÖZAVCI, DANGEROUS GIFTS: IMPERIALISM, SECURITY, AND CIVIL WARS IN THE LEVANT, 1798–1864, 280 (Oxford 2021); *see also* G.H. Bolsover, *Nicholas I and the Partition of Turkey*, 27 SLAVONIC & E. EURO. REV. 115, 116, 138 (1948) (noting that "[a]t various times during his reign Nicholas I of Russia tentatively approached other governments with suggestions about a new order to replace the Turkish empire in Europe.").

[310] *See supra* note 50 and accompanying text.

[311] The only scholarly biography of Judge Frank is ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW (1983); *see* Mark Tushnet, Book Note, *The Iconoclast as Reformer: Jerome Frank's Impact*

biographer observed, "Cardozo, as the law's most brilliant and eloquent rationalizer, became Frank's *bête noire*."[312] Frank was particularly critical of Cardozo's "skill at making past decisions appear to support a present quantum leap forward" and "hon[ing] the technique of harmonizing and reconciling precedent to make startling changes appear routine, logical, and inevitable."[313] Cardozo's "cleverness threatened Frank's efforts to demystify judicial discretion and power, prompting Frank's challenge in *Law and the Modern Mind*[314] (and in a subsequent essay that Frank published anonymously,

---

on American Law, 3 L. & HIST. REV. 449 (1985). For further recollections of Frank's impact from a colleague both during Frank's brief stints in the academy as well as his sixteen years as a federal court of appeals judge, see Charles E. Clark, *Jerome N. Frank*, 66 YALE L.J. 817 (1957).

[312] GLENNON, *supra* note 311, at 46.

[313] *Id.* Professor Glennon specifically cites *MacPherson* among other examples. *See id.* at 46 n.46, 207 n.46 (the book uses endnotes rather than footnotes).

[314] It is interesting that Cardozo read this volume in which Frank applied insights from his Freudian psychotherapy sessions in Chicago to big thoughts about law. *Id.* at 49 ("In his writings Frank constantly urged readers to confront problems. His openness was partly influenced by Freudian psychology, which seeks to trace problems to their roots in early childhood and its unconscious urges."); Anthony Chase, *Jerome Frank and American Psychoanalytic Jurisprudence*, 2 INT'L J. L. & PSYCH. 29, 41-54 (1979). In fact, Frank's biographer reports that Cardozo actually wrote a rather droll letter to Frank about the book, needling him as much as Frank was to needle Cardozo *post mortem*:

> After Frank sent Cardozo a copy of *Law and the Modern Mind*, the judge replied, "Being as yet not wholly adult, but, in truth, a hopeless juvenile, I did what any juvenile would so: I looked at the index to see the references to myself. I have consulted these with hope and trepidation and am now strutting about the house, convinced that I am no hobbledehog, but in truth a grown man."

GLENNON, *supra* note 311, at 51. The author admits that Cardozo sent him to the Oxford Dictionary with his infliction of "hobbledehog" upon Frank. However, it appears that Cardozo either misremembered the word, or used a variant that has become extinct; the only plausible entry is for *hobbledehoy*, a word of unknown origin, which is said to mean "a clumsy or awkward person, esp. a youth." THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1242 (Leslie Brown ed., 1993). In the reprint of the 1930 edition of LAW AND THE MODERN MIND (Legal Classics Library 1985) (Brentano's 1930) that sits upon the author's bookshelf, the author counts fourteen mentions of "Cardozo" in the index. *See id.* at 357. Among this festoon of citations, the most significant are those to an entire Chapter of the book that Frank devoted to Cardozo, which Frank entitles "The Candor of Cardozo." *See id.*, pt. II, ch. VI, at 236-39. There, Jerome Frank allows perhaps at least more qualified praise than did the later criticism leveled by Anon Y. Mous:

criticizing Cardozo's judicial style for "obfuscating judicial realities.")[315] In his famous "anonymously" authored article published in the wartime *Virginia Law Review*, Judge Frank argued:

> The style of one of our greatest American judges, Mr. Justice Cardozo, recently deceased and properly venerated, has been praised without published dissent. It has lately been said, with almost tiring repetition, that he wrote "a singularly facile and lucid English," that he had "a liquid style that sparkles." Already that praise has induced some other judges to attempt to imitate him; and his imitators are beginning to breed their imitators. Unaware that there are many unable to subscribe to that praise but unwilling or too lazy to make public their dissents, the oncoming generation of lawyers may feel constrained to accept that so-called "singularly facile and lucid English" as the ideal pattern, and to esteem lightly the manner in which certain other American judges express themselves. That would be a misfortune, for it would retard the effect on legal writing of that healthy development, occurring elsewhere, of an unapologetic American style. And such a style has its importance.[316]

Frank went on to explain how Cardozo's judicial *operas* fell short because they actually communicated less than the ideas they had to offer:

> Cardozo was a contradictory personality: although he was a recluse, a retiring man, he devoted most of his life to public service and was therefore constantly making a public appearance. Deeply hurt, in his youth,

---

> Cardozo, it would seem, has reached adult emotional stature. Unlike some of the other thinkers we have discussed, he is able to contemplate without fear a public which shall know what he knows. And yet, surprisingly, he is not ready to abandon entirely the ancient dream. Just because he is bravely candid, just because he strives to do away with myth-making, unusual significance is to be attached to his backward glances . . . .

Id. at 237-38.

315 GLENNON, *supra* note 311, at 46-47.

316 Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 625 (1943).

> by a certain bitter personal experience, he withdrew from the manner of living followed by most of his fellow men. Yet he did not seek refuge in morbid introspection or in an ivory tower. He did indeed retreat from 20th Century living. But he re-entered it. And-here is the point-he re-entered it disguised as an 18th Century scholar and gentleman. His observations of the contemporary scene were keen, but they were not quite the observations of a contemporary. He wanted, at one and the same time, to be in and yet out of what was happening in the America of his time.[317]

This takes us up to Frank's most trenchant observations, which help us to understand a bit better how Cardozo may—to an extent—have hoist himself on his own petard in his effort to downplay the remarkable revolution with which his *MacPherson* opinion was pregnant:

> Cardozo attained eminence as a thinker not because but in spite of his style. To force himself to think in a foreign tongue must have cost him much effort. That with such a handicap he thought clearly is a tribute to his genius.
>
> Yet the indirection of his style may sometimes have served a deliberate purpose. "Those of us whose lives have been spent on the bench," he admitted, "have learned caution and reticence, perhaps even in excess.

---

[317] *Id.* at 630. Frank continued the unmasking:

> He achieved a compromise. And that compromise expresses itself in his style. It is neither 20th Century nor American. It is imitative of 18th Century English: he wrote of 20th Century America not in the American idiom of today but in a style that employed the obsolescent "King's English" of two hundred years ago.

Id. Frank then ratcheted his critique up to the boundary of parody:

> It would be unfair to suggest that Cardozo usually thought in American and translated into semi-archaic English. One feels that he had used a private time-machine to transport himself back into 18th Century England. He had, that is, translated himself into a past alien speech environment. The style became the man. So that those who adulate his style do not compare him with contemporary Americans; they say that he was an "essayist rare enough to rank with Lamb."

Id. at 631.

> We know the value of the veiled phrase, the blurred edge, the uncertain line."[318]

Even more to the point, "Cardozo's mannerisms are sometimes an unmitigated nuisance to the lawyer who must, in a work-a-day world, make use of his judicial opinions."[319] Indeed, "[t]hey sometimes obscure where there is need for clarity," and, concomitantly, "[h]e was a nice analyst with a zest, not always exercised, for following up all the implications of his ideas."[320]

And here we have spotlighted how Cardozo unwittingly contributed to the Appellate Division's struggle with implementing *MacPherson*.

Between (1) framing the discussion in terms of the *Thomas v. Winchester*[321] case—and its exception to privity for a claim against a "dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons, who, without fault on their part, are injured by using it as such medicine in consequence of the false label"[322]—*and* (2) the stylistic oddity of Cardozo's expression of his own holding, wrapped in the mantle of *Winchester*,[323] it is understandable how attorneys with

---

[318] *Id.* at 638; *see* Winter, *supra* note 50, at 362.

[319] Anon Y. Mous, *supra* note 316, at 637-38.

[320] *Id.* at 638. Frank did put his money where his anonymous mouth was—he provided examples of the mid-20th Century judicial writers he thought "whose style should serve as a better model than Cardozo's" because "[t]hey write much as they talk, as their fellow Americans talk." *Id.* at 639-40. Three he specified: Justice Hugo Black, Justice William O. Douglas—and Justice Robert H. Jackson (Albany Law School Class of 1912). *Id.* For the author's own thoughts on judicial style, see his tandem articles, Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from the Roberts Court to Learned Hand–Segmentation, Audience, and the Opportunity of Justice Sotomayor*, 13 BARRY L. REV. 29 (2010); Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future from the Roberts Court to Learned Hand–Context and Congruence*, 12 BARRY L. REV. 53 (2009).

[321] Thomas v. Winchester, 6 N.Y. 397 (1852) (2 Seld.); *see* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) ("The foundations of this branch of the law, at least in this state, were laid in *Thomas v. Winchester* (6 N.Y. 397).").

[322] *Thomas*, 6 N.Y. at 397.

[323] Specifically—

> We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place and limb in peril when negligently made, it is then a thing of

lesser gifts than his might have gotten lost in the labyrinth of Cardozo's words.[324]

One might also reasonably wonder if Judge Cardozo himself might have thought better of his rookie season's effort in *MacPherson*—despite what he later wrote in *Ultramares* and in his own musings off the bench. For another looming Cardozo creation from a dozen years later—1928's *Palsgraf v. Long Island Railroad Co.*[325]—demonstrates a different influence on his Torts jurisprudence. As Professor William Nelson observed, while by 1928, "Cardozo and a majority of the Court of Appeals had rendered people in positions of power responsible in damages if they foresaw harm resulting from their actions, however remote the harm might be and by whatever indirection it might be produced," nonetheless, "at the same time that Cardozo and his brethren brought the reform program to fruition, they

---

> danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.

Id. at 389-90. Easy-peasy for the Appellate Division and County Supreme Court Justices to implement, right? As we have shown in Section IV, not so much. *See supra* Section IV.

[324] Indeed, Robert Martin Davis demonstrated that "the rule defined and applied by Judge Cardozo" was "not a single statement of doctrine or policy." Davis, *supra* note 65, at 206. "[M]ore analytically, it is a set of tests which demands satisfaction before liability may be imposed." *Id.* He then identified *nine* separate criteria that have to be worked through to apply this set of tests! *See id.* at 206-07.

[325] 162 N.E. 99 (N.Y. 1928)

also imposed limits upon it" because "Cardozo and his colleagues were no radicals. They appreciated the uncertainties that entrepreneurs, who could always foresee harm, would face if they were liable in damages whenever harm, however remote and indirect, occurred."[326] Leaving some vitality lingering in the privity realm of *Winterbottom* might have appealed to Cardozo in ways that he did not otherwise betray. For the Court of Appeals not to act upon any opportunity to correct retrograde rulings of the Appellate Divisions between *MacPherson*'s announcement in 1916 and Cardozo's departure from Albany for Washington in 1932 is indeed curious. But if such thoughts abided in him, Cardozo kept them close to the vest; and to use a phrase of his that remained unread even by the bar for decades, they "lay hidden lost in the womb of time."[327] Perhaps he had become concerned, as his successor Chief Justice Crane was in 1936, about "carr[ying] the doctrine of *MacPherson* . . . entirely too far" and thus exposing "the manufacturer of every coffee pot or dishpan [to] liab[ility] for the consequences of a broken handle, no matter how far removed the injured person might be from the original purchaser."[328] Cardozo was in Washington by that time, worrying about federal matters; and no

---

[326] William E. Nelson, Palsgraf v. Long Island R.R.: *Its Historical Context*, 34 TOURO L. REV. 281, 290 (2018).

[327] *See* Justice Cardozo's unpublished concurrence in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), reproduced in PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 571-72 (6th ed. 2015); *see* Richard D. Friedman, *Cardozo on the Supreme Court: Meeting High Expectations*, 34 TOURO L. REV. 741, 747 & nn.32-35 (2018); KAUFMAN, *supra* note 35, at 501-02.

[328] Hoenig v. Cent. Stamping Co., 6 N.E.2d 415, 416 (N.Y. 1936) (Crane, C.J., dissenting). This case is discussed *supra* note 89 and accompanying text. The notion is not entirely speculative nor unprecedented. As Professor William Nelson observed:

> Other limitations on *MacPherson* were also consistent with the underlying purposes of the Court of Appeals in *Palsgraf*. [For example,] [a] second limitation—that the rule applied only to claims of negligence and not to suits for breach of warranty, where privity of contract between consumer and manufacturer was still required—similarly reflected Cardozo's concerns in *Moch* and *Ultramares* that the "field of obligation" not "be expanded beyond reasonable limits" and that contracting parties not be exposed to "the involuntary assumption of a series of new relations, inescapably hooked together," since the "hazards of a business conducted on these terms" would be too "extreme."

Nelson, *supra* note 326, at 298 (footnotes omitted).

chance to comment on *MacPherson* in any case that came to Washington during his pre-*Erie* tenure there.[329]

There is, finally, one more player in this saga whose impact must be assessed: Chief Judge Willard Bartlett, who penned a strong—yet rarely today referenced—dissent from Cardozo's famous opinion.[330] A bastion of tradition and a champion of the Court's 19th century jurisprudence, Bartlett made the strongly supported opposing case. Yet his focus was not on why *Cardozo's* opinion was "wrong;" it was on why the *Appellate Division's* opinion was wrong:

> The theory upon which the case was submitted to the jury by the learned judge who presided at the trial was that, although an automobile is not an inherently dangerous vehicle, it may become such if equipped with a weak wheel; and that if the motor car in question, when it was put upon the market was in itself inherently dangerous by reason of its being equipped with a weak

---

[329] The two reported cases from Cardozo's tenure on the U.S. Supreme Court that cite *MacPherson* do so in contexts other than parsing Cardozo's rule. *See* Am. Car & Foundry Co. v. Brassert, 289 U.S. 261 (1933) (Hughes, C.J.) (admiralty law case from Seventh Circuit) (citing *MacPherson* and noting that "[w]hatever liability there may be in that aspect, either to respondent or to others, it is not a liability falling within the policy and purview of the act of Congress limiting the liability of shipowners"); Young v. Masci, 289 U.S. 253, 258-59 (1933) (Brandeis, J.) (citing *MacPherson* and noting that "[a] person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument," and giving as an example of "a person acting outside the state [who] may be held responsible according to the law of the state for injurious consequences within it" liability "for negligent manufacture.").

[330] Judge Cardozo and Chief Justice Bartlett's juxtaposed opinions exemplify a dichotomy that Judge Cardozo wrote about in his 1921 Storrs Lectures at Yale, subsequently published as *The Nature of The Judicial Process*. As First Circuit Judge Kermit Lipez described it during Touro Law School's 2017 Cardozo Symposium, "[r]eflecting on his experience on the New York Court of Appeals, Cardozo wrote that most of the cases that come before his court 'could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain.' Then there are the cases that inspired Cardozo's lectures, where '[t]here are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.'" Kermit V. Lipez, *Justice Cardozo's the Nature of the Judicial Process: A Case Study*, 34 TOURO L. REV. 247, 247 & nn.1-3 (2018) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14, 164 (1921)). Chief Judge Bartlett clearly saw *MacPherson* in the former category, while Judge Cardozo just as clearly saw *MacPherson* in the latter category.

> wheel, the defendant was chargeable with a knowledge of the defect so far as it might be discovered by a reasonable inspection and the application of reasonable tests. This liability, it was further held, was not limited to the original vendee, but extended to a subvendee like the plaintiff, who was not a party to the original contract of sale.
>
> I think that these rulings, which have been approved by the Appellate Division, extend the liability of the vendor of a manufactured article further than any case which has yet received the sanction of this court. It has heretofore been held in this state that the liability of the vendor of a manufactured article for negligence arising out of the existence of defects therein does not extend to strangers injured in consequence of such defects but is confined to the immediate vendee. The exceptions to this general rule which have thus far been recognized in New York are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof; in other words, where the article sold was inherently dangerous. As has already been pointed out, the learned trial judge instructed the jury that an automobile is not an inherently dangerous vehicle.[331]

---

[331] MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055 (N.Y. 1916) (Bartlett, C.J., dissenting). Interestingly, a federal diversity decision from a Western Circuit held great sway with Chief Judge Bartlett:

> The rule upon which, in my judgment, the determination of this case depends, and the recognized exception thereto, were discussed by Circuit Judge Sanborn of the United States Circuit Court of Appeals in the Eighth Circuit, in *Huset v. J.I. Case Threshing Machine Co.* (120 Fed. Rep. 865) in an opinion which reviews all the leading American and English decisions on the subject up to the time when it was rendered (1903). I have already discussed the leading New York cases, but as to the rest I feel that I can add nothing to the learning of that opinion or the cogency of its reasoning. I have examined the cases to which Judge Sanborn refers, but if I were to discuss them at length I should be forced merely to paraphrase his language, as a study of the authorities he cites has led me to the same conclusion; and the repetition of what has already been so well said would contribute nothing to the

In this way, Bartlett's dissent is a prodigious rejoinder to a junior Judge's majority opinion.[332] It damns it by talking over it.

When the Court of Appeals' disposition of the case was announced,[333] Chief Judge Bartlett took the further, extraordinary (at the time) step of actually *reading* his dissent *from the bench*.[334] As commentators a century later observed, dissent-reading from the bench is an act of judicial performance art,[335] designed to send a signal to

---

> advantage of the bench, the bar or the individual litigants whose case is before us.

Id. at 1056 (Bartlett, C.J., dissenting). But Judge Walter Henry Sanborn's decision in *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903), which many courts considered the strongest pro-privity precedent even after *MacPherson*, was abandoned by the same court in a later agribusiness product-injury case, in which the Eighth Circuit embraced *MacPherson* with vigor in an opinion by Judge John B. Sanborn, Jr. *See* E. I. Du Pont De Nemours & Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934). The New York courts apparently did not take note of this.

[332] As the late Chief Judge Judith Kaye perceptively observed:

> What is bold about Cardozo's opinion begins with the timing of it. *MacPherson* was handed down on March 14, 1916, barely two years after Cardozo left the practice of law, while he was still a temporary judge of the Court of Appeals, and over the dissent of the Chief Judge. Some brand-new junior judges might have found the circumstances a bit intimidating, taking respectable refuge on more solid, narrow ground.

Judith S. Kaye, Book Note, *Cardozo: A Law Classic*, 112 HARV. L. REV. 1026, 1034 (1999) (footnote omitted).

[333] *MacPherson*, 111 N.E. at 1056 (Bartlett, Ch. J., dissenting) (where the reporter notes "Hiscock, Chase and Cuddeback, JJ., concur with Cardozo, J., and Hogan, J., concurs in result; Willard Bartlett, Ch. J., reads dissenting opinion; Pound, J., not voting.").

[334] And still an uncommon and noteworthy phenomenon in America's contemporary appellate courts. *See, e.g.*, William D. Blake & Hans J. Hacker, *The Brooding Spirit of the Law: Supreme Court Justices Reading Dissents from the Bench*, JUST. SYS. J., 2010, at 1, 2 (describing as "an extraordinary event when a justice not only writes in dissent, but purposefully draws attention to that dissent by reading it from the bench"). Indeed, in his excellent and thorough article on dissents, First Circuit Judge Kermit Lipez does not even mention the notion of actually reading one's dissent from the bench. *See* Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313 (2005).

[335] Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia,* 56 WAKE FOREST L. REV. 321 (2021); Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 8 (2008). Professor Guinier describes hearing Justice Steven Breyer read a dissent from the bench after Chief Justice Roberts read the majority opinion: "On a nine-person bench where the give and take between judges and lawyers usually involves rapid-fire exchanges, Justice Breyer proceeds to 'hold

bench and bar beyond merely emphasizing the dissenter's disagreement with the majority opinion.[336] It is the equivalent of a judicial call to arms. Thus, Chief Judge Bartlett's act of reading from the bench his *MacPherson* dissent could have been perceived as a call to the Appellate Divisions to limit the impact of the hidden brazenness of Cardozo's *MacPherson* opinion.[337] Willard Bartlett had the *gravitas* to sound an alarm, like that of Hagan Tronje to the vassals in Wagner's *Götterdämmerung*,[338] which would be heeded throughout the bench in New York.[339] To take such a step against the handiwork of his young

---

court' alone for the next twenty-one minutes." *Id.* at 4, 8. "Except for the single moment when someone cleared his throat," Professor Guinier recalled, "the only sound for twenty-one dramatic minutes was Justice Breyer's highly charged, determined voice." *Id.* at 11. The author of the present article, however, interprets "demosprudence" with a different meaning—in the act of reading a dissent from the bench, the judge is engaging in an act of *demonstrative* jurisprudence, a kind understood by Socrates when he engaged in it at his own trial before the jury in Athens over 2000 years ago. *See generally, e.g.*, I.F. STONE, THE TRIAL OF SOCRATES (1989). As a reviewer said of that book, "The philosopher we meet on these pages is an arrogant, bullying elitist who welcomed death and did his best to antagonize the jury that sentenced him,' and comes across '[i]n this iconoclastic portrait of a secular saint . . . as a thoroughly dislikable, albeit superior, man who upheld unpopular truths.'" *See also The Trial of Socrates*, PUBLISHER'S WKLY., https://www.publishersweekly.com/9780316817585 (on file with the Touro Law Review) (last visited Aug. 13, 2025).

[336] *See* Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench*, 93 MINN. L. REV. 1560 (2009).

[337] *See id.* at 1581. As the authors of that article observe of judges who read dissents from the bench,

> Justices will read opinions from the bench when they care a good deal about the issue and when they want to change the policy set by the majority. That is, they use their dissents to signal litigants and other actors (here we test the relationship with [the legislature]) that the decision is a bad one and someone must act to change it. This is consistent with existing work and also adds to the concept that Justices act in calculated ways when rendering decisions.

Id.

[338] *See Götterdämmerung*, ALEX ROSS: THE REST IS NOISE (May 22, 2013), http://web.archive.org/web/20250913142121/https://www.therestisnoise.com/2013/05/wagnerdome-8-g%C3%B6tterd%C3%A4mmerung.html (on file with the Touro Law Review).

[339] *See Willard Bartlett*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/biography/willard-bartlett/ (on file with the Touro Law Review) (last visited Jan. 20, 2026) (reprinted from THE JUDGES OF THE NEW YORK

Siegfried (i.e., Judge Cardozo) was a bit of a *götterdämmerung* in and of itself.[340] Bartlett read this dissent on March 14, 1916—knowing that he must retire from the Court at the end of the year because six months later, on October 14, 1916, he would reach the limit for judicial service under New York's Constitution.[341] Of course, none of the many Appellate Division Justices who were to have *MacPherson* cited to them by attorneys for product-injury plaintiffs over the next forty years would ever formally cite to that dissent, or even allude to that day when Chief Justice Bartlett's voice rang throughout the hand-carved, oak-paneled courtroom of New York's Court of Appeals.[342] Yet, the impact, while quantifiably unknowable, will forever pique our curiosity whenever we pause to examine the role of intermediate appellate courts and, as an example of that role, the mixed results that Cardozo's *MacPherson* opinion achieved in the four Departments of the New York State Appellate Division.

COURT OF APPEALS: A BIOGRAPHICAL HISTORY (Hon. Albert M. Rosenblatt ed., Fordham Univ. Press 2007).

[340] *See* Kaye, *supra* note 332, at 1034.

[341] *See* Lynn G. Goodnough, *Albert Conway—Chief Judge for the Court of Appeals*, 34 ST. JOHN'S L. REV. 10, 11 (1959) (referring to the mandatory retirement age of 70 "by virtue of the [state] constitutional fiat fixing the judicial barrier at 70 years"). The provision is currently found at N.Y. CONST. art VI, § 25(b) (providing that "[e]ach judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy.").

[342] During that last year of his active service, Chief Judge Bartlett had presided over preparations for the relocation of this historic courtroom to what would soon become the Court of Appeals' new home. "The Court of Appeals originally sat in the State Capitol. It moved to its present home at 20 Eagle Street a short distance away in [January] 1917. The magnificent courtroom, built by the renowned architect H. H. Richardson, was brought over and reassembled piece by piece." *Court of Appeals Hall*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/court/nys-court-appeals/ (on file with the Touro Law Review) (last visited Jan. 20, 2026); *see* Cornelia Brooke Gilder, *Capitol Hill: Summit of the City*, *in* ALBANY ARCHITECTURE: A GUIDE TO THE CITY 73-74 (Diana S. Waite ed., 1993); *see* BERGAN, *supra* note 8, at 258-59.