offence unless they are satisfied that on the facts a jury properly directed could not have acquitted of it. Their Lordships cannot put it as high as that. In the first place it is at least doubtful whether the credit of the McKinnells was fairly presented to the jury, and without their evidence there was no proof of any offence at all. In the second place, on the footing that the McKinnells' evidence was acceptable, there has to be considered the misdirection on the facts relating to accident which their Lordships have already referred to. While it is difficult to reconcile the theory of accident with the statements made by the appellant to the McKinnells, it is not impossible. Their Lordships do not think this is a case in which a conviction for the lesser offence can, without a verdict of a jury, be imposed on the appellant.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be allowed, the conviction set aside and the sentence quashed.

Solicitors: *Norton, Rose, Botterell & Roche; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

HEDLEY BYRNE & CO. LTD. . . . APPELLANTS;
AND
HELLER & PARTNERS LTD. . . . RESPONDENTS.

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Feb. 25, 26, 27, 28;
Mar. 4, 5, 6, 7;
May 28.

Negligence — Duty of care to whom? — Careless misrepresentation — Bankers—References regarding company given by bankers to other bankers at customer's request—Communicated to customers inquiring about company's credit-worthiness—Express disclaimer of responsibility—Whether a special relationship creating duty of care—Whether action against bankers maintainable.

Banking—Reference by bankers—Careless misrepresentation—References not justified—Plaintiffs' financial loss—Whether a special relationship creating a duty of care — Whether action against bankers maintainable.

The appellants were advertising agents, who had placed substantial forward advertising orders for a company on terms by which they, the appellants, were personally liable for the cost of the

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* *Present*: LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD DEVLIN and LORD PEARCE.

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orders. They asked their bankers to inquire into the company's financial stability and their bankers made inquiries of the respondents, who were the company's bankers. The respondents gave favourable references but stipulated that these were "without "responsibility." In reliance on these references the appellants placed orders which resulted in a loss of £17,000. They brought an action against the respondents for damages for negligence:—

Held, that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment (post, pp. 486, 502, 514). However, since here there was an express disclaimer of responsibility, no such duty was, in any event, implied.

Nocton v. *Lord Ashburton* [1914] A.C. 932; 30 T.L.R. 602, H.L. applied.

Candler v. *Crane, Christmas & Co.* [1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426, C.A., overruled. *Le Lievre* v. *Gould* [1893] 1 Q.B. 491; 9 T.L.R. 243, C.A. explained and not followed (post, pp. 488, 502, 519, 532, 535).

Per Lord Morris of Borth-y-Gest and Lord Hodson. *Semble*, if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness, he does not accept, and there is not expected of him, any higher duty than that of giving an honest answer (post, pp. 504, 513).

Per Lord Devlin. The duty of care arises where the responsibility is voluntarily accepted or undertaken either generally, where a general relationship is created, or specifically in relation to a particular transaction (post, p. 529).

Per Lord Pearce. To import such a duty the representation must normally concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer (post, p. 539).

Decision of the Court of Appeal [1962] 1 Q.B. 396; [1961] 3 W.L.R. 1225; [1961] 3 All E.R. 891, C.A. affirmed on different grounds.

APPEAL from the Court of Appeal (Ormerod, Pearson and Harman L.JJ.).

This was an appeal (by leave of the Court of Appeal) by the appellants, Hedley Byrne & Co. Ltd., who were the plaintiffs in the action, from an order of the Court of Appeal dated October 18, 1961, affirming the judgment of McNair J., dated December 20, 1960, in favour of the respondents, Heller & Partners Ltd., the defendants in the action, whereby it was held that the action failed on a point of law, but that otherwise the damages recoverable by the appellants would have been £15,454 3s. 6d. with

interest at the rate of 4 per cent. per annum from January 1, 1959.

The appellants were a firm of advertising agents. The respondents were merchant bankers. Towards the end of 1957 the appellants on behalf of a customer, Easipower Ltd. placed some small orders for advertising. Later proposals were made to them for an advertising programme involving the expenditure of £100,000 and in November, 1957, they received indirectly from Martin's Bank Ltd., Easipower's then bankers, a reference reporting Easipower to be "a respectably constituted company "whose trading connection is expanding speedily. We consider "the company to be quite good for its engagements." They placed on behalf of Easipower on credit terms substantial orders for advertising time on television programmes and for advertising space in certain newspapers on terms that they themselves became personally liable to the television and newspaper companies.

The appellants, becoming doubtful of the financial position of Easipower, wanted a bankers' report concerning the company which then had an account with the respondents. They themselves banked at the Piccadilly branch of the National Provincial Bank Ltd. which they asked to obtain a report. The Piccadilly branch communicated with its City office, a representative of which telephoned the respondents on August 18, 1958, and it was common ground that a contemporaneous note of the ensuing conversation was accurate: "Heller & Partners Ltd. Minute of "telephone conversation. Call from National Provincial Bank "Ltd., 15, Bishopsgate, E.C.2. 18.8.58. Person called: "L. Heller, re Easipower Ltd. They wanted to know in confi- "dence and without responsibility on our part, the respectability "and standing of Easipower Ltd., and whether they would be "good for an advertising contract for £8,000 to £9,000. I "replied, the company recently opened an account with us. "Believed to be respectably constituted and considered good for "its normal business engagements. The company is a sub- "sidiary of Pera Industries Ltd., which is in liquidation, but we "understand that the managing director, Mr. Williams, is "endeavouring to buy the shares of Easipower Ltd. from the "liquidator. We believe that the company would not undertake "any commitments they were unable to fulfil." In due course this answer was communicated orally by the Piccadilly branch of National Provincial to the appellants. On August 21, 1958,

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a letter of confirmation was sent to them by that branch. The letter had the headings "confidential" and "for your private "use and without responsibility on the part of this bank or the "manager." In the letter the oral answer which the respondents had given to the City office was passed on with the prefatory words "In reply to your telephoned inquiry of August 18, "bankers say . . ." The information had been given by the respondents gratuitously.

On November 4, 1958, a letter was sent to the Piccadilly branch of National Provincial on behalf of the appellants saying: "I have been requested by the directors to again ask you to "check the financial structure and status of Easipower Ltd." After some particular references, the letter concluded: "I "would be appreciative if you could make your check as exhaus- "tive as you reasonably can." On November 7, 1958, the City office of National Provincial wrote the respondents a letter headed "private and confidential" in the following terms: "Dear Sir, "We shall be obliged by your opinion in confidence as to the "respectability and standing of Easipower Ltd., 27 Albemarle "Street, London, W.1, and by stating whether you consider "them trustworthy, in the way of business, to the extent of "£100,000 per annum advertising contract. Yours faithfully ". . ." On November 11, 1958, the respondents replied in a letter headed:

"CONFIDENTIAL

"For your private use and without responsibility on the part "of this bank or its officials."

The letter continued:

"Dear Sir, In reply to your inquiring letter of 7th instant "we beg to advise:

"Re E . . . . . Ltd.

"Respectably constituted company, considered good for its "ordinary business engagements. Your figures are larger than "we are accustomed to see.

"Yours faithfully,

"Per pro. Heller & Partners Ltd."

On November 14, 1958, the Piccadilly branch of National Provincial wrote to the appellants, passing on what the respondents had stated in this letter, heading their own letter "Confidential. For your private use and without responsibility "on the part of this bank or the manager" and prefacing it

with the words: " In reply to your inquiry letter of November 4, " bankers say . . ."

The appellants relied on these statements and as a result they lost sums, calculated as £17,661 18s. 6d. in their statement of claim, when Easipower went into liquidation. In this action they sought to recover this loss from the respondents as damages on the ground that their replies were given negligently and in breach of the respondents' duty to exercise care in giving them. An allegation of fraud was originally made but was abandoned. McNair J. held that the respondents were negligent but that they owed no duty of care to the appellants. The Court of Appeal likewise held that there was no duty of care and it was therefore unnecessary to consider whether the finding of negligence was correct.

Gerald Gardiner Q.C., *D. G. A. Lowe* and *B. Anns* for the appellants. It is submitted: (1) *Donoghue* v. *Stevenson* [1] is part of the law of England in its statement of the duty to act with care. It is authority for holding that a false statement made carelessly and acted upon by the person to whom it is made to his detriment is actionable, though no contractual relationship may exist between them. In *Heaven* v. *Pender* [2] the majority of the court were wrong and the minority view was right. (2) Where a man holds himself out as exercising special skill or where he exercises a particular profession, he is under a duty to exercise skill and care. A surgeon or a doctor or a solicitor or a surveyor owes a duty to act with reasonable skill and care, whether or not he is acting gratuitously. (3) These particular defendants in the particular and highly peculiar circumstances of this case did owe a duty of care to these particular plaintiffs.

The old cases on professional services are relevant: *Shiells* v. *Blackburne* [3]; *Wilkinson* v. *Coverdale* [4]; *Gladwell* v. *Steggall* [5] and *Donaldson* v. *Haldane*.[6] *George* v. *Skivington* [7] was followed in *Cann* v. *Willson*,[8] a case rightly decided and wrongly overruled in *Le Lievre* v. *Gould*,[9] which is a troublesome case for the appellants, because it was rightly decided, but on the wrong

[1] [1932] A.C. 562; 48 T.L.R. 494, H.L.
[2] (1883) 11 Q.B.D. 503, C.A.
[3] (1789) 1 H.Bl. 158.
[4] (1793) 1 Esp. 75.
[5] (1839) 5 Bing.N.C. 733.
[6] (1840) 7 Cl. & F. 762.
[7] (1869) L.R. 5 Ex. 1.
[8] (1888) 39 Ch.D. 39; 4 T.L.R. 588.
[9] [1893] 1 Q.B. 491; 9 T.L.R. 243, C.A.

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basis. *Derry* v. *Peek* [10] did not establish that innocent but negligent misrepresentation cannot give rise to a cause of action. *Nocton* v. *Lord Ashburton*,[11] which is relied on, indicates that a duty of care can be inferred in the present circumstances. Estoppel is not put forward.

Donoghue v. *Stevenson* [12] is in the main stream of judicial decision. Already *Macpherson* v. *Buick Motor Co.*[13] had been decided in the same way in the United States. The distinction between a negligent act and a negligent word in England is not clear. It would be strange if a person who handled his pen so carelessly as to put out X's eye were liable to pay damages, but not if he handled it so carelessly in writing, that X was financially ruined. The great advantage of the common law is the readiness of the judges to adapt the law to changing conditions.

As to the application of *Donoghue* v. *Stevenson*,[14] see *Grant* v. *Australian Knitting Mills Ltd.*[15] and *Barnes* v. *Irwell Valley Water Board.*[16] *Old Gate Estates Ltd.* v. *Toplis & Harding & Russell* [17] was wrongly decided. See also *Sharp* v. *Avery and Kenwood* [18]; *Watson* v. *Buckley, Owen, Garrett & Co. Ltd.*[19]; *Haseldine* v. *C. A. Daw & Son Ltd.* [20]; *Bourhill* v. *Young* [21]; *Woods* v. *Duncan* [22]; *Morrison Steamship Co. Ltd.* v. *Greystoke Castle (Cargo Owners)* [23] and *Denny* v. *Supplies & Transport Co. Ltd.*[24] *Candler* v. *Crane, Christmas & Co.*[25] was wrongly decided by the majority and the dissenting judgment of Denning L.J. was correct. On the law as there laid down compare the American Restatement of the Law of Torts, Vol. III, pp. 122–123, para. 552, comment (a); *Glanzer* v. *Shepherd* [26]; *International Products Co.* v. *Erie Railroad Co.*[27]; *Mulroy* v. *Wright* [28];

[10] (1889) 14 App.Cas. 337; 5 T.L.R. 625, H.L.
[11] [1914] A.C. 932; 30 T.L.R. 602, H.L.
[12] [1932] A.C. 562.
[13] (1916) 217 N.Y. 382.
[14] [1932] A.C. 562.
[15] [1936] A.C. 85, 102; 52 T.L.R. 38, P.C.
[16] [1939] 1 K.B. 21; 54 T.L.R. 815; [1938] 2 All E.R. 650, C.A.
[17] (1939) 161 L.T. 227, 229; [1939] 3 All E.R. 209.
[18] [1938] 4 All E.R. 85, C.A.
[19] [1940] 1 All E.R. 174.
[20] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156, C.A.
[21] [1943] A.C. 92, 101; [1942] 2 All E.R. 369, H.L.
[22] [1946] A.C. 401, 421, 438, 443; 62 T.L.R. 283; [1946] 1 All E.R. 420, H.L.
[23] [1947] A.C. 265, 270, 279; 63 T.L.R. 11; [1946] 2 All E.R. 696, H.L.
[24] [1950] 2 K.B. 374; 66 (1) T.L.R. 1168, C.A.
[25] [1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426, C.A.
[26] (1922) 233 N.Y. 236.
[27] (1927) 244 N.Y. 331.
[28] (1931) 240 N.W. 116.

Doyle v. *Chatham & Phoenix National Bank*[29]; *Ultramares Corporation* v. *Touche*[30] and *Edwards* v. *Lamb*.[31] The result reached in a large number of the American cases shows that, even though there is no contract, there may be special circumstances giving rise to a fiduciary relationship. In *Candler's* case[32] the accountants were persons who had assumed a special skill and were in a position to know the facts required by the investor, who would act on the information given and would suffer damage if it was not accurate. On those facts the defendants should have been held liable and in the present case the same principles should apply to bankers in a state of facts which produces the same situation. It makes no difference whether or not the person giving the information is interested in the result.

Reliance is placed on *Swift* v. *Jewsbury*,[33] in which the manager of a bank was held liable for knowingly making a false statement of this kind. See also *Hosegood* v. *Bull*[34] and *Hirst* v. *West Riding Union Banking Co. Ltd.*[35] It is conceded that, as was held in *Parsons* v. *Barclay & Co. Ltd.*,[36] the bankers were under no duty to make special inquiries before giving the references. *Robinson* v. *National Bank of Scotland Ltd.*,[37] should not be followed in modern times, and, in any event, the facts were different from those of the present case, because in that case the pursuer did not rely on the report given as the report in the present case was relied on. Although up to the time of the decision of that case it may have been reasonable to confine the obligation arising out of the giving of a banker's reference to giving an honest answer, modern business practice imposes the further obligation that there must be no negligence. In that case Lord Haldane did not exclude the possibility that in special circumstances a duty might arise.

Reliance is also placed on *Banbury* v. *Bank of Montreal*[38]; *Evans* v. *Barclays Bank*[39]; *Batts Combe Quarry Co.* v. *Barclays Bank Ltd.*[40]; *Woods* v. *Martins Bank Ltd.*[41]; *Plowright* v.

[29] (1930) 253 N.Y. 369.
[30] (1931) 255 N.Y. 170.
[31] (1899) 69 N.H. 599.
[32] [1951] 2 K.B. 164.
[33] (1874) L.R. 9 Q.B. 301.
[34] (1876) 36 L.T. 617.
[35] [1901] 2 K.B. 560; 17 T.L.R. 629, C.A.
[36] (1910) 103 L.T. 196; 26 T.L.R. 628, C.A.
[37] 1916 S.C.(H.L.) 154.
[38] [1918] A.C. 628; 34 T.L.R. 518, H.L.
[39] [1924] W.N. 97.
[40] (1931) 48 T.L.R. 4.
[41] [1959] 1 Q.B. 55; [1958] 1 W.L.R. 1018; [1958] 3 All E.R. 166.

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Lambert [42] and *Clayton* v. *Woodman & Son (Builders) Ltd.*[43] See also Halsbury's Laws of England, 3rd ed., Vol. II, p. 241, para. 455; Emanuel on Banking, 3rd ed., p. 19, and Paget on Banking, 6th ed., pp. 139–143. As to the application of the principle stare decisis, see *Caledonian Railway Co.* v. *Walker's Trustees* [44]; *Quinn* v. *Leatham* [45] and *Midland Silicones Ltd.* v. *Scruttons Ltd.*[46]

In the present case if English law did not provide a remedy, it would be an unfortunate gap. It would be a discredit to English law if, however fraudulent or negligent a bank might be in giving such information, there was no remedy against it. If there is no such duty as the appellants submit, it could be said successfully that the information given was either not given in writing or not under seal. But on the correct application of *Donoghue* v. *Stevenson* [47] there should be judgment for the appellants. It should apply to words as well as deeds. Behind it are the principles which have been applied to distributors of goods, to architects in relation to workmen on a building, to advice given by bankers and to motor-cyclists playing "follow "my leader." It was evident that if the bank in the present case did not exercise due care it would be likely to cause loss to the person for whom the report was made and who could do nothing to avert the damage. The bank was in a special position to know the facts. The correct application of the principle in *Donoghue* v. *Stevenson*,[47] which is not limited to damage to person or property, imposes on it a duty to take reasonable care. *Robinson's* case [48] is not to be treated as a decision that no banker can ever owe such a duty to a person to whom he gives a reference; it only held that the bank there in question was not liable in fraud because it had not been fraudulent. Giving references and certificates is part of a banker's professional work in which, like a doctor, he is to exercise reasonable care and skill. Bank customers are now taken to have consented impliedly to their banks giving references with regard to them, unless they specifically forbid it. At the time when *Tournier* v. *National*

[42] (1885) 52 L.T. 646, 652.
[43] [1962] 2 Q.B. 533; [1962] 1 W.L.R. 585; [1962] 2 All E.R. 33, C.A.
[44] (1882) 7 App.Cas. 259, 260, 275, H.L.
[45] [1901] A.C. 495, 498, 506; 17 T.L.R. 749, H.L.
[46] [1962] A.C. 446, 475; [1962] 2 W.L.R. 186; [1962] 1 All E.R. 1, H.L.
[47] [1932] A.C. 562.
[48] 1916 S.C.(H.L.) 154.

Provincial and Union Bank of England [49] was decided, it was the reverse. Bankers' references are important in the business world. They should be integrated in the banking system and there should be a duty of care in regard to them. It has never been suggested that if a person with professional skill undertakes work so that he is bound to exercise reasonable care and skill, there is a rule limiting liability to a particular sort of damage, physical damage and damage to property, for example, in the case of a doctor who misdiagnoses a patient.

In summary, the information as to creditworthiness given was intended by the respondents to be communicated by the National Provincial Bank to a customer, whose identity was immaterial to the respondents, for that customer's use, and in giving that information, knowing that it would be relied on by some third party, such as the appellants, there was a duty imposed on the respondents to use reasonable care. In fact the information the respondents gave was calculated to give a false impression and the person giving it should have realised that. There is no reason in principle or authority why losses flowing from a careless statement of this description should not be recoverable, since there is the necessary relationship of proximity.

John Foster Q.C., *J. M. Shaw* and *L. Blom-Cooper* for the respondents. Bankers in giving references use guarded terms because to speak straight out would be a breach of duty to their customers. Because of that duty it is necessary for them to say "light grey" instead of "black." In giving this information the respondents had no interest of their own. The service was given gratuitously. Further, the evidence shows that they did not know that the National Provincial Bank required this information for the appellants or any other customer and in giving it they did not have in mind any definite person or class of persons. They knew nothing of the appellants and never intended the information to be communicated to them. The reference was marked "confidential" and given on the express understanding that no responsibility was incurred. So far as the respondents were concerned, the National Provincial Bank might have been wanting to know the financial standing of a would-be customer. At most it might have been inferred that the National Provincial Bank required the information as background for advising one of their customers. An undisclosed principal is not

[49] [1924] 1 K.B. 461; 40 T.L.R. 214, C.A.

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a "neighbour" within the rule in *Donoghue* v. *Stevenson*.[50] This case does not come within the ambit of the principle enunciated in that decision. There is no liability here. The information was only an expression of opinion. If there had been a liability, it would not be one which could be taken over by third parties like the appellants, to whom no duty was owed. The attitude of the respondents was: (1) They did not contemplate anyone but the National Provincial Bank being interested. (2) The information was given personally and confidentially to the National Provincial Bank and so, even if the person who gave it contemplated that there might be a customer who was interested, it would be a customer hearing the National Provincial Bank's version of the situation. (3) Even in the case of a written document sent to the National Provincial Bank, there would be ample opportunity for that bank to check its contents. The spoken or written word is not packaged, so that it cannot be examined like the ginger-beer bottle in *Donoghue* v. *Stevenson*,[50] which allowed no chance of intermediate examination and so created a proximity. This information could be examined.

There is no liability for negligent misrepresentation unless through a careless misstatement something is created or a situation arises which is dangerous to life or limb or harmful to property, for example, a negligent misstatement that it is safe to go into a cellar or to use a lift, when it is not, or a statement by a doctor that a person has not got leprosy when he has. In those cases the safety is part of the res gestae. There is no liability for innocent misrepresentation: see *Heilbut, Symons & Co.* v. *Buckleton*.[51]

There being no general duty not to make careless statements, liability can only arise under three categories, which are exhaustive and under which a special duty is created. That duty (a) must be contractual or (b) must be fiduciary or (c) must arise from a relationship of proximity, the breach causing financial loss which flows from physical damage to the person or property of the plaintiff. To extend the law to create a general duty would open the floodgates of litigation.

As to the dichotomy between warranty and representation, see *Hopkins* v. *Tanqueray*[52]; *Angus* v. *Clifford*[53]; *Low* v.

[50] [1932] A.C. 562.
[51] [1913] A.C. 30, 48–49, H.L.
[52] (1854) 15 C.B. 130, 140, 142.
[53] [1891] 2 Ch. 449, 463, 470; 7 T.L.R. 447, C.A.

Bouverie[54]; *Scholes* v. *Brook*[55] and *Thiodon* v. *Tindall*.[56] Where there is a warranty there is a condition, and the person who gives it is liable in damages if he gives an untrue answer. The test in the case of a warranty is whether there is an intention to contract. It is an old-established principle that damages cannot be obtained for innocent misrepresentation unless there is a warranty.

When a person sets up as an investment adviser, that imposes on him a duty to the persons he advises. But no duty is raised simply by asking a person for advice. By asking a policeman the way one does not make him one's traffic adviser. Compare *Woods* v. *Martins Bank Ltd.*[57] See also *De la Bere* v. *Pearson Ltd.*[58] If the appellants' contentions are right the anomalous result might be produced that on the decision of *Akerhielm* v. *De Mare*[59] a negligent defendant might be under a heavier liability than a fraudulent defendant.

Derry v. *Peek*[60] ruled out any liability not arising from a fiduciary relationship and that indicates that the area was not covered by *Nocton's* case.[61] See also *Humphrey* v. *Bowers*.[62] If A is under a duty of care to B in contract, it is clear that no jus quaesitum tertio arises. Nor does a right of action in X arise when A has agreed with B to do something for the benefit of X. Accordingly, it would be strange if a jus quaesitum tertio could be inferred here. See also *Morrison Steamship Co. Ltd.* v. *Greystoke Castle* (*Cargo Owners*).[63] In *Love* v. *Mack*[64] such a special duty as is here suggested would certainly have been invoked if it had existed. See also *Heskell* v. *Continental Express Ltd.*[65]; *Groom* v. *Crocker*[66]; *Everett* v. *Griffiths*[67]; *Herschel* v. *Mrupi*[68] and *Tournier* v. *National Provincial & Union Bank of England*.[69] The present case cannot be distinguished from *Robinson* v. *National Bank of Scotland*[70] in the

[54] [1891] 3 Ch. 82, 100, 105; 7 T.L.R. 582, C.A.
[55] (1891) 63 L.T. 837; 7 T.L.R. 214; 64 L.T. 674, C.A.
[56] (1891) 65 L.T. 343; 7 T.L.R. 581, D.C.
[57] [1959] 1 Q.B. 55, 72; [1958] 1 W.L.R. 1018; [1958] 3 All E.R. 166.
[58] [1908] 1 K.B. 280; 24 T.L.R. 120, C.A.
[59] [1959] A.C. 289; [1959] 3 W.L.R. 108; [1959] 3 All E.R. 485, P.C.
[60] 14 App.Cas. 337, 347, 360
[61] [1914] A.C. 932, 950.
[62] (1929) 45 T.L.R. 297, 298.
[63] [1947] A.C. 265, 280; 63 T.L.R. 11; [1946] 2 All E.R. 696, H.L.
[64] (1905) 93 L.T. 352, C.A.
[65] [1950] 1 All E.R. 1033; 83 Ll.L.Rep. 438.
[66] [1939] 1 K.B. 194, 222, 223; 54 T.L.R. 861; [1938] 2 All E.R. 394, C.A.
[67] [1920] 3 K.B. 163; 36 T.L.R. 491, C.A.
[68] 1954 (3) S.A. 464, 477.
[69] [1924] 1 K.B. 461; 40 T.L.R. 214, C.A.
[70] 1916 S.C.(H.L.) 154.

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House of Lords, where it was laid down as a general rule that a banker giving an inquirer a reference as to the credit of a customer owed no duty to that inquirer except to answer honestly. No relationship fitting that case can now be formulated so as to create a liability.

One transaction, such as the one in the present case, cannot raise a relationship. In the end it is a matter of degree. To give advice is also quite different from expressing an opinion. To say "I advise you to go to Manchester" is very different from saying "In my opinion the road to Manchester is clear." A person asking one's advice about investments is in a very different position from a person asking one's opinion. In the latter case there can be no fiduciary relationship. To give advice does not correspond to the situation when one bank asks another about the credit situation of X. Banks must clearly reserve to themselves the right not to answer questions about their customers. There is no difference in principle between a query by a bank on behalf of one of its customers and a query by that customer. No duty arose here. See by analogy *Australian Steam Shipping Co. Ltd.* v. *Devitt* [71] and *Fish* v. *Kelly*.[72] If one goes into a plumber's shop to ask his advice about one's plumbing system, that mere situation does not create a fiduciary relationship so that, if he gives one bad advice, he is liable in damages. *Thomson* v. *Schmitt* [73] is relied on. From a study of *Nocton's* case,[74] on which the appellants relied, it appears that their case depends on a distinction made a long time ago, brought in by a side-wind and not in accordance with the current of the law. See also *Kennedy* v. *Panama, New Zealand & Australian Royal Mail Co. Ltd.*[75]

The categories in which there exists a special duty to take care are fixed and exhaustive, as was rightly decided in *Candler* v. *Crane, Christmas & Co.*,[76] which is in accordance with the earlier authorities and with established principle.

When one is testing the duty of care there is a difference in kind between a physical act and words. The approach to negligent misstatement must be different. In the case of words, in order to create a liability, there must be an intention that the person to whom they are directed shall act on them in the manner

[71] (1917) 33 T.L.R. 178.
[72] (1864) 17 C.B.N.S. 194.
[73] (1891) 8 T.L.R. 120, C.A.
[74] [1914] A.C. 932, 944, 945–946, 950–951, 952, 956, 963, 967, 968, 972.
[75] (1867) L.R. 2 Q.B. 580, 585–586.
[76] [1951] 2 K.B. 164.

which occasions the loss to him. Otherwise the effect on the whole community would be very grave and confusion would be created in many aspects of the law. One must distinguish in principle between cases where financial loss is caused through physical injury and where it is caused directly. The thing done is different when it is a case of mere words.

As to the American decisions, in *Glanzer* v. *Shepherd* [77] there were special facts on which it was held that there existed a duty. See also *International Products Co.* v. *Erie Railroad Co.*[78] But the *Ultramares* case [79] is helpful. It demonstrates that *Candler's* case [80] would have been decided in the same way in America as in England. It indicates that in such circumstances as the present there is no intention to create a legal relationship and no duty should be inferred. See also the American Restatement of the Law of Torts, Vol. III, p. 71, para. 531.

Reliance is also placed on *Peek* v. *Gurney* [81]; *Halsey* v. *Brotherhood* [82]; *Scholfield* v. *Earl of Londesborough* [83]; *Rutter* v. *Palmer* [84]; *Ashdown* v. *Samuel Williams & Sons Ltd.*[85] and *Sinclair* v. *Cleary.*[86] See also "Misrepresentation as Deceit, "Negligence or Warranty," by Francis H. Bohlen (1929) 42 Harvard Law Review 733; "Liability in Negligence for False "Statements," by W. L. Morrison (1951) 67 Law Quarterly Review 212, 214–215, and "Liability in Tort for Negligent "Statements," by G. W. Paton (1947) 25 Canadian Bar Review 123.

In summary, the finding of McNair J. that there was negligence in giving the reference was incorrect on the evidence. Even if there had been negligence, the respondents would not have been liable, because there was no duty on them to take care. No special relationship was created imposing such a duty on them. They were acting gratuitously and they expressly disclaimed all responsibility. The appellants had ample opportunity to check the information given and the damage they suffered did not flow from the misrepresentation. If the law had

[77] 233 N.Y. 236, 237, 240, 241.
[78] 244 N.Y. 331.
[79] 255 N.Y. 170.
[80] [1951] 2 K.B. 164.
[81] (1873) L.R. 2 Q.B. 580.
[82] (1881) 19 Ch.D. 386, 392.
[83] [1896] A.C. 514, 537; 12 T.L.R. 604, H.L.
[84] [1922] 2 K.B. 87, 93; 38 T.L.R. 555, C.A.
[85] [1957] 1 Q.B. 409, 429; [1956] 3 W.L.R. 1104; [1957] 1 All E.R. 35, C.A.
[86] [1946] Q.S.R. 74.

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been as the appellants submit, many authorities would have been decided otherwise than they were.

J. M. Shaw following. In the statement of claim there was no allegation of any special duty owed by the respondents to the appellants. The relationship between the respondents and Easipower, which was said to constitute a special relationship, was pleaded in the statement of claim as particulars of negligence and this was the only relevance of it. There is nothing to distinguish *Robinson's* case [87] from the present one.

Gerald Gardiner Q.C. in reply. In considering the development of this branch of the law the American cases are significant: *Macpherson* v. *Buick Motor Co.*[88] and *Devlin* v. *Smith.*[89] The *Ultramares* case [90] is the American equivalent of *Le Lievre* v. *Gould.*[91] Though South Africa has a different system of law, its decisions in this field are almost identical with the American: *Perlman* v. *Zoukendyk* [92] and *Herschel* v. *Mrupi.*[93] It is substantially similar to the law expressed in the American Restatement.

In *Candler's* case [94] the accounts were got out for the sole purpose of the plaintiff seeing them. The duty was imposed on the defendants when they started getting out those accounts, knowing that Candler was going to see them for the purpose of deciding whether or not to invest in the business in question. There is no difficulty in developing the law laid down in *Donoghue* v. *Stevenson* [95] to cover cases of this kind. The law imposes a duty to take care on a person acting in such circumstances that, if he stopped to think, he would know that someone else's person or property would be injured by his negligence. This principle should be extended to the field of skilled persons who know that, if they do not use their skill and care, someone will be damaged. When a professional man undertakes to do a professional job and provides information or advice, whether directly or through an agent, knowing that a sum of money depends on it, this imposes on him a duty of care. The fact that in the case of a warranty there must be an intention to contract is true but irrelevant because that is in the realm of contract, while this is in the realm of tort. Section 14 of the

[87] 1916 S.C.(H.L.) 154.
[88] 217 N.Y. 832.
[89] (1882) 89 N.Y. 470.
[90] 255 N.Y. 170.
[91] [1893] 1 Q.B. 491.
[92] 1934 C.P.D. 151.
[93] 1954 (3) S.A. 464.
[94] [1951] 2 K.B. 164.
[95] [1932] A.C. 562.

Sale of Goods Act, 1893, which was a consolidating Act, dealing with the law as it already stood, embodied the conception that if a seller sold something knowing that it was for a particular purpose, he owed a duty to the purchaser. Reliance is placed on *Nocton's* case,[96] treating *Derry* v. *Peek*[97] wholly as an action founded on deceit. See also *Scholes* v. *Brook*[98]; *De la Bere* v. *Pearson Ltd.*[99]; *Thiodon* v. *Tindall*[100]; *Edwards* v. *Mallan*[101]; *Thomson* v. *Schmitt*[102]; *Everett* v. *Griffiths*[103]; *Love* v. *Mack*[104]; *Shiells* v. *Blackburne*[105]; *Doorman* v. *Jenkins*[106]; *Whitehead* v. *Greetan*[107]; *Fish* v. *Kelly*[108] and *Sorrell* v. *Smith.*[109] In *Robinson* v. *National Bank of Scotland*[110] the decision turned on the Lord Ordinary's view of the facts,[111] which was accepted by the House of Lords. *Candler's* case[112] was discussed in an article by Warren A. Seavey (1951) 67 Law Quarterly Review 466.

Here a tort was committed and accordingly it does not matter what was in the mind of the person who gave the information. If what one has done amounts to a tort, it is no answer to an action to say that one acted from the best of motives. If one is in the field of the imposition of a duty, that duty is imposed whether or not the defendant thought that he owed it. In the present case the law imposed on the respondents a duty towards anyone who might be injured by their negligence, as in *Donoghue* v. *Stevenson.*[113] A banker is not obliged to give this sort of information, but, if he does, the law imposes on him a duty to take care. In such a case a defendant has open to him all the usual defences, just as in a case of negligent driving, when an injured passenger is suing, the defendant may rely on the principle volenti non fit injuria or that the passenger has agreed that there is to be no liability for any negligence by the driver. It would be strange if in the present circumstances there was a tort in which one could not recover pecuniary loss suffered. The

[96] [1914] A.C. 932, 947, 969–971, 978.
[97] 14 App.Cas. 337.
[98] 63 L.T. 837, 838.
[99] [1908] 1 K.B. 280.
[100] 65 L.T. 343, 347–348.
[101] [1908] 1 K.B. 1002, 1005; 24 T.L.R. 376, C.A.
[102] 8 T.L.R. 120.
[103] [1920] 3 K.B. 163, 181, 193, 211.
[104] 93 L.T. 352.
[105] 1 H.Bl. 158.
[106] (1834) 2 A. & E. 256.
[107] (1825) 2 Bing. 464.
[108] 17 C.B.N.S. 194.
[109] [1925] A.C. 700, 722, 723–724, H.L.
[110] 1916 S.C.(H.L.) 154.
[111] 1916 S.C. 46, 56.
[112] [1951] 2 K.B. 164.
[113] [1932] A.C. 562.

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result of upholding the appellants' contentions would not be to open the floodgates of litigation.

The primary contentions of the appellants are: (1) The correct application of *Donoghue* v. *Stevenson* [113] results in the conclusion that the appellants are entitled to recover and that *Candler's* case [114] was wrongly decided. (2) The appellants are entitled to recover because due care was not exercised by the respondents. (3) On the evidence a fiduciary relationship was created: see *Plowright* v. *Lambert*.[115] *Woods* v. *Martins Bank Ltd.*[116] was rightly decided.

If liability for negligence is to be limited, it must be limited in clear terms: *Olley* v. *Marlborough Court Ltd.*[117]; *Canada Steamship Lines Ltd.* v. *The King* [118] and *White* v. *John Warwick & Co. Ltd.*[119]

There is no hardship or unfairness in making a bank responsible for exercising care in giving references. If the respondents wanted to make a contract whereby the persons on whose behalf the inquiries were made were to have no right of action for negligence, they should have made this clear. To mark the communication "confidential" and "without responsibility" is a mere "rubber stamp" routine. Such vague language cannot save the bank from liability.

Their Lordships took time for consideration.

May 28. LORD REID. My Lords, this case raises the important question whether and in what circumstances a person can recover damages for loss suffered by reason of his having relied on an innocent but negligent misrepresentation. I cannot do better than adopt the following statement of the case from the judgment of McNair J.: "This case raised certain interesting "questions of law as to the liability of bankers giving references "as to the credit-worthiness of their customers. The plaintiffs "are a firm of advertising agents. The defendants are merchant "bankers. In outline, the plaintiffs' case against the defendants "is that, having placed on behalf of a client, Easipower Ltd., on "credit terms substantial orders for advertising time on television "programmes and for advertising space in certain newspapers on

[113] [1932] A.C. 562.
[114] [1951] 2 K.B. 164.
[115] 52 L.T. 646.
[116] [1959] 1 Q.B. 55.
[117] [1949] 1 K.B. 532, 547, 549; 65 T.L.R. 95; [1949] 1 All E.R. 127, C.A.
[118] [1952] A.C. 192; [1952] 1 T.L.R. 261; [1952] 1 All E.R. 305, P.C.
[119] [1953] 1 W.L.R. 1285, 1289-1291; [1953] 2 All E.R. 1021, C.A.

" terms under which they, the plaintiffs, became personally liable " to the television and newspaper companies, they caused inquiries " to be made through their own bank of the defendants as to the " credit-worthiness of Easipower Ltd. who were customers of the " defendants and were given by the defendants satisfactory refer- " ences. These references turned out not to be justified, and the " plaintiffs claim that in reliance on the references, which they " had no reason to question, they refrained from cancelling the " orders so as to relieve themselves of their current liabilities."

[His Lordship stated the facts and continued:] The appellants now seek to recover this loss from the respondents as damages on the ground that these replies were given negligently and in breach of the respondents' duty to exercise care in giving them. In his judgment McNair J. said: " On the " assumption stated above as to the existence of the duty, I have " no hesitation in holding (1) that Mr. Heller was guilty of negli- " gence in giving such a reference without making plain—as he " did not—that it was intended to be a very guarded reference, " and (2) that properly understood according to its ordinary and " natural meaning the reference was not justified by facts known " to Mr. Heller."

Before your Lordships the respondents were anxious to contest this finding, but your Lordships found it unnecessary to hear argument on this matter, being of opinion that the appeal must fail even if Mr. Heller was negligent. Accordingly I cannot and do not express any opinion on the question whether Mr. Heller was in fact negligent. But I should make it plain that the appellants' complaint is not that Mr. Heller gave his reply without adequate knowledge of the position, nor that he intended to create a false impression, but that what he said was in fact calculated to create a false impression and that he ought to have realised that. And the same applies to the respondents' letter of November 11.

McNair J. gave judgment for the respondents on the ground that they owed no duty of care to the appellants. He said: " I " am accordingly driven to the conclusion by authority binding " upon me that no such action lies in the absence of contract or " fiduciary relationship. On the facts before me there is clearly " no contract, nor can I find a fiduciary relationship. It was " urged on behalf of the plaintiff that the fact that Easipower " Ltd. were heavily indebted to the defendants and that the defen- " dants might benefit from the advertising campaign financed by

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"the plaintiffs, were facts from which a special duty to exercise "care might be inferred. In my judgment, however, these facts, "though clearly relevant on the question of honesty if this had "been in issue, are not sufficient to establish any special relation-"ship involving a duty of care even if it was open to me to extend "the sphere of special relationship beyond that of contract and "fiduciary relationship."

This judgment was affirmed by the Court of Appeal both because they were bound by authority and because they were not satisfied that it would be reasonable to impose upon a banker the obligation suggested.

Before coming to the main question of law, it may be well to dispose of an argument that there was no sufficiently close relationship between these parties to give rise to any duty. It is said that the respondents did not know the precise purpose of the inquiries and did not even know whether the National Provincial Bank wanted the information for its own use or for the use of a customer: they knew nothing of the appellants. I would reject that argument. They knew that the inquiry was in connection with an advertising contract, and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did not know who these contractors were: there is no suggestion of any speciality which could have influenced them in deciding whether to give information or in what form to give it. I shall therefore treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind or degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff.

The appellants' first argument was based on *Donoghue* v. *Stevenson*.[1] That is a very important decision, but I do not think that it has any direct bearing on this case. That decision may encourage us to develop existing lines of authority, but it cannot entitle us to disregard them. Apart altogether from authority, I would think that the law must treat negligent words differently from negligent acts. The law ought so far as possible to reflect the standards of the reasonable man, and that is what *Donoghue* v. *Stevenson*[1] sets out to do. The most obvious difference between negligent words and negligent acts is this. Quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be

[1] [1932] A.C. 562; 48 T.L.R. 494, H.L.

influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection. The appellant agrees that there can be no duty of care on such occasions, and we were referred to American and South African authorities where that is recognised, although their law appears to have gone much further than ours has yet done. But it is at least unusual casually to put into circulation negligently made articles which are dangerous. A man might give a friend a negligently-prepared bottle of home-made wine and his friend's guests might drink it with dire results. But it is by no means clear that those guests would have no action against the negligent manufacturer.

Another obvious difference is that a negligently made article will only cause one accident, and so it is not very difficult to find the necessary degree of proximity or neighbourhood between the negligent manufacturer and the person injured. But words can be broadcast with or without the consent or the foresight of the speaker or writer. It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment. It would be no use to say that a speaker or writer owes a duty but can disclaim responsibility if he wants to. He, like the manufacturer, could make it part of a contract that he is not to be liable for his negligence: but that contract would not protect him in a question with a third party, at least if the third party was unaware of it.

So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement. I therefore turn to the authorities to see what more is required. The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility, and that appears to me not to conflict with any authority which is binding on this House. Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty. The refusal of English law to recognise any jus quaesitum tertii causes some difficulties, but they are not relevant, here. Then there are cases where a person does not merely make a statement but performs a gratuitous service. I do not intend to examine the cases about that, but at least they show that in some cases that person owes a duty of care apart from any contract, and to that extent they pave the way to holding that there

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can be a duty of care in making a statement of fact or opinion which is independent of contract.

Much of the difficulty in this field has been caused by *Derry* v. *Peek*.[2] The action was brought against the directors of a company in respect of false statements in a prospectus. It was an action of deceit based on fraud and nothing else. But it was held that the directors had believed that their statements were true although they had no reasonable grounds for their belief. The Court of Appeal held that this amounted to fraud in law, but naturally enough this House held that there can be no fraud without dishonesty and that credulity is not dishonesty. The question was never really considered whether the facts had imposed on the directors a duty to exercise care. It must be implied that on the facts of that case there was no such duty. But that was immediately remedied by the Directors' Liability Act, 1890, which provided that a director is liable for untrue statements in a prospectus unless he proves that he had reasonable ground to believe and did believe that they were true.

It must now be taken that *Derry* v. *Peek*[2] did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action. It is true Lord Bramwell said[3]: "To found an action for damages "there must be a contract and breach, or fraud." And for the next 20 years it was generally assumed that *Derry* v. *Peek*[4] decided that. But it was shown in this House in *Nocton* v. *Lord Ashburton*[5] that that is much too widely stated. We cannot, therefore, now accept as accurate the numerous statements to that effect in cases between 1889 and 1914, and we must now determine the extent of the exceptions to that rule.

In *Nocton* v. *Lord Ashburton*[5] a solicitor was sued for fraud. Fraud was not proved but he was held liable for negligence. Viscount Haldane L.C. dealt with *Derry* v. *Peek*[6] and pointed out[7] that while the relationship of the parties in that case was not enough, the case did not decide "that where a different sort "of relationship ought to be inferred from the circumstances the "case is to be concluded by asking whether an action for deceit "will lie . . . There are other obligations besides that of honesty "the breach of which may give a right to damages. These "obligations depend on principles which the judges have worked

[2] (1889) 14 App.Cas. 337; 5 T.L.R. 625. H.L.
[3] 14 App.Cas. 337, 347.
[4] Ibid. 337.
[5] [1914] A.C. 932; 30 T.L.R. 602. H.L.
[6] 14 App.Cas. 337.
[7] [1914] A.C. 932, 947.

" out in the fashion that is characteristic of a system where much " of the law has always been judge-made and unwritten." It hardly needed *Donoghue* v. *Stevenson* [8] to show that that process can still operate. Then [9] Lord Haldane quoted a passage from the speech of Lord Herschell in *Derry* v. *Peek* [10] where he excluded from the principle of that case " those cases where a " person within whose special province it lay to know a particular " fact has given an erroneous answer to an inquiry made with " regard to it by a person desirous of ascertaining the fact for the " purpose of determining his course." Then [11] he explained the expression " constructive fraud " and said: " What it really " means in this connection is, not moral fraud in the ordinary " sense, but breach of the sort of obligation which is enforced by " a court which from the beginning regarded itself as a court of " conscience." He went on to refer to " breach of special duty " and said [12]: " If such a duty can be inferred in a particular case " of a person issuing a prospectus, as, for instance, in the case of " directors issuing to the shareholders of the company which they " direct a prospectus inviting the subscription by them of further " capital, I do not find in *Derry* v. *Peek* [13] an authority for the " suggestion that an action for damages for misrepresentation " without an actual intention to deceive may not lie." I find no dissent from these views by the other noble and learned Lords. Lord Shaw also quoted the passage I have quoted from the speech of Lord Herschell, and, dealing with equitable relief, he approved [14] a passage in an argument of Sir Roundell Palmer in *Peek* v. *Gurney* [15] which concluded, " . . . in order that a person " may avail himself of relief founded on it he must show that " there was such a proximate relation between himself and the " person making the representation as to bring them virtually " into the position of parties contracting with each other," an interesting anticipation in 1871 of the test of who is my neighbour.

Lord Haldane gave a further statement of his view in *Robinson* v. *National Bank of Scotland Ltd.*,[16] a case to which I shall return. Having said that in that case there was no duty excepting the duty of common honesty, he went on to say: " In saying " that I wish emphatically to repeat what I said in advising this " House in the case of *Nocton* v. *Lord Ashburton*,[17] that it is a

[8] [1932] A.C. 562.
[9] [1914] A.C. 932, 950.
[10] 14 App.Cas. 337, 360.
[11] [1914] A.C. 932, 954.
[12] Ibid. 955.
[13] 14 App.Cas. 337.
[14] [1914] A.C. 932, 971.
[15] (1871) L.R. 13 Eq. 79, 97.
[16] 1916 S.C.(H.L.) 154, 157.
[17] [1914] A.C. 932.

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"great mistake to suppose that, because the principle in *Derry* v. "*Peek*[18] clearly covers all cases of the class to which I have "referred, therefore the freedom of action of the courts in "recognising special duties arising out of other kinds of relation-"ship which they find established by the evidence is in any way "affected. I think, as I said in *Nocton's* case,[19] that an "exaggerated view was taken by a good many people of the "scope of the decision in *Derry* v. *Peek*.[20] The whole of the "doctrine as to fiduciary relationships, as to the duty of care "arising from implied as well as express contracts, as to the duty "of care arising from other special relationships which the courts "may find to exist in particular cases, still remains, and I should "be very sorry if any word fell from me which should suggest "that the courts are in any way hampered in recognising that the "duty of care may be established when such cases really occur." This passage makes it clear that Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.

A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

[18] 14 App.Cas. 337.
[19] [1914] A.C. 932.
[20] 14 App.Cas. 337.

If that is right, then it must follow that *Candler* v. *Crane, Christmas & Co.*[21] was wrongly decided. There the plaintiff wanted to see the accounts of a company before deciding to invest in it. The defendants were the company's accountants, and they were told by the company to complete the company's accounts as soon as possible because they were to be shown to the plaintiff who was a potential investor in the company. At the company's request the defendants showed the completed accounts to the plaintiff, discussed them with him, and allowed him to take a copy. The accounts had been carelessly prepared and gave a wholly misleading picture. It was obvious to the defendants that the plaintiff was relying on their skill and judgment and on their having exercised that care which by contract they owed to the company, and I think that any reasonable man in the plaintiff's shoes would have relied on that. This seems to me to be a typical case of agreeing to assume a responsibility: they knew why the plaintiff wanted to see the accounts and why their employers, the company, wanted them to be shown to him, and agreed to show them to him without even a suggestion that he should not rely on them.

The majority of the Court of Appeal held that they were bound by *Le Lievre* v. *Gould*[22] and that *Donoghue* v. *Stevenson*[23] had no application. In so holding I think that they were right. The Court of Appeal have bound themselves to follow all rationes decidendi of previous Court of Appeal decisions, and, in face of that rule, it would have been very difficult to say that the ratio in *Le Lievre* v. *Gould*[24] did not cover *Candler's* case.[25] Denning L.J., who dissented, distinguished *Le Lievre* v. *Gould*[26] on its facts, but, as I understand the rule which the Court of Appeal have adopted, that is not sufficient if the ratio applies; and this is not an appropriate occasion to consider whether the Court of Appeal's rule is a good one. So the question which we now have to consider is whether the ratio in *Le Lievre* v. *Gould*[26] can be supported. But before leaving *Candler's* case[27] I must note that Cohen L.J. (as he then was) attached considerable importance to a New York decision, *Ultramares Corporation* v. *Touche*,[28] a decision of Cardozo C.J. But I think that another

[21] [1951] 2 K.B. 164; [1951] 1 T.L.R. 871; [1951] 1 All E.R. 426, C.A.
[22] [1893] 1 Q.B. 491; 9 T.L.R. 243, C.A.
[23] [1932] A.C. 562.
[24] [1893] 1 Q.B. 491.
[25] [1951] 2 K.B. 164.
[26] [1893] 1 Q.B. 491.
[27] [1951] 2 K.B. 164.
[28] (1931) 255 N.Y. 170.

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decision of that great judge, *Glanzer* v. *Shepherd*,[29] is more in point because in the latter case there was a direct relationship between the weigher who gave a certificate and the purchaser of the goods weighed, who the weigher knew was relying on his certificate: there the weigher was held to owe a duty to the purchaser with whom he had no contract. The *Ultramares* case[30] can be regarded as nearer to *Le Lievre* v. *Gould*.[31]

In *Le Lievre* v. *Gould*[31] a surveyor, Gould, gave certificates to a builder who employed him. The plaintiffs were mortgagees of the builder's interest and Gould knew nothing about them or the terms of their mortgage; but the builder, without Gould's authority, chose to show them Gould's report. I have said that I do not intend to decide anything about the degree of proximity necessary to establish a relationship giving rise to a duty of care, but it would seem difficult to find such proximity in this case, and the actual decision in *Le Lievre* v. *Gould*[31] may therefore be correct. But the decision was not put on that ground: if it had been *Cann* v. *Willson*[32] would not have been overruled.

Lord Esher M.R. held that there was no contract between the plaintiffs and the defendant and that this House in *Derry* v. *Peek*[33] had "restated the old law that, in the absence of contract, "an action for negligence cannot be maintained when there is "no fraud."[34] Bowen L.J. gave a similar reason; he said[35]: "Then *Derry* v. *Peek*[36] decided this further point—viz., that in "cases like the present (of which *Derry* v. *Peek*[36] was itself an "instance) there is no duty enforceable in law to be careful"; and he added[37] that the law of England "does not consider that "what a man writes on paper is like a gun or other dangerous "instrument, and, unless he intended to deceive, the law does "not, in the absence of contract, hold him responsible for drawing "his certificate carelessly." So both he and Lord Esher held that *Cann* v. *Willson*[38] was wrong in deciding that there was a duty to take care. We now know on the authority of *Donoghue* v. *Stevenson*[39] that Bowen L.J. was wrong in limiting duty of care to guns or other dangerous instruments, and I think that, for reasons which I have already given, he was also wrong in limiting the duty of care with regard to statements to cases where

[29] (1922) 233 N.Y. 236.
[30] 255 N.Y. 170.
[31] [1893] 1 Q.B. 491.
[32] (1888) 39 Ch.D. 39; 4 T.L.R. 588.
[33] 14 App.Cas. 337.
[34] [1893] 1 Q.B. 491, 498.
[35] Ibid. 501.
[36] 14 App.Cas. 337.
[37] [1893] 1 Q.B. 491, 502.
[38] 39 Ch.D. 39.
[39] [1932] A.C. 562.

there is a contract. On both points Bowen L.J. was expressing what was then generally believed to be the law, but later statements in this House have gone far to remove those limitations. I would therefore hold that the ratio in *Le Lievre* v. *Gould* [40] was wrong and that *Cann* v. *Willson* [41] ought not to have been overruled.

Now I must try to apply these principles to the present case. What the appellants complain of is not negligence in the ordinary sense of carelessness, but rather misjudgment, in that Mr. Heller, while honestly seeking to give a fair assessment, in fact made a statement which gave a false and misleading impression of his customer's credit. It appears that bankers now commonly give references with regard to their customers as part of their business. I do not know how far their customers generally permit them to disclose their affairs, but, even with permission, it cannot always be easy for a banker to reconcile his duty to his customer with his desire to give a fairly balanced reply to an inquiry. And inquirers can hardly expect a full and objective statement of opinion or accurate factual information such as skilled men would be expected to give in reply to other kinds of inquiry. So it seems to me to be unusually difficult to determine just what duty beyond a duty to be honest a banker would be held to have undertaken if he gave a reply without an adequate disclaimer of responsibility or other warning. It is in light of such considerations that I approach an examination of the case of *Robinson* v. *National Bank of Scotland Ltd.*[42]

It is not easy to extract the facts from the report of the case in the Court of Session.[43] Several of the witnesses were held to be unreliable and the principal issue in the case, fraud, is not relevant for present purposes. But the position appears to have been this. Harley and two brothers Inglis wished to raise money. They approached an insurance company on the false basis that Harley was to be the borrower and the Inglis brothers were to be guarantors. To satisfy the company as to the financial standing of the Inglis brothers Harley got his London bank to write to M'Arthur, a branch agent of the National Bank of Scotland, and M'Arthur on July 28, 1910, sent a reply which was ultimately held to be culpably careless but not fraudulent. Robinson, the pursuer in the action, said that he had been approached by Harley

[40] [1893] 1 Q.B. 491.
[41] 39 Ch.D. 39.
[42] 1916 S.C.(H.L.) 154.
[43] 1916 S.C. 46.

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to become a guarantor before the inquiry was made by Harley, but he was disbelieved by the Lord Ordinary who held that he was not brought into the matter before September. This was accepted by the majority in the Inner House and there is no indication that any of their Lordships in this House questioned the finding that the letter of July 28 was not obtained on behalf of Robinson. Harley and the brothers Inglis did not proceed with their scheme in July but they resumed negotiations in September. The company wanted an additional guarantor and Harley approached Robinson. A further reference was asked and obtained from M'Arthur on October 1 about the Brothers Inglis, but no point was made of this. The whole case turned on M'Arthur's letter of July 28. After further negotiation the company made a loan to Harley with the brothers Inglis and Robinson as guarantors. Harley and the brothers Inglis all became bankrupt and Robinson had to pay the company under his guarantee.

Robinson sued the National Bank and M'Arthur. He alleged that M'Arthur's letter was fraudulent and that he had been induced by it to guarantee the loan. He also alleged that M'Arthur had a duty to disclose certain facts about the brothers Inglis which were known to him, but this alternative case played a very minor part in the litigation. Long opinions were given in the Court of Session on the question of fraud but the alternative case of a duty to disclose was dealt with summarily. The Lord Justice-Clerk said[44]: "It appears to me that there was no such "duty of disclosure imposed upon Mr. M'Arthur towards the "pursuer as would justify us in applying the principle on which "*Nocton's* case[45] was decided." Lord Dundas referred[46] to cases of liability of a solicitor to his client for erroneous advice and of similar liability arising from a fiduciary relationship and said: "Such decisions seem to me to have no bearing on, or "application to, the facts of the present case." He also drew attention to the last sentence of the letter of July 28 which he said would become important if fraud were out of the case. That sentence is: "The above information is to be considered strictly "confidential, and is given on the express understanding that we "incur no responsibility whatever in furnishing it." Lord Salvesen, who dissented, did not deal with the point: and

[44] 1916 S.C. 46, 63.
[45] [1914] A.C. 932.
[46] 1916 S.C. 46, 67.

Lord Guthrie merely said [47] that here there was no fiduciary relationship.

In this House an unusual course was taken during the argument [48]: " . . . after counsel for the respondents (Mr. Blackburn " K.C.) had been heard for a short time, Earl Loreburn informed " him that their Lordships, as at present advised, thought that " there was no special duty on M'Arthur toward the pursuer; " that the respondents were not liable unless M'Arthur's repre- " sentations were dishonest; and that their Lordships had not " been satisfied as yet that the representations were dishonest " . . . that under the circumstances the House was prepared to " dismiss the appeal; but that they considered the pursuer " had been badly treated, though he had not any cause of action " at law, and that, therefore, their Lordships were disposed to " direct that there should be no costs of the action on either side. " Earl Loreburn said that Mr. Blackburn might prefer to argue " the case further and endeavour to alter these views, but of " course he would run the risk of altering their Lordships' views " as to the legal responsibility as well as upon the subject of " costs." Mr. Blackburn then—wisely no doubt—said no more, and judgment was given for the bank but with no costs here or below.

That case is very nearly indistinguishable from the present case. Lord Loreburn regarded the fact that M'Arthur knew that his letter might be used to influence others besides the immediate inquirer as entitling Robinson to found on it if fraud had been proved. But it is not clear to me that he intended to decide that there would have been sufficient proximity between Robinson and M'Arthur to enable him to maintain that there was a special relationship involving a duty of care if the other facts had been sufficient to create such a relationship. I would not regard this as a binding decision on that question.

With regard to the bank's duty Lord Haldane said [49]: " There " is only one other point about which I wish to say anything, and " that is the question which was argued by the appellant, as to " there being a special duty of care under the circumstances " here. I think the case of *Derry* v. *Peek* [50] in this House has " finally settled in Scotland, as well as in England and Ireland, " the conclusion that in a case like this no duty to be careful is " established. There is the general duty of common honesty, and

[47] 1916 S.C. 46, 85.
[48] 1916 S.C.(H.L.) 154–5.
[49] Ibid. 157.
[50] 14 App.Cas. 337.

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" that duty, of course, applies to the circumstances of this case " as it applies to all other circumstances. But when a mere " inquiry is made by one banker of another, who stands in no " special relation to him, then, in the absence of special " circumstances from which a contract to be careful can be " inferred, I think there is no duty excepting the duty of common " honesty to which I have referred."

I think that by " a contract to be careful " Lord Haldane must have meant an agreement or undertaking to be careful. This was a Scots case and by Scots law there can be a contract without consideration: Lord Haldane cannot have meant that similar cases in Scotland and England would be decided differently on the matter of special relationship for that reason. I am, I think, entitled to note that this was an extempore judgment. So Lord Haldane was contrasting a " mere inquiry " with a case where there are special circumstances from which an undertaking to be careful can be inferred. In *Robinson's* case [51] any such undertaking was excluded by the sentence in M'Arthur's letter which I have quoted and in which he said that the information was given " on the express understanding that we incur no responsibility " whatever in furnishing it."

It appears to me that the only possible distinction in the present case is that here there was no adequate disclaimer of responsibility. But here the appellants' bank, who were their agents in making the inquiry, began by saying that " they wanted " to know in confidence and without responsibility on our part," that is, on the part of the respondents. So I cannot see how the appellants can now be entitled to disregard that and maintain that the respondents did incur a responsibility to them.

The appellants founded on a number of cases in contract where very clear words were required to exclude the duty of care which would otherwise have flowed from the contract. To that argument there are, I think, two answers. In the case of a contract it is necessary to exclude liability for negligence, but in this case the question is whether an undertaking to assume a duty to take care can be inferred: and that is a very different matter. And, secondly, even in cases of contract general words may be sufficient if there was no other kind of liability to be excluded except liability for negligence: the general rule is that a party is not exempted from liability for negligence " unless " adequate words are used "—*per* Scrutton L.J. in *Rutter* v.

[51] 1916 S.C.(H.L.) 154.

Palmer.[52] It being admitted that there was here a duty to give an honest reply, I do not see what further liability there could be to exclude except liability for negligence: there being no contract there was no question of warranty.

I am therefore of opinion that it is clear that the respondents never undertook any duty to exercise care in giving their replies. The appellants cannot succeed unless there was such a duty and therefore in my judgment this appeal must be dismissed.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the important question of law which has concerned your Lordships in this appeal is whether, in the circumstances of the case, there was a duty of care owed by the respondents, whom I will call " the bank," to the appellants, whom I will call " Hedleys." In order to recover the damages which they claim Hedleys must establish that the bank owed them a duty, that the bank failed to discharge such duty, and that as a consequence Hedleys suffered loss.

An allegation of fraud was originally made but was abandoned. The learned judge held that the bank had been negligent but that they owed no duty to Hedleys to exercise care. The Court of Appeal agreed with the learned judge that no such duty was owed and it was therefore not necessary for them to consider whether the finding of negligence ought or ought not to be upheld. In your Lordships' House the legal issues were debated and again it did not become necessary to consider whether the finding of negligence ought or ought not to be upheld. It is but fair to the bank to state that they firmly contend that they were not in any way negligent and that they were prepared to make submissions by way of challenge of the conclusions of the learned judge.

[His Lordship stated the facts and continued:] It is, I think, a reasonable and proper inference that the bank must have known that the National Provincial were making their inquiry because some customer of theirs was or might be entering into some advertising contract in respect of which Easipower Ltd. might become under a liability to such customer to the extent of the figures mentioned. The inquiries were from one bank to another. The name of the customer (Hedleys) was not mentioned by the inquiring bank (National Provincial) to the answering bank (the bank): nor did the inquiring bank (National Provincial) give to the customer (Hedleys) the name of the answering bank (the bank). These circumstances do not seem to me to be material. The bank must have known that the inquiry was being made by

[52] [1922] 2 K.B. 87, 92; 38 T.L.R. 555, C.A.

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someone who was contemplating doing business with Easipower Ltd. and that their answer or the substance of it would in fact be passed on to such person. The conditions subject to which the bank gave their answers are important but the fact that the person to whom the answers would in all probability be passed on was unnamed and unknown to the bank is not important for the purposes of a consideration of the legal issue which now arises. It is inherently unlikely that the bank would have entertained a direct application from Hedleys asking for a report or would have answered an inquiry made by Hedleys themselves: even if they had, they would certainly have stipulated that their answer was without responsibility. The present appeal does not raise any question as to the circumstances under which a banker is entitled (apart from direct authorisation) to answer an inquiry. I leave that question as it was left by Atkin L.J. in *Tournier* v *National Provincial & Union Bank of England*[53] when he said: "I do not desire to express any final opinion on the practice of "bankers to give one another information as to the affairs of their "respective customers, except to say it appears to me that if it is "justified it must be upon the basis of an implied consent of the "customer."

The legal issue which arises is, therefore, whether the bank would have been under a liability to Hedleys if they had failed to exercise care. This involves the questions whether the circumstances were such that the bank owed a duty of care to Hedleys, or would have owed such a duty but for the words "without "responsibility," or whether they owed such a duty but were given a defence by the words "without responsibility" which would protect them if they had failed to exercise due care.

My Lords, it seems to me that if A assumes a responsibility to B to tender him deliberate advice, there could be a liability if the advice is negligently given. I say "could be" because the ordinary courtesies and exchanges of life would become impossible if it were sought to attach legal obligation to every kindly and friendly act. But the principle of the matter would not appear to be in doubt. If A employs B (who might, for example, be a professional man such as an accountant or a solicitor or a doctor) for reward to give advice and if the advice is negligently given there could be a liability in B to pay damages. The fact that the advice is given in words would not, in my view, prevent liability from arising. Quite apart, however, from employment or contract

[53] [1924] 1 K.B. 461, 486; 40 T.L.R. 214, C.A.

there may be circumstances in which a duty to exercise care will arise if a service is voluntarily undertaken. A medical man may unexpectedly come across an unconscious man, who is a complete stranger to him, and who is in urgent need of skilled attention: if the medical man, following the fine traditions of his profession, proceeds to treat the unconscious man he must exercise reasonable skill and care in doing so. In his speech in *Banbury* v. *Bank of Montreal*[54] Lord Atkinson said: "It is well "established that if a doctor proceeded to treat a patient "gratuitously, even in a case where the patient was insensible "at the time and incapable of employing him, the doctor would "be bound to exercise all the professional skill and knowledge he "possessed, or professed to possess, and would be guilty of gross "negligence if he omitted to do so." To a similar effect were the words of Lord Loughborough in the much earlier case of *Shiells* v. *Blackburne*[55] when he said: ". . . if a man gratuitously "undertakes to do a thing to the best of his skill, where his "situation or profession is such as to imply skill, an omission of "that skill is imputable to him as gross negligence." Compare also *Wilkinson* v. *Coverdale*.[56] I can see no difference of principle in the case of a banker. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created.

In the absence of any direct dealings between one person and another, there are many and varied situations in which a duty is owed by one person to another. A road user owes a duty of care towards other road users. They are his "neighbours." A duty was owed by the dock owner in *Heaven* v. *Pender*.[57] Under a contract with a shipowner he had put up a staging outside a ship in his dock. The plaintiff used the staging because he was employed by a ship painter who had contracted with the shipowner to paint the outside of the ship. The presence of the

[54] [1918] A.C. 626, 689; 34 T.L.R. 518, H.L.(E.).
[55] (1789) 1 H.Bl. 158.
[56] (1793) 1 Esp. 75.
[57] (1883) 11 Q.B.D. 503, C.A.

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plaintiff was for business in which the dock owner was interested and the plaintiff was to be considered as having been invited by the dock owner to use the staging. The dock owner was therefore under an obligation to take reasonable care that at the time when the staging was provided by him for immediate use it was in a fit state to be used. For an injury which the plaintiff suffered because the staging had been carelessly put up he was entitled to succeed in a claim against the defendant. The chemist in *George* v. *Skivington* [58] sold the bottle of hair wash to the husband knowing that it was to be used by the wife. It was held on demurrer that the chemist owed a duty towards the wife to use ordinary care in compounding the hair wash. In *Donoghue* v. *Stevenson* [59] it was held that the manufacturer of an article of food, medicine, or the like, is under a duty to the ultimate consumer to take reasonable care that the article is free from defect likely to cause injury to health.

My Lords, these are but familiar and well known illustrations, which could be multiplied, which show that irrespective of any contractual or fiduciary relationship and irrespective of any direct dealing, a duty may be owed by one person to another. It is said, however, that where careless (but not fraudulent) misstatements are in question there can be no liability in the maker of them unless there is either some contractual or fiduciary relationship with a person adversely affected by the making of them or unless, through the making of them, something is created or circulated or some situation is created which is dangerous to life, limb or property. In logic I can see no essential reason for distinguishing injury which is caused by a reliance upon words from injury which is caused by a reliance upon the safety of the staging to a ship or by a reliance upon the safety for use of the contents of a bottle of hair wash or a bottle of some consumable liquid. It seems to me, therefore, that if A claims that he has suffered injury or loss as a result of acting upon some misstatement made by B who is not in any contractual or fiduciary relationship with him, the inquiry that is first raised is whether B owed any duty to A: if he did the further inquiry is raised as to the nature of the duty. There may be circumstances under which the only duty owed by B to A is the duty of being honest: there may be circumstances under which B owes to A the duty not only of being honest but also a duty of taking reasonable care.

[58] (1869) L.R. 5 Ex. 1.

[59] [1932] A.C. 562.

The issue in the present case is whether the bank owed any duty to Hedleys and if so what the duty was.

Leaving aside cases where there is some contractual or fiduciary relationship, there may be many situations in which one person voluntarily or gratuitously undertakes to do something for another person and becomes under a duty to exercise reasonable care. I have given illustrations. But apart from cases where there is some direct dealing there may be cases where one person issues a document which should be the result of an exercise of the skill and judgment required by him in his calling and where he knows and intends that its accuracy will be relied upon by another. In this connection it will be helpful to consider the case of *Cann* v. *Willson*.[60] The owner of some property wished to obtain an advance of money on mortgage of the property and applied to a firm of solicitors for the purpose of their finding a mortgagee. Being informed by the solicitors that, for the purpose of finding a mortgagee, he should have a valuation made of the property, he consulted the defendants and asked them to make a valuation. They surveyed and inspected the property and then made a valuation which they sent to the solicitors. The solicitors then particularly called the defendants' attention to the purpose for which the valuation was wanted and to the responsibility they were undertaking. The defendants stated that their valuation was a moderate one and certainly was not made in favour of the borrower. The valuation and representations so made by the defendants to the solicitors were communicated to the plaintiff (and a co-trustee of his) by the solicitors. The plaintiff (and his co-trustee, who died before the commencement of the action) then advanced money to the owner upon the security of a mortgage of his property. Chitty J. held[61] on the evidence (1) that the defendants were aware of the purpose for which the valuation was made, and (2) that the "valuation was sent by the defendants direct to the agents of the plaintiff for the purpose of "inducing the plaintiff and his co-trustee to lay out the trust "money on mortgage." The owner made default in payment and the property proved insufficient to answer the mortgage. The plaintiff alleged that the value of the property was not anything like the value given by the defendants in their valuation. Chitty J. held[61] that "the valuation as made was, in fact, no "valuation at all." In those circumstances, the claim made was on the basis that the plaintiff had sustained loss through the

[60] 39 Ch.D. 39.

[61] Ibid. 42.

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negligence, want of skill, breach of duty and misrepresentation of the defendants. Chitty J. held the defendants liable. His decision was principally based upon his finding that the defendants owed a duty of care to the plaintiff. It had been argued that there was also liability in the defendants in contract (referred to in the judgment as the first ground) and on the ground of fraud (referred to as the third ground). At the end of his judgment Chitty J. said [62]: "I have entirely passed by the question of "contract. It is unnecessary to decide that point. I consider "on these two last grounds—and if I were to prefer one to the "other it would be the second ground—that the defendant is "liable for the negligence." In the course of his judgment he said [63]: "It is not necessary, in my opinion, to decide the case "with reference to the third point, but even on the third point "I think the defendants are liable—and that is what may be "termed fraudulent misrepresentation." He then (that is, on June 7, 1888) referred to the judgment in the Court of Appeal in *Peek* v. *Derry*.[64] That judgment was reversed in the House of Lords on July 1, 1889. Chitty J. compared the situation with that which arose in *Heaven* v. *Pender*.[65] He pointed out [66] that in that case there was "no contractual relation between the "plaintiff and the dock-owner, and there was no personal direct "invitation to the plaintiff to come and do the work on that ship, "yet it was held that the dock-owner had undertaken an obligation towards the plaintiff, who was one of the persons likely to "come and do the work to the vessel, and that he was liable to "him and was under an obligation to him to use due diligence "in the construction of the staging." Chitty J. went on, therefore, to hold [67] that, as the defendants had "knowingly placed "themselves" in the position of sending their valuation "direct "to the agents of the plaintiff for the purpose of inducing the "plaintiff," then they "in point of law incurred a duty towards "him to use reasonable care in the preparation of the document." He likened the case to *George* v. *Skivington* [68] and continued [69]: "In this case the document supplied appears to me to stand "upon a similar footing and not to be distinguished from that "case, as if it had been an actual article that had been handed "over for the particular purpose of being so used. I think, therefore, that the defendants stood with regard to the plaintiff—

[62] 39 Ch.D. 39, 44.
[63] Ibid. 43.
[64] (1887) 37 Ch.D. 541, C.A.
[65] 11 Q.B.D. 503.
[66] 39 Ch.D. 39, 42.
[67] Ibid. 42–3.
[68] L.R. 5 Ex. 1.
[69] 39 Ch.D. 39, 43.

"quite apart from any question of there being a contract or not "in the peculiar circumstances of this case—in the position of "being under an obligation or duty towards him." My Lords, I can see no fault or flaw in this reasoning and I am prepared to uphold it. If it is correct, then it is submitted that in the present case the bank knew that some existing (though to them by name unknown) person was going to place reliance upon what they said and that accordingly they owed a duty of care to such person. I will examine this submission. Before doing so I must, however, further consider *Cann* v. *Willson*.[70] It was overruled by the Court of Appeal in *Le Lievre* v. *Gould*.[71] The latter case, binding on the Court of Appeal, in turn led to the decision in *Candler* v. *Crane, Christmas & Co.*[72] It is necessary, therefore, to consider the reasons which governed the Court of Appeal in *Le Lievre* v. *Gould*[73] in overruling *Cann* v. *Willson*.[74] I do not propose to examine the facts in *Le Lievre* v. *Gould*[75]; nor need I consider whether the result would have been no different had *Cann* v. *Willson*[76] not been overruled. Lord Esher M.R. said[77]: "But "I do not hesitate to say that *Cann* v. *Willson* is not now law. "Chitty J., in deciding that case, acted upon an erroneous pro- "position of law, which has been since overruled by the House "of Lords in *Derry* v. *Peek*[78] when they restated the old law "that, in the absence of contract, an action for negligence cannot "be maintained when there is no fraud." Bowen L.J. said[79] that he considered that *Derry* v. *Peek*[80] had overruled *Cann* v. *Willson*.[81] He considered that *Heaven* v. *Pender*[82] gave no support for that decision because it was no more than an instance of the class of cases where one who, having the conduct and control of premises which may injure those whom he knows will have a right to and will use them, owes a duty to protect them. He said[83]: "Then *Derry* v. *Peek*[84] decided this further point,— "viz., that in cases like the present (of which *Derry* v. *Peek*[84] "was itself an instance) there is no duty enforceable in law to be "careful." He followed the view expressed by Romer J. in *Scholes* v. *Brook*[85] that the decision of the House of Lords in

[70] 39 Ch.D. 39.
[71] [1893] 1 Q.B. 491.
[72] [1951] 2 K.B. 164.
[73] [1893] 1 Q.B. 491.
[74] 39 Ch.D. 39.
[75] [1893] 1 Q.B. 491.
[76] 39 Ch.D. 39.
[77] [1893] 1 Q.B. 491, 497–8.
[78] 14 App.Cas. 337.
[79] [1893] 1 Q.B. 491, 499.
[80] 14 App.Cas. 337.
[81] 39 Ch.D. 39.
[82] 11 Q.B.D. 503.
[83] [1893] 1 Q.B. 491, 501.
[84] 14 App.Cas. 337.
[85] (1891) 63 L.T. 837; 7 T.L.R. 214; 64 L.T. 674, C.A.

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Derry v. *Peek*[86] by implication negatived the existence of any such general rule as laid down in *Cann* v. *Willson*.[87] The reasoning of A. L. Smith L.J. in overruling *Cann* v. *Willson*[87] was on similar lines.

The inquiry is thus raised as to whether it was correct to say that *Derry* v. *Peek*[88] had either directly or at least by implication overruled that part of the reasoning in *Cann* v. *Willson*[89] which led Chitty J. to say that, quite apart from contract and quite apart from fraud, there was a duty of care owed by the defendants to the plaintiffs. My Lords, whatever views may have been held at one time as to the effect of *Derry* v. *Peek*,[90] authoritative guidance as to this matter was given in your Lordships' House in 1914 in the case of *Nocton* v. *Lord Ashburton*.[91] In his speech in that case Viscount Haldane L.C. said[92]: "My "Lords, the discussion of the case by the noble and learned "Lords who took part in the decision appears to me to exclude "the hypothesis that they considered any other question to be "before them than what was the necessary foundation of an "ordinary action for deceit. They must indeed be taken to have "thought that the facts proved as to the relationship of the "parties in *Derry* v. *Peek*[93] were not enough to establish any "special duty arising out of that relationship other than the "general duty of honesty. But they do not say that where a "different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an "action for deceit will lie. I think that the authorities subsequent "to the decision of the House of Lords show a tendency to "assume that it was intended to mean more than it did. In "reality the judgment covered only a part of the field in which "liabilities may arise. There are other obligations besides that "of honesty the breach of which may give a right to damages. "These obligations depend on principles which the judges have "worked out in the fashion that is characteristic of a system "where much of the law has always been judge-made and "unwritten." After a review of many authorities Lord Haldane said[94]: "But side by side with the enforcement of the duty of "universal obligation to be honest and the principle which gave "the right to rescission, the courts, and especially the Court of

[86] 14 App.Cas. 337.
[87] 39 Ch.D. 39.
[88] 14 App.Cas. 337.
[89] 39 Ch.D. 39.
[90] 14 App.Cas. 337.
[91] [1914] A.C. 932.
[92] Ibid. 947.
[93] 14 App.Cas. 337.
[94] [1914] A.C. 932, 955.

" Chancery, had to deal with the other cases to which I have " referred, cases raising claims of an essentially different character, " which have often been mistaken for actions of deceit. Such " claims raise the question whether the circumstances and " relations of the parties are such as to give rise to duties of " particular obligation which have not been fulfilled." Lord Haldane pointed out that from the circumstances and relations of the parties a special duty may arise: there may be an implied contract at law or a fiduciary obligation in equity. What *Derry* v. *Peek* [95] decided was that the directors were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. (I need not here refer to statutory enactments since *Derry* v. *Peek*.[95])

In his speech in the same case Lord Dunedin pointed out [96] that there can be no negligence unless there is a duty but that a duty may arise in many ways. There may be duties owing to the world at large: alterum non laedere. There may be duties arising from contract. There may be duties which arise from a relationship without the intervention of contract in the ordinary sense of the term, such as the duties of a trustee to his cestui que trust or of a guardian to his ward.

Lord Shaw in his speech pointed out [97] that *Derry* v. *Peek* [98] " was an action wholly and solely of deceit, founded wholly and " solely on fraud, was treated by this House on that footing alone, " and that—this being so—what was decided was that fraud must " ex necessitate contain the element of moral delinquency. " Certain expressions by learned Lords may seem to have made " incursions into the region of negligence, but *Derry* v. *Peek* [98] " as a decision was directed to the single and specific point just " set out." Lord Shaw [99] formulated the following principle: " That once the relations of parties have been ascertained to be " those in which a duty is laid upon one person of giving informa- " tion or advice to another upon which that other is entitled to " rely as the basis of a transaction, responsibility for error amount- " ing to misrepresentation in any statement made will attach to " the adviser or informer, although the information and advice " have been given not fraudulently but in good faith."

Lord Parmoor in his speech said [100] in reference to *Derry* v. *Peek* [101]: " That case decides that in an action founded on deceit,

[95] 14 App.Cas. 337.
[96] [1914] A.C. 932, 964.
[97] Ibid. 970–1.
[98] 14 App.Cas. 337.
[99] [1914] A.C. 932, 972.
[100] Ibid. 978.
[101] 14 App.Cas. 337.

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" and in which deceit is a necessary factor, actual dishonesty, " involving mens rea, must be proved. The case, in my opinion, " has no bearing whatever on actions founded on a breach of duty " in which dishonesty is not a necessary factor."

My Lords, guided by the assistance given in *Nocton* v. *Lord Ashburton*,[102] I consider that it ought not to have been held in *Le Lievre* v. *Gould*[103] that *Cann* v. *Willson*[104] was wrongly decided. Independently of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful.

In his speech in *Heilbut, Symons & Co.* v. *Buckleton*[105] Lord Moulton said that it was of the greatest importance to " maintain " in its full integrity the principle that a person is not liable in " damages for an innocent misrepresentation, no matter in what " way or under what form the attack is made." That principle is, however, in no way impeached by recognition of the fact that if a duty exists there is a remedy for the breach of it. As Bowen L.J. said in *Low* v. *Bouverie*[106]: " . . . the doctrine that negli- " gent misrepresentation affords no cause of action is confined to " cases in which there is no duty, such as the law recognises, to " be careful."

The inquiry in the present case, and in similar cases, becomes, therefore, an inquiry as to whether there was a relationship between the parties which created a duty and, if so, whether such duty included a duty of care.

The guidance which Lord Haldane gave in *Nocton* v. *Lord Ashburton*[107] was repeated by him in his speech in *Robinson* v. *National Bank of Scotland Ltd.*[108] He clearly pointed out that *Derry* v. *Peek*[109] did not affect (1) the whole doctrine as to fiduciary relationship, (2) the duty of care arising from implied as well as express contracts, and (3) the duty of care arising from other special relationships which the courts may find to exist in particular cases.

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty

[102] [1914] A.C. 932.
[103] [1893] 1 Q.B. 491.
[104] 39 Ch.D. 39.
[105] [1913] A.C. 30, 51, H.L.
[106] [1891] 3 Ch. 82, 105; 7 T.L.R. 582, C.A.
[107] [1914] A.C. 932.
[108] 1916 S.C.(H.L.) 154.
[109] 14 App.Cas. 337.

of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

I do not propose to examine the facts of particular situations or the facts of recently decided cases in the light of this analysis but I proceed to apply it to the facts of the case now under review. As I have stated, I approach the case on the footing that the bank knew that what they said would in fact be passed on to some unnamed person who was a customer of the National Provincial Bank. The fact that it was said that "they," that is, the National Provincial Bank, "wanted to know" does not prevent this conclusion. In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care. The bank need not have answered the inquiry from the National Provincial Bank. It appears, however, that it is a matter of banking convenience or courtesy and presumably of mutual business advantage that inquiries as between banks will be answered. The fact that it is most unlikely that the bank would have answered a direct inquiry from Hedleys does not affect the question as to what the bank must have known as to the use that would be made of any answer that they gave but it cannot be left out of account in considering what it was that the bank undertook to do. It does not seem to me that they undertook before answering an inquiry to expend time or trouble "in searching records, studying documents, "weighing and comparing the favourable and unfavourable "features and producing a well-balanced and well-worded "report." (I quote the words of Pearson L.J.[110]) Nor does it seem to me that the inquiring bank (nor therefore their customer) would expect such a process. This was, I think, what was denoted by Lord Haldane in his speech in *Robinson* v. *National Bank of Scotland Ltd.*[111] when he spoke of a "mere inquiry" being made by one banker of another. In *Parsons* v. *Barclay & Co. Ltd.*[112]

[110] [1962] 1 Q.B. 396, 414; [1961] 3 W.L.R. 1225; [1961] 3 All E.R. 891, C.A.

[111] 1916 S.C.(H.L.) 154.

[112] (1910) 103 L.T. 196; 26 T.L.R. 628, C.A.

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Cozens-Hardy M.R. expressed the view that it was no part of a banker's duty, when asked for a reference, to make inquiries outside as to the solvency or otherwise of the person asked about or to do more than answer the question put to him honestly from what he knew from the books and accounts before him. There was in the present case no contemplation of receiving anything like a formal and detailed report such as might be given by some concern charged with the duty (probably for reward) of making all proper and relevant inquiries concerning the nature, scope and extent of a company's activities and of obtaining and marshalling all available evidence as to its credit, efficiency, standing and business reputation. There is much to be said, therefore, for the view that if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness he does not accept, and there is not expected from him, any higher duty than that of giving an honest answer. I need not, however, seek to deal further with this aspect of the matter, which perhaps cannot be covered by any statement of general application, because, in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and then reject the stipulation. Furthermore, within accepted principles (as illustrated in *Rutter* v. *Palmer* [113]) the words employed were apt to exclude any liability for negligence.

I would therefore dismiss the appeal.

LORD HODSON. My Lords, the appellants, who are advertising agents, claim damages for loss which they allege they have suffered through the negligence of the respondents, who are merchant bankers. The negligence attributed to the respondents consists of their failure to act with reasonable skill and care in giving references as to the credit-worthiness of a company called Easipower Ltd. which went into liquidation after the references had been given so that the appellants were unable to recover the bulk of the costs of advertising orders which Easipower Ltd. had placed with them. The learned judge at the trial found that the respondent bankers had been negligent in the advice which they gave in

[113] [1922] 2 K.B. 87.

the form of bankers' references, the appellants being a company which acted in reliance on the references and suffered financial loss accordingly, but that he must enter judgment for the respondents since there was no duty imposed by law to exercise care in giving these references, the duty being only to act honestly in so doing.

The respondents have at all times maintained that they were in no sense negligent and further that no damage flowed from the giving of references, but first they took the point that, whether or no they were careless and whether or no the appellants suffered damage as a result of their carelessness, they must succeed on the footing that no duty was owed by them. This point has been taken throughout as being, if the respondents are right, decisive of the whole matter. I will deal with it first, although the underlying question is whether the respondent bankers who at all times disclaimed responsibility ever assumed any duty at all.

The appellants depend on the existence of a duty said to be assumed by or imposed on the respondents when they gave a reference as to the credit-worthiness of Easipower Ltd. knowing that it would or might be relied upon by the appellants or some other third party in like situation.

The case has been argued first on the footing that the duty was imposed by the relationship between the parties recognised by law as being a special relationship derived either from the notion of proximity introduced by Lord Esher in *Heaven* v. *Pender*,[114] or from those cases firmly established in our law which show that those who hold themselves out as possessing a special skill are under a duty to exercise it with reasonable care.

The important case of *Donoghue* v. *Stevenson* [115] shows that the area of negligence is extensive, for, as Lord Macmillan said: "The grounds of action may be as various and manifold as human "errancy; and the conception of legal responsibility may develop "in adaptation to altering social conditions and standards. The "criterion of judgment must adjust and adapt itself to the "changing circumstances of life. The categories of negligence "are never closed. . . . Where there is room for diversity of view, "it is in determining what circumstances will establish such a "relationship between the parties as to give rise, on the one side, "to a duty to take care, and on the other side to a right to have "care taken."

In that case the necessary relationship was held to have been

[114] 11 Q.B.D. 503, 509.

[115] [1932] A.C. 562, 619.

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established where the manufacturer of an article, ginger beer in a bottle, sold it to a distributor in circumstances which prevented the distributor or the ultimate purchaser or consumer from discovering by inspection any defect. He is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from injurious defect. No doubt that was the actual decision in that case, and indeed it was thought by Wrottesley J. in *Old Gate Estates Ltd.* v. *Toplis & Harding & Russell* [116] that he was precluded from awarding damages in tort for a negligent valuation made by a firm of valuers which knew it was to be used by the plaintiffs since the doctrine of *Donoghue* v. *Stevenson* [117] was confined to negligence which results in danger to life, limb or health. I do not think that this is the true view of *Donoghue* v. *Stevenson*,[117] but the decision itself, although its effect has been extended to cases where there was no expectation as contrasted with opportunity of inspection (see *Grant* v. *Australian Knitting Mills Ltd.*[118]) and to liability of repairers (see *Haseldine* v. *C. A. Daw & Son Ltd.*[119]), has never been applied to cases where damages are claimed in tort for negligent statements producing damage. The attempt so to apply it failed as recently as 1951, when in *Candler* v. *Crane, Christmas & Co.*[120] the Court of Appeal by a majority held that a false statement made carelessly, as contrasted with fraudulently, by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties and that this principle had in no way been modified by the decision in *Donoghue* v. *Stevenson*.[121] Cohen L.J., one of the majority of the court, referred [122] to the language of Lord Esher M.R. in *Le Lievre* v. *Gould*,[123] who, repeating the substance of what he had said in *Heaven* v. *Pender*,[124] said: "If "one man is near to another, or is near to the property of another, "a duty lies upon him not to do that which may cause a personal "injury to that other, or may injure his property." Asquith L.J., the other member of the majority of the court, held that the "neighbour" doctrine had not been applied where the damage complained of was not physical in its incidence to either person or property. The majority thus went no further than Wrottesley J.,

[116] (1939) 161 L.T. 227; [1939] 3 All E.R. 209.
[117] [1932] A.C. 562.
[118] [1936] A.C. 85; 52 T.L.R. 38, P.C.
[119] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156, C.A.
[120] [1951] 2 K.B. 164.
[121] [1932] A.C. 562.
[122] [1951] 2 K.B. 164, 199.
[123] [1893] 1 Q.B. 491, 497.
[124] 11 Q.B.D. 503, 509.

in the *Old Gate Estates* case [125] save that injury to property was said to be contemplated by the doctrine expounded in *Donoghue* v. *Stevenson*.[126] It is desirable to consider the reasons given by the majority for their decision in the *Candler* case,[127] for the appellants rely upon the dissenting judgment of Denning L.J. in the same case. The majority, as also the learned trial judge, held that they were bound by the decision of the Court of Appeal in *Le Lievre* v. *Gould*,[128] in which the leading judgment was given by Lord Esher M.R. and referred to as authoritative by Lord Atkin in *Donoghue* v. *Stevenson*.[129]

It is true that Lord Esher refused to extend the proximity doctrine so as to cover the relationship between the parties in that case and the majority in *Candler's* case [130] were unable to draw a valid distinction between the facts of that case and the case of *Le Lievre* v. *Gould*.[131] Denning L.J., however, accepted the argument for the appellant which has been repeated before your Lordships, that the facts in *Le Lievre* v. *Gould* [131] were not such as to impose a liability, for the plaintiff mortgagees who alleged that the owner's surveyor owed a duty to them not only had the opportunity but had stipulated for inspection by their own surveyor. The defendant's employee who prepared the accounts in *Candler's* case [132] knew that the plaintiff was a potential investor in the company of which the accounts were negligently prepared and that the accounts were required in order that they might be shown to the plaintiff. In these circumstances I agree with Denning L.J. that there is a valid distinction between the two cases. In *Le Lievre* v. *Gould* [133] it was held that an older case of *Cann* v. *Willson* [134] was overruled. That is a case where the facts were in pari materia with those in *Candler's* case [135] and Chitty J. held the defendants liable because (1) they independently of contract owed a duty to the plaintiff which they failed to discharge, (2) that they had made reckless statements on which the plaintiff had acted. This case was decided before this House, in *Derry* v. *Peek*,[136] overruled the Court of Appeal on the second proposition but the first proposition was untouched by *Derry* v. *Peek*,[136] and, in so far as it depended on the authority of *George*

[125] 161 L.T. 227.
[126] [1932] A.C. 562.
[127] [1951] 2 K.B. 164.
[128] [1893] 1 Q.B. 491.
[129] [1932] A.C. 562.
[130] [1951] 2 K.B. 164
[131] [1893] 1 Q.B. 491.
[132] [1951] 2 K.B. 164.
[133] [1893] 1 Q.B. 491.
[134] 39 Ch.D. 39.
[135] [1951] 2 K.B. 164.
[136] 14 App.Cas. 337.

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v. *Skivington*,[137] the latter case was expressly affirmed in *Donoghue* v. *Stevenson* [138] although it had often previously been impugned. It is true that, as Asquith L.J. pointed out in referring to *George* v. *Skivington*,[139] the hair wash, put into circulation with the knowledge that it was intended to be used by the purchaser's wife, was a negligently compounded hair wash so that the case was so far on all fours with *Donoghue* v. *Stevenson*,[140] but the declaration also averred that the defendant had said that the hair wash was safe. I cannot see that there is any valid distinction in this field between a negligent statement, for example, an incorrect label on a bottle which leads to injury and a negligent compounding of ingredients which leads to the same result. It may well be that at the time when *Le Lievre* v. *Gould* [141] was decided the decision of this House in *Derry* v. *Peek* [142] was thought to go further than it did. It certainly decided that careless statements recklessly but honestly made by directors in a prospectus issued to the public were not actionable on the basis of fraud, and inferentially that such statements would not be actionable in negligence (which had not in fact been pleaded), but it was pointed out by this House in *Nocton* v. *Lord Ashburton* [143] that an action does lie for negligent misstatement where the circumstances disclose a duty to be careful. It is necessary in this connection to quote the actual language of Lord Haldane [144]: "Such a special duty may arise "from the circumstances and relations of the parties. These may "give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular "case of a person issuing a prospectus, as, for instance, in the "case of directors issuing to the shareholders of the company "which they direct a prospectus inviting the subscription by them "of further capital, I do not find in *Derry* v. *Peek* [145] an authority "for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What "was decided there was that from the facts proved in that case "no such special duty to be careful in statement could be inferred, "and that mere want of care therefore gave rise to no cause of "action. In other words, it was decided that the directors stood

[137] L.R. 5 Ex. 1.
[138] [1932] A.C. 562.
[139] L.R. 5 Ex. 1.
[140] [1932] A.C. 562.
[141] [1893] 1 Q.B. 491.
[142] 14 App.Cas. 337.
[143] [1914] A.C. 932.
[144] Ibid. 955-956.
[145] 14 App.Cas. 337.

" in no fiduciary relation and therefore were under no fiduciary " duty to the public to whom they had addressed the invitation " to subscribe. I have only to add that the special relationship " must, whenever it is alleged, be clearly shown to exist."

So far I have done no more than summarise the argument addressed to the Court of Appeal in *Candler's* case [146] to which effect was given in the dissenting judgment of Denning L.J., with which I respectfully agree in so far as it dealt with the facts of that case. I am therefore of opinion that his judgment is to be preferred to that of the majority, although the opinion of the majority is undoubtedly supported by the ratio decidendi of *Le Lievre* v. *Gould* [147] which they cannot be criticised for following.

This, however, does not carry the appellants further than this, that, provided they can establish a special duty, they are entitled to succeed in an action based on breach of that duty.

I shall later refer to certain cases which support the view that, apart from what are usually called fiduciary relationships such as those between trustee and cestui que trust, solicitor and client, parent and child, or guardian and ward, there are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury or injury to property but covers a duty to avoid inflicting pecuniary loss provided always that there is a sufficiently close relationship to give rise to a duty of care.

The courts of equity recognised that a fiduciary relationship exists " in almost every shape," to quote from Field J. in *Plowright* v. *Lambert.* [148] He went on to refer to a case (*Tate* v. *Williamson* [148a]) which had said that the relationship could be created " voluntarily, as it were, by a person coming into a " state of confidential relationship with another by offering to " give advice in a matter, and so being disabled thereafter from " purchasing."

It is difficult to see why liability as such should depend on the nature of the damage. Lord Roche in *Morrison Steamship Co. Ltd.* v. *Greystoke Castle (Cargo Owners)* [149] instanced damage to a lorry by the negligence of the driver of another lorry which, while it does no damage to the goods in the second lorry, causes the goods owner to be put to expense which is recoverable by direct action against the negligent driver.

[146] [1951] 2 K.B. 164.
[147] [1893] 1 Q.B. 491.
[148] (1885) 52 L.T. 646, 652.
[148a] (1866) L.R. 2 Ch. 55.
[149] [1947] A.C. 265, 280; 63 T.L.R. 11: [1946] 2 All E.R. 696, H.L.

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It is not to be supposed that the majority of the Court of Appeal who decided as they did in *Candler's* case [150] were unmindful of the decision in *Nocton* v. *Lord Ashburton*,[151] to which their attention was drawn, but they seem to have been impressed with the view that in the passage I have quoted Lord Haldane had in mind only fiduciary relationships in the strict sense, but, in my opinion, the words need not be so limited. I am fortified in this opinion by examples to be found in the old authorities such as *Shiells* v. *Blackburne*,[152] *Wilkinson* v. *Coverdale* [153] and *Gladwell* v. *Steggall*;[154] which are illustrations of cases where the law has held that a duty to exercise reasonable care (breach of which is remediable in damages) has been imposed in the absence of a fiduciary relationship where persons hold themselves out as possessing special skill and are thus under a duty to exercise it with reasonable care. The statement of Lord Loughborough in *Shiells* v. *Blackburne* [155] is always accepted as authoritative and ought not to be dismissed as dictum, although the plaintiff failed to establish facts which satisfied the standard he set. He said: "... if a man gratuitously undertakes to do "a thing to the best of his skill, where his situation or profession "is such as to imply skill, an omission of that skill is imputable "to him as gross negligence." True that proximity is more difficult to establish where words are concerned than in the case of other activities and mere casual observations are not to be relied upon (see *Fish* v. *Kelly* [156]), but these matters go to difficulty of proof rather than principle.

A modern instance is to be found in the case of *Woods* v. *Martins Bank Ltd.*,[157] where Salmon J. held that on the facts of the case the defendant bank which had held itself out as being advisers on investments (which was within the scope of their business) and had not given the plaintiff reasonably careful or skilful advice so that he suffered loss were held in breach of duty and so liable in damages even though the plaintiff may not have been a customer of the bank at the material time.

True that the learned judge based this part of his conclusion on a fiduciary relationship which he held to exist between the plaintiff and the bank and thus brought himself within the scope of the decision in *Candler's* case [158] by which he was bound. For

[150] [1951] 2 K.B. 164.
[151] [1914] A.C. 932.
[152] 1 H.Bl. 158.
[153] 1 Esp. 75.
[154] (1839) 5 Bing.N.C. 733.
[155] 1 H.Bl. 158, 163.
[156] (1864) 17 C.B.N.S. 194.
[157] [1959] 1 Q.B. 55; [1958] 1 W.L.R. 1018; [1958] 3 All E.R. 166.
[158] [1951] 2 K.B. 164.

my part, I should have thought that even if the learned judge put a strained interpretation on the word "fiduciary" which is based on the idea of trust, the decision can be properly sustained as an example involving a special relationship.

I do not overlook the point forcefully made by Harman L.J. in his judgment [159] and elaborated by counsel for the respondents before your Lordships, that it may in certain cases appear to be strange that, whereas innocent misrepresentation does not sound in damages, yet in the special cases under consideration an injured party may sue in tort a third party whose negligent misrepresentation has induced him to enter into the contract. As was pointed out by Lord Wrenbury, however, in *Banbury* v. *Bank of Montreal*,[160] innocent misrepresentation is not the cause of action but evidence of the negligence which is the cause of action.

Was there, then, a special relationship here? I cannot exclude from consideration the actual terms in which the reference was given and I cannot see how the appellants can get over the difficulty which these words put in their way. They cannot say that the respondents are seeking, as it were, to contract out of their duty by the use of language which is insufficient for the purpose, if the truth of the matter is that the respondents never assumed a duty of care nor was such a duty imposed upon them.

The first question is whether a duty was ever imposed, and the language used must be considered before the question can be answered. In the case of a person giving a reference I see no objection in law or morals to the giver of the reference protecting himself by giving it without taking responsibility for anything more than the honesty of his opinion—which must involve without taking responsibility for negligence in giving that opinion. I cannot accept the contention of the appellants that the responsibility disclaimed was limited to the bank to which the reference was given, nor can I agree that it referred only to responsibility for accuracy of detail.

Similar words were present in the case of *Robinson* v. *National Bank of Scotland Ltd.*,[161] a case in which the facts cannot, I think, be distinguished in any material respect from this. Moreover, in the Inner House the words of disclaimer were, I think, treated as not without significance.

In this House the opinion was clearly expressed that the representations made were careless, inaccurate and misleading but

[159] [1962] 1 Q.B. 396, 415.
[160] [1918] A.C. 626.
[161] 1916 S.C.(H.L.) 154.

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that the pursuer had no remedy since there was no special duty on the bank's representative towards the pursuer. This conclusion was reached quite apart from the disclaimer of responsibility contained in the defender bank's letters.

Viscount Haldane recalled the case of *Nocton* v. *Lord Ashburton* [162] in the following passage [163]: "In saying that I "wish emphatically to repeat what I said in advising this House "in the case of *Nocton* v. *Lord Ashburton*,[164] that it is a great "mistake to suppose that, because the principle in *Derry* v. *Peek* [165] clearly covers all cases of the class to which I have "referred, therefore the freedom of action of the courts in recognising special duties arising out of other kinds of relationship "which they find established by the evidence is in any way "affected. I think, as I said in *Nocton's* case,[166] that an "exaggerated view was taken by a good many people of the "scope of the decision in *Derry* v. *Peek*.[167] The whole of the "doctrine as to fiduciary relationships, as to the duty of care "arising from implied as well as express contracts, as to the "duty of care arising from other special relationships which the "courts may find to exist in particular cases, still remains, and "I should be very sorry if any word fell from me which should "suggest that the courts are in any way hampered in recognising "that the duty of care may be established when such cases "really occur."

This authority is, I think, conclusive against the appellants and is not effectively weakened by the fact that the case came to an end before that matter had been fully argued upon the House intimating that it was prepared to dismiss the appeal without costs on either side since the pursuer had, in its opinion, been badly treated. Since no detailed reasons were given by the House for the view that a banker's reference given honestly does not in the ordinary course carry with it a duty to take reasonable care, that duty being based on a special relationship, it will not, I hope, be out of place if I express my concurrence with the observations of Pearson L.J. who delivered the leading judgment in the Court of Appeal and said [168]: "Apart from authority, I "am not satisfied that it would be reasonable to impose upon a "banker the obligation suggested, if that obligation really adds

[162] [1914] A.C. 932.
[163] 1916 S.C.(H.L.) 154, 157.
[164] [1914] A.C. 932.
[165] 14 App.Cas. 337.
[166] [1914] A.C. 932.
[167] 14 App.Cas. 337.
[168] [1962] 1 Q.B. 396, 414–5.

" anything to the duty of giving an honest answer. It is conceded " by Mr. Cooke that the banker is not expected to make outside " inquiries to supplement the information which he already has. " Is he then expected, in business hours in the bank's time, to " expend time and trouble in searching records, studying docu- " ments, weighing and comparing the favourable and unfavour- " able features and producing a well-balanced and well-worded " report? That seems wholly unreasonable. Then, if he is not " expected to do any of those things, and if he is permitted to " give an impromptu answer in the words that immediately come " to his mind on the basis of the facts which he happens to " remember or is able to ascertain from a quick glance at the " file or one of the files, the duty of care seems to add little, if " anything, to the duty of honesty. If the answer given is " seriously wrong, that is some evidence—of course, only some " evidence—of dishonesty. Therefore, apart from authority, it is " far from clear, to my mind, that the banker, in answering such " an inquiry, could reasonably be supposed to be assuming any " duty higher than that of giving an honest answer."

This is to the same effect as the opinion of Cozens Hardy M.R. in *Parsons* v. *Barclay & Co. Ltd.*[169]: " I desire for myself " to repudiate entirely the suggestion that when one banker is " asked by another for a customer such a question as was asked " here, it is in any way the duty of the banker to make inquiries " other than what appears from the books of account before him, " or, of course, to give information other than what he is " acquainted with from his own personal knowledge . . . I think " that if we were to take the contrary view . . . we should neces- " sarily be putting a stop to that very wholesome and useful " habit by which the banker answers in confidence and answers " honestly, to another banker."

It would, I think, be unreasonable to impose an additional burden on persons such as bankers who are asked to give references and might, if more than honesty were required, be put to great trouble before all available material had been explored and considered.

It was held in *Low* v. *Bouverie* [170] that if a trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under a legal obligation to do more than to give honest answers to the best of his actual

[169] 103 L.T. 196, 199.

[170] [1891] 3 Ch. 82; 7 T.L.R. 582, C.A.

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knowledge and belief, he is not bound to make inquiries himself. I do not think a banker giving references in the ordinary exercise of business should be in any worse position than the trustee. I have already pointed out that a banker, like anyone else, may find himself involved in a special relationship involving liability, as in *Woods* v. *Martins Bank Ltd.*,[171] but there are no special features here which enable the appellants to succeed.

I do not think it is possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case, but since preparing this opinion I have had the opportunity of reading the speech which my noble and learned friend, Lord Morris of Borth-y-Gest, has prepared. I agree with him that if in a sphere where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry such person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance upon it, then a duty of care will arise.

I would dismiss the appeal.

LORD DEVLIN. My Lords, the bare facts of this case, stated sufficiently to raise the general point of law, are these. The appellants, being anxious to know whether they could safely extend credit to certain traders with whom they were dealing, sought a banker's reference about them. For this purpose their bank, the National Provincial, approached the respondents who are the traders' bank. The respondents gave, without making any charge for it and in the usual way, a reference which was so carelessly phrased that it led the appellants to believe the traders to be creditworthy when in fact they were not. The appellants seek to recover from the respondents the consequent loss.

Mr. Foster, for the respondents, has given your Lordships three reasons why the appellants should not recover. The first is founded upon a general statement of the law which, if true, is of immense effect. Its hypothesis is that there is no general duty not to make careless statements. No one challenges that hypothesis. There is no duty to be careful in speech as there is a duty to be honest in speech. Nor indeed is there any general duty to be careful in action. The duty is limited to those who

[171] [1959] 1 Q.B. 55.

can establish some relationship of proximity such as was found to exist in *Donoghue* v. *Stevenson*.[172] A plaintiff cannot, therefore, recover for financial loss caused by a careless statement unless he can show that the maker of the statement was under a special duty to him to be careful. Mr. Foster submits that this special duty must be brought under one of three categories. It must be contractual; or it must be fiduciary; or it must arise from the relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. The law is now settled, Mr. Foster submits, and these three categories are exhaustive. It was so decided in *Candler* v. *Crane, Christmas & Co.*[173] and that decision, Mr. Foster submits, is right in principle and in accordance with earlier authorities.

Mr. Gardiner, for the appellants, agrees that outside contractual and fiduciary duty there must be a relationship of proximity—that is *Donoghue* v. *Stevenson* [174]—but he disputes that recovery is then limited to loss flowing from physical damage. He has not been able to cite a single case in which a defendant has been held liable for a careless statement leading, otherwise than through the channel of physical damage, to financial loss. But he submits that in principle such loss ought to be recoverable and that there is no authority which prevents your Lordships from acting upon that principle. Unless Mr. Gardiner can persuade your Lordships of this, his case fails at the outset. This, therefore, is the first and the most fundamental of the issues which the House is asked to decide.

Mr. Foster's second reason is that, if it is open to your Lordships to declare that there are or can be special or proximate relationships outside the categories he has named, your Lordships cannot formulate one to fit the case of a banker who gives a reference to a third party who is not his customer; and he contends that your Lordships have already decided that point in *Robinson* v. *National Bank of Scotland Ltd.*[175] His third reason is that if there can be found in cases such as this a special relationship between bankers and third parties, on the facts of the present case the appellants fall outside it; and here he relies particularly on the fact that the reference was marked "Strictly confidential and given on the express understanding "that we incur no responsibility whatever in furnishing it."

My Lords, I approach the consideration of the first and

[172] [1932] A.C. 562.
[173] [1951] 2 K.B. 164.
[174] [1932] A.C. 562.
[175] 1916 S.C.(H.L.) 154.

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fundamental question in the way in which Lord Atkin approached the same sort of question—that is, in essence the same sort, though in particulars very different—in *Donoghue* v. *Stevenson*.[176] If Mr. Foster's proposition is the result of the authorities, then, as Lord Atkin said,[177] "I should consider the result a grave defect "in the law, and so contrary to principle that I should hesitate "long before following any decision to that effect which had not "the authority of this House." So before I examine the authorities, I shall explain why I think that the law, if settled as Mr. Foster says it is, would be defective. As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical. The common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.

Originally it was thought that the tort of negligence must be confined entirely to deeds and could not extend to words. That was supposed to have been decided by *Derry* v. *Peek*.[178] I cannot imagine that anyone would now dispute that if this were the law, the law would be gravely defective. The practical proof of this is that the supposed deficiency was in relation to the facts in *Derry* v. *Peek*[178] immediately made good by Act of Parliament. Today it is unthinkable that the law could permit directors to be as careless as they liked in the statements they made in a prospectus.

A simple distinction between negligence in word and negligence in deed might leave the law defective but at least it would be intelligible. This is not, however, the distinction that is drawn in Mr. Foster's argument and it is one which would be unworkable. A defendant who is given a car to overhaul and repair if necessary is liable to the injured driver (a) if he overhauls it and repairs it negligently and tells the driver it is safe when it is not; (b) if he overhauls it and negligently finds it not to be in need of repair and tells the driver it is safe when it is not; and (c) if he negligently omits to overhaul it at all and tells the driver that it is safe when it is not. It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver

[176] [1932] A.C. 562.
[177] Ibid. 582.
[178] 14 App.Cas. 337.

drove the car and for which he could not recover. In this type of case, where if there were a contract there would undoubtedly be a duty of service, it is not practicable to distinguish between the inspection or examination, the acts done or omitted to be done, and the advice or information given. So neither in this case nor in *Candler* v. *Crane, Christmas & Co.*[179] (Denning L.J. noted the point [180] where he gave the example of the analyst who negligently certifies food to be harmless) has Mr. Foster argued that the distinction lies there.

This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached.

I shall now examine the relevant authorities, and your Lordships will, I hope pardon me if with one exception I attend only to those that have been decided in this House, for I have made it plain that I will not in this matter yield to persuasion but only to compulsion. The exception is the case of *Le Lievre* v. *Gould*,[181] for your Lordships will not easily upset decisions of the Court of Appeal if they have stood unquestioned for as long as 70 years. The five relevant decisions of this House are *Derry* v. *Peek*,[182]

[179] [1951] 2 K.B. 164.
[180] Ibid. 179.
[181] [1893] 1 Q.B. 491.
[182] 14 App.Cas. 337.

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Nocton v. *Lord Ashburton*,[183] *Robinson* v. *National Bank of Scotland Ltd.*,[184] *Donoghue* v. *Stevenson*,[185] and *The Greystoke Castle*.[186] The last of these I can deal with at once, for it lies outside the main stream of authority on this point. It is a case in which damage was done to a ship as the result of a collision with another ship. The owners of cargo on the first ship, which cargo was not itself damaged, thus became liable to the owners of the first ship for a general average contribution. They sued the second ship as being partly to blame for the collision. Thus they were claiming for the financial loss caused to them by having to make the general average contribution although their property sustained no physical damage. This House held that they could recover. Their Lordships did not in that case lay down any general principle about liability for financial loss in the absence of physical damage; but the case itself makes it impossible to argue that there is any general rule showing that such loss is of its nature irrecoverable.

I turn back to the earlier authorities beginning with *Derry* v. *Peek*.[187] The facts in this case are so well known that I need not state them again. Nor need I state in my own words the effect of the decision. That has been done authoritatively by this House in *Nocton* v. *Lord Ashburton*.[188] I quote Lord Haldane [189] as stating most comprehensively the limits of the decision, noting that his view of the case is fully supported by Lord Shaw [190] and Lord Parmoor [191]: "My Lords, the discussion "of the case by the noble and learned Lords who took part in the "decision appears to me to exclude the hypothesis that they "considered any other question to be before them than what was "the necessary foundation of an ordinary action for deceit. They "must indeed be taken to have thought that the facts proved as "to the relationship of the parties in *Derry* v. *Peek* [192] were not "enough to establish any special duty arising out of that relation-"ship other than the general duty of honesty. But they do not "say that where a different sort of relationship ought to be "inferred from the circumstances the case is to be concluded by "asking whether an action for deceit will lie."

There was in *Derry* v. *Peek*,[192] as the report of the case [193]

[183] [1914] A.C. 932.
[184] 1916 S.C.(H.L.) 154.
[185] [1932] A.C. 562.
[186] [1947] A.C. 265.
[187] 14 App.Cas. 337.
[188] [1914] A.C. 932.
[189] Ibid. 947.
[190] Ibid. 970.
[191] Ibid. 978.
[192] 14 App.Cas. 337.
[193] Ibid. 338.

shows, no plea of innocent or negligent misrepresentation and so their Lordships did not make any pronouncement on that. I am bound to say that had there been such a plea I am sure that the House would have rejected it. As Lord Haldane said, their Lordships must "be taken to have thought" that there was no liability in negligence. But what your Lordships may be taken to have thought, though it may exercise great influence upon those who thereafter have to form their own opinion on the subject, is not the law of England. It is impossible to say how their Lordships would have formulated the principle if they had laid one down. They might have made it general or they might have confined it to the facts of the case. They might have made an exception of the sort indicated by Lord Herschell [194] or they might not. This is speculation. All that is certain is that on this point the House laid down no law at all.

Clearly in *Le Lievre* v. *Gould* [195] it was thought that the House had done so. Lord Esher M.R.[196] treated *Derry* v. *Peek* [197] as restating the old law "that, in the absence of contract, an action "for negligence cannot be maintained when there is no fraud." A. L. Smith L.J. stated the law in the same way.[198] This is wrong and the House, in effect, said so in *Nocton* v. *Lord Ashburton*.[199]

My Lords, I need not consider how far thereafter a court of equal authority was bound to follow *Le Lievre* v. *Gould*.[200] It may be that the decision on the facts was correct even though the reasoning was too wide. There has been a difference of opinion about the effect of the decision: compare Asquith L.J. in *Candler* v. *Crane, Christmas & Co.*[201] with Denning L.J.[202] Nor need I consider what part of the reasoning, if any, should be held to survive *Nocton* v. *Lord Ashburton*.[203] It is clear that after 1914 it would be to *Nocton* v. *Lord Ashburton* [203] and not to *Le Lievre* v. *Gould* [204] that the lawyer would look in order to ascertain what the exceptions were to the general principle that a man is not liable for careless misrepresentation. I cannot feel, therefore, that there is any principle enunciated in *Le Lievre* v. *Gould* [204] which is now so deeply embedded in the law that your Lordships ought not to disturb it.

[194] 14 App.Cas. 337, 360.
[195] [1893] 1 Q.B. 491.
[196] [1893] 1 Q.B. 491, 498.
[197] 14 App.Cas. 337.
[198] [1893] 1 Q.B. 491.
[199] [1914] A.C. 932.
[200] [1893] 1 Q.B. 491.
[201] [1951] 2 K.B. 164, 193.
[202] Ibid. 181.
[203] [1914] A.C. 932.
[204] [1893] 1 Q.B. 491.

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I come now to the case of *Nocton* v. *Lord Ashburton*,[205] which both sides put forward as the most important of the authorities which your Lordships have to consider. The appellants say that it removed the restrictions which *Derry* v. *Peek*[206] was thought to have put upon liability for negligent misrepresentation. The respondents say that it removed those restrictions only to a very limited extent, that is to say, by adding fiduciary obligation to contract as a source of special duty; and that it closed the door on any further expansion. I propose, therefore, to examine it with some care because it is not at all easy to determine exactly what it decided. Lord Haldane L.C.[207] began his speech by saying: "Owing to the mode in which this case has been treated both by "the learned judge who tried it and by the Court of Appeal, the "question to be decided has been the subject of some uncertainty "and much argument." He went on to say that the difficulties in giving relief were concerned with form and not with substance. The main difficulty, I think, lies in discovering from the statement of claim what the cause of action was. Lord Ashburton sought relief from the consequences of having advanced money on mortgage to several persons of whom the defendant Nocton was one. The statement of claim consists of a long narrative of events interspersed with complaints. Although in the end the vital fact was that Nocton was Lord Ashburton's solicitor, there is no allegation of any retainer and nothing is pleaded in contract. The fact that Nocton was a solicitor emerges only in the framing of the complaint in paragraph 13[208] where it was said that Nocton's advice to make the advance of £65,000 "was not that of a solicitor "advising his client in good faith, but was given for his own "private ends." The relief asked for in respect of this transaction[209] is a declaration "that [the plaintiff] was improperly "advised and induced by the defendant Nocton whilst acting as "the plaintiff's confidential solicitor" to advance £65,000. In paragraphs 31 to 33 of the statement of claim[209] it is related that the plaintiff was asked to release part of his security for the loan; and it is said that: "The defendant Nocton in advising the plain-"tiff to execute the said release allowed the plaintiff to believe that "he was advising the plaintiff independently and in good faith "and in the plaintiff's interest." No separate relief was sought in respect of this transaction.

[205] [1914] A.C. 932.
[206] 14 App.Cas. 337.
[207] [1914] A.C. 932, 943.
[208] [1914] A.C. 932, 938.
[209] Ibid. 939.

Until the case reached this House no substantial point of law was raised. Neville J. at the trial held that the only issue raised by the statement of claim was whether the defendant Nocton was guilty of fraud and that the plaintiff had failed to prove it. The Court of Appeal agreed with the judge's view of the pleadings. Cozens-Hardy M.R. said that if damages had been claimed on the ground of negligence, the action would have been practically undefended. But it was then too late to amend the statement of claim, if only because a new cause of action would have been statute-barred. On the facts the Court of Appeal reversed in part the judge's finding of fraud, holding that there was fraud in relation to the release.

In this House at the conclusion of the appellant's argument the respondent's counsel was told that the House was unlikely to differ from the judgment of Neville J. on fraud. The pith of the respondent's argument is reported as follows[210]: "Assuming "that fraud is out of the question, the allegations in the state- "ment of claim are wide enough to found a claim for dereliction "of duty by a person occupying a fiduciary relation. In the old "cases in equity the term 'fraud' was frequently applied to "cases of a breach of fiduciary obligation." He was then stopped.

It can now be understood why Lord Haldane regarded the question as one of form rather than of substance. The first question which the House had to consider was whether the statement of claim was wide enough to cover negligence. Lord Parmoor thought that it was[211] and decided the appeal on that ground. So, I think, in the end did Lord Dunedin,[212] but he also expressed his agreement with the opinion of Lord Haldane L.C. Lord Haldane, with whom Lord Atkinson concurred, thought that possibly negligence was covered, but he did not take the view that the statement of claim must be interpreted either as an allegation of deceit or as an allegation of negligence. He said[213]: "There "is a third form of procedure to which the statement of claim "approximated very closely, and that is the old bill in Chancery "to enforce compensation for breach of a fiduciary obligation. "There appears to have been an impression that the necessity "which recent authorities have established of proving moral fraud "in order to succeed in an action of deceit has narrowed the scope "of this remedy. For the reasons which I am about to offer to

[210] [1914] A.C. 932, 943.
[211] Ibid. 977.
[212] Ibid. 965.
[213] Ibid. 946.

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"your Lordships, I do not think that this is so." The Lord Chancellor then went on to examine *Derry* v. *Peek* [214] in order to determine exactly what it had decided.

I find most interest for present purposes in the speech of Lord Shaw. He held [215] that the pleadings disclosed "a claim for "liability upon a ground quite independent of fraud, namely, "of misrepresentations and misstatements made by a person "entrusted with a duty to another, and in failure of that duty." He posed [216] what he considered to be the crucial question: "What was the relation in which the parties stood to each other "at the time of the transaction?" He stated [217] that the defendant was Lord Ashburton's solicitor and so under a duty to advise. He concluded [218] in the following terms: ". . . once the relations "of parties have been ascertained to be those in which a duty is "laid upon one person of giving information or advice to another "upon which that other is entitled to rely as the basis of a trans- "action, responsibility for error amounting to misrepresentation "in any statement made will attach to the adviser or informer, "although the information and advice have been given not "fraudulently but in good faith. It is admitted in the present "case that misrepresentations were made; that they were "material; that they were the cause of loss; that they were "made by a solicitor to his client in a situation in which the "client was entitled to rely, and did rely, upon the information "received. I accordingly think that that situation is plainly open "for the application of the principle of liability to which I have "referred, namely, liability for the consequences of a failure of "duty in circumstances in which it was a matter equivalent to "contract between the parties that that duty should be fulfilled." Lord Shaw does not anywhere in his speech refer to the relationship as being of a fiduciary character.

Lord Haldane L.C. [219] laid down the general principle in much the same terms. He said: "Although liability for negligence "in word has in material respects been developed in our law "differently from liability for negligence in act, it is nonetheless "true that a man may come under a special duty to exercise care "in giving information or advice. I should accordingly be sorry "to be thought to lend countenance to the idea that recent "decisions have been intended to stereotype the cases in which

[214] 14 App.Cas. 337.
[215] [1914] A.C. 932, 967.
[216] Ibid. 968.
[217] Ibid. 969.
[218] Ibid. 972.
[219] Ibid. 948.

"people can be held to have assumed such a special duty. "Whether such a duty has been assumed must depend on the "relationship of the parties, and it is at least certain that there "are a good many cases in which that relationship may be properly "treated as giving rise to a special duty of care in statement." It is quite true that Lord Haldane L.C. applied this principle only to cases of breach of fiduciary duty. But that was inevitable on the facts of the case since upon the view of the pleadings on which he was proceeding it was necessary to show equitable fraud.

In my judgment, the effect of this case is as follows. The House clearly considered the view of *Derry* v. *Peek*,[220] exemplified in *Le Lievre* v. *Gould*,[221] too narrow. It considered that outside contract (for contract was not pleaded in the case), there could be a special relationship between parties which imposed a duty to give careful advice and accurate information. The majority of their Lordships did not extend the application of this principle beyond the breach of a fiduciary obligation but none of them said anything at all to show that it was limited to fiduciary obligation. Your Lordships can, therefore, proceed upon the footing that there is such a general principle and that it is for you to say to what cases, beyond those of fiduciary obligation, it can properly be extended.

I shall not at this stage deal in any detail with *Robinson* v. *National Bank of Scotland Ltd.*[222] Its chief relevance is to Mr. Foster's second point. All that need be said about it on his first point is that it is no authority for the proposition that those relationships which give rise to a special duty of care are limited to the contractual and the fiduciary. On the contrary, it is a clear authority for the view that Lord Haldane did not mean the general principle he stated in *Nocton* v. *Lord Ashburton*[223] to be limited to fiduciary relationships. He said[224] that he wished emphatically to repeat what he had said in *Nocton* v. *Lord Ashburton*,[225] that it would be a great mistake to suppose that the principle in *Derry* v. *Peek*[226] affected the freedom of action of the courts in recognising special duties arising out of other kinds of relationship. He went on: "The whole of the doctrine "as to fiduciary relationships, as to the duty of care arising from "implied as well as express contracts, as to the duty of care "arising from other special relationships which the courts may find

[220] 14 App.Cas. 337.
[221] [1893] 1 Q.B. 491.
[222] 1916 S.C.(H.L.) 154.
[223] [1914] A.C. 932.
[224] 1916 S.C.(H.L.) 154, 157.
[225] [1914] A.C. 932.
[226] 14 App.Cas. 337.

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" to exist in particular cases, still remains, and I should be very " sorry if any word fell from me which should suggest that the " courts are in any way hampered in recognising that the duty of " care may be established when such cases really occur."

I come next to *Donoghue* v. *Stevenson*.[227] In his celebrated speech in that case Lord Atkin did two things. He stated[228] what he described as a " general conception " and from that conception he formulated[229] a specific proposition of law. In between[230] he gave a warning " against the danger of stating " propositions of law in wider terms than is necessary, lest " essential factors be omitted in the wider survey and the " inherent adaptability of English law be unduly restricted."

What Lord Atkin called[231] a " general conception of relations " giving rise to a duty of care " is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

The specific proposition arising out of this conception[232] is that " a manufacturer of products, which he sells in such a form " as to show that he intends them to reach the ultimate consumer " in the form in which they left him with no reasonable possibility " of intermediate examination, and with the knowledge that the " absence of reasonable care in the preparation or putting up of " the products will result in an injury to the consumer's life or " property, owes a duty to the consumer to take that reasonable " care."

Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was " proximity " between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves.

[227] [1932] A.C. 562.
[228] Ibid. 580.
[229] Ibid. 599.
[230] Ibid. 584.
[231] Ibid. 580.
[232] Ibid. 599.

What *Donoghue* v. *Stevenson* [233] did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides.

Lord Thankerton and Lord Macmillan approached the problem fundamentally in the same way, though they left any general conception on which they were acting to be implied. They inquired directly—Lord Thankerton [234] and Lord Macmillan [235]—whether the relationship between the plaintiff and the defendant was such as to give rise to a duty to take care. It is significant, whether it is a coincidence or not, that the term "special relationship" used by Lord Thankerton [236] is also the one used by Lord Haldane in *Nocton* v. *Lord Ashburton*.[237] The field is very different but the object of the search is the same.

In my opinion, the appellants in their argument tried to press *Donoghue* v. *Stevenson* [238] too hard. They asked whether the principle of proximity should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. Then they take the specific proposition laid down by *Donoghue* v. *Stevenson* [238] and try to apply it literally to a certificate or a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers. An inquiry into the possibilities of intermediate examination of a certificate will not be fruitful. The real value of *Donoghue* v. *Stevenson* [238] to the argument in this case is that it shows how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.

It would be surprising if the sort of problem that is created by the facts of this case had never until recently arisen in English law. As a problem it is a by-product of the doctrine of consideration. If the respondents had made a nominal charge for the reference, the problem would not exist. If it were possible in

[233] [1932] A.C. 562.
[234] Ibid. 603.
[235] Ibid. 619–620.
[236] Ibid. 603.
[237] [1914] A.C. 932, 956.
[238] [1932] A.C. 562.

English law to construct a contract without consideration, the problem would move at once out of the first and general phase into the particular; and the question would be, not whether on the facts of the case there was a special relationship, but whether on the facts of the case there was a contract.

The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort. This is the foundation of the liability of a gratuitous bailee. In the famous case of *Coggs* v. *Bernard*,[239] where the defendant had charge of brandy belonging to the plaintiff and had spilt a quantity of it, there was a motion in arrest of judgment "for that it was not alleged in the declaration "that the defendant was a common porter, nor averred that he "had anything for his pains." The declaration was held to be good notwithstanding that there was not any consideration laid. Gould J. said[239]: "The reason of the action is, the particular "trust reposed in the defendant, to which he has concurred by "his assumption, and in the executing which he has miscarried "by his neglect." This proposition is not limited to the law of bailment. In *Skelton* v. *London & North Western Railway Co.*[240] Willes J. applied it generally to the law of negligence. He said: "Actionable negligence must consist in the breach of some duty "... if a person undertakes to perform a voluntary act, he is "liable if he performs it improperly, but not if he neglects to "perform it. Such is the result of the decision in the case of "*Coggs* v. *Bernard*."[241] Likewise in *Banbury* v. *Bank of Montreal*,[242] where the bank had advised a customer on his investments, Lord Finlay L.C. said: "He is under no obligation "to advise, but if he takes upon himself to do so, he will incur "liability if he does so negligently."

The principle has been applied to cases where as a result of the negligence no damage was done to person or to property and the consequential loss was purely financial. In *Wilkinson* v. *Coverdale*[243] the defendant undertook gratuitously to get a fire

[239] (1703) 2 Ld.Raym. 909.
[240] (1867) L.R. 2 C.P. 631, 636.
[241] 2 Ld.Raym. 909.
[242] [1918] A.C. 626, 654.
[243] 1 Esp. 75.

policy renewed for the plaintiff, but, in doing so, neglected formalities, the omission of which rendered the policy inoperative. It was held that an action would lie. In two similar cases the defendants succeeded on the ground that negligence was not proved in fact. Both cases were thus decided on the basis that in law an action would lie. In the first of them, *Shiells* v. *Blackburne*,[244] the defendant had, acting voluntarily and without compensation, made an entry of the plaintiff's leather as wrought leather instead of dressed leather, with the result that the leather was seized. In *Dartnall* v. *Howard & Gibbs* [245] the defendants purchased an annuity for the plaintiff but on the personal security of two insolvent persons. The court, after verdict, arrested the judgment upon the ground that the defendants appeared to be gratuitous agents and that it was not averred that they had acted either with negligence or dishonesty.

Many cases could be cited in which the same result has been achieved by setting up some nominal consideration and suing in contract instead of in tort. In *Coggs* v. *Bernard* [246] Holt C.J. put the obligation on both grounds. He said: "... secondly, "it is objected, that there is no consideration to ground this "promise upon, and therefore the undertaking is but nudum "pactum. But to this I answer, that the owners trusting him with "the goods is a sufficient consideration to oblige him to a careful "management. Indeed, if the agreement had been executory, "to carry these brandies from the one place to the other such a "day, the defendant had not been bound to carry them. But "this is a different case, for assumpsit does not only signify a "future agreement, but in such a case as this, it signifies an "actual entry upon the thing, and taking the trust upon himself: "And if a man will do that, and miscarries in the performance "of his trust, an action will lie against him for that, though "nobody could have compelled him to do the thing."

De La Bere v. *Pearson Ltd.*[247] is an example of a case of this sort decided on the ground that there was a sufficiency of consideration. The defendants advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff asked for the name of a good stockbroker. The editor recommended the name of a person whom he knew to be an outside broker and whom he ought to

[244] 1 H.Bl. 158.
[245] (1825) 4 B. & C. 345.
[246] 2 Ld.Raym. 909, 919.
[247] [1908] 1 K.B. 280; 24 T.L.R. 120, C.A.

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have known, if he had made proper inquiries, to be an undischarged bankrupt. The plaintiff dealt with him and lost his money. The case being brought in contract, Vaughan Williams L.J. thought [248] that there was sufficient consideration in the fact that the plaintiff consented to the publication of his question in the defendants' paper if the defendants so chose. For Barnes P.[249] the consideration appears to have lain in the plaintiff addressing an inquiry as invited. In the same way when in *Everett* v. *Griffiths* [250] the Court of Appeal was considering the liability of a doctor towards the person he was certifying, Scrutton L.J. said that the submission to treatment would be a good consideration.

My Lords, I have cited these instances so as to show that in one way or another the law has ensured that in this type of case a just result has been reached. But I think that today the result can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration. I agree with Sir Frederick Pollock's note on the case of *De La Bere* v. *Pearson Ltd.*[251] where he said in Contracts, 13th ed., p. 140, that "the cause of action is better "regarded as arising from default in the performance of a volun-"tary undertaking independent of contract."

My Lords, it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the obtaining and imparting of information. But I cannot see why it should not be: and if it had not been thought erroneously that *Derry* v. *Peek* [252] negatived any liability for negligent statements, I think that by now it probably would have been. It cannot matter whether the information consists of fact or of opinion or is a mixture of both, nor whether it was obtained as a result of special inquiries or comes direct from facts already in the defendant's possession or from his general store of professional knowledge. One cannot, as I have already endeavoured to show, distinguish in this respect between a duty to inquire and a duty to state.

I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or

[248] [1908] 1 K.B. 280, 287.
[249] Ibid. 289.
[250] [1920] 3 K.B. 163, 191; 36 T.L.R. 491, C.A.
[251] [1908] 1 K.B. 280.
[252] 14 App.Cas. 337.

to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton* v. *Lord Ashburton* [253] are "equivalent to contract," that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good.

I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in *Woods* v. *Martins Bank Ltd.*,[254] the customers or potential customers of the bank. Responsibility can attach only to the single act, that is, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to

[253] [1914] A.C. 932, 972.

[254] [1959] 1 Q.B. 55.

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formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract. But in so far as your Lordships describe the circumstances in which an implication will ordinarily be drawn, I am prepared to adopt any one of your Lordships' statements as showing the general rule; and I pay the same respect to the statement by Denning L.J. in his dissenting judgment in *Candler* v. *Crane, Christmas & Co.*[255] about the circumstances in which he says a duty to use care in making a statement exists.

I do not go further than this for two reasons. The first is that I have found in the speech of Lord Shaw in *Nocton* v. *Lord Ashburton*[256] and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case. Mr. Gardiner does not claim to succeed unless he can establish that the reference was intended by the respondents to be communicated by the National Provincial Bank to some unnamed customer of theirs, whose identity was immaterial to the respondents, for that customer's use. All that was lacking was formal consideration. The case is well within the authorities I have already cited and of which *Wilkinson* v. *Coverdale*[257] is the most apposite example.

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton* v. *Lord Ashburton*[258] has long stood as the authority and for the latter there is the decision of Salmon J. in *Woods* v. *Martins Bank Ltd.*[259] which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which

[255] [1951] 2 K.B. 164.
[256] [1914] A.C. 932.
[257] 1 Esp. 75.
[258] [1914] A.C. 932.
[259] [1959] 1 Q.B. 55.

a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person, any more than in *Donoghue* v. *Stevenson* [260] the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue* v. *Stevenson*,[260] a specific proposition to fit the case. When that has to be done, the speeches of your Lordships today as well as the judgment of Denning L.J. to which I have referred—and also, I may add, the proposition in the American Restatement of the Law of Torts, Vol. III, p. 122, para. 552, and the cases which exemplify it—will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation, for I bear in mind Lord Atkin's warning, which I have quoted, against placing unnecessary restrictions on the adaptability of English law. I have, I hope, made it clear that I take quite literally the dictum of Lord Macmillan,[261] so often quoted from the same case, that "the categories of negligence are never "closed." English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity.

I have another reason for caution. Since the essence of the matter in the present case and in others of the same type is the acceptance of responsibility, I should like to guard against the imposition of restrictive terms notwithstanding that the essential condition is fulfilled. If a defendant says to a plaintiff: "Let me do this for you; do not waste your money in employing "a professional, I will do it for nothing and you can rely on me," I do not think he could escape liability simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any. The relevance of these factors is to show the unlikelihood of a defendant in such circumstances assuming a legal responsibility, and as such they may often be decisive. But they are not theoretically conclusive and so cannot be the subject of definition. It would be unfortunate if they were. For it would mean that plaintiffs would seek to avoid the rigidity of the definition by bringing the action in contract as in *De Le Bere* v. *Pearson Ltd.*[262] and setting up something that would do for consideration. That, to my mind,

[260] [1932] A.C. 562.
[261] Ibid. 639.
[262] [1908] 1 K.B. 280.

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would be an undesirable development in the law; and the best way of avoiding it is to settle the law so that the presence or absence of consideration makes no difference.

Your Lordships' attention was called to a number of cases in courts of first instance or of appeal which it was said would have been decided differently if the appellants' main contention was correct. I do not propose to go through them in order to consider whether on the facts of each it should or should not be upheld. I shall content myself with saying that, in my opinion, *Le Lievre* v. *Gould* [263] and all decisions based on its reasoning (in which I specifically include, lest otherwise it might be thought that generalia specialibus non derogant, the decision of Devlin J. in *Heskell* v. *Continental Express Ltd.*[264]) can no longer be regarded as authoritative; and, when similar facts arise in the future, the case will have to be judged afresh in the light of the principles which the House has now laid down.

My Lords, I have devoted much time and thought to considering the first reason given by Mr. Foster for rejecting the appellants' claim. I have done so not only because his reason was based on a ground so fundamental that it called for a full refutation, but also because it is impossible to find the correct answer on the facts to the appellants' claim until the relevant criteria for ascertaining whether or not there is a duty to take care have been clearly established. Once that is done, their application to the facts of this case can be done very shortly, for the case then becomes a very simple one.

I am satisfied, for the reasons I have given, that a person for whose use a banker's reference is furnished is not, simply because no consideration has passed, prevented from contending that the banker is responsible to him for what he has said. The question is whether the appellants can set up a claim equivalent to contract and rely on an implied undertaking to accept responsibility. Mr. Foster's second point is that in *Robinson* v. *National Bank of Scotland Ltd.*[265] this House has already laid it down as a general rule that in the case of a banker furnishing a reference that cannot be done. I do not agree. The facts in that case have been stated by my noble and learned friend Lord Reid, and I need not repeat them. I think it is plain upon those facts that the bank in that case was not furnishing

[263] [1893] 1 Q.B. 491.
[264] [1950] 1 All E.R. 1033, 1044; 83 Ll.L.Rep. 438, 455.
[265] 1916 S.C.(H.L.) 154.

the reference for the use of the pursuer; he was not a person for whose use of the reference they were undertaking any responsibility, and that quite apart from their general disclaimer. Furthermore, the pursuer never saw the reference; he was given only what the Lord Justice-Clerk [266] described as "a gloss of it." This makes the connection between the pursuer and the defendants far too remote to constitute a relationship of a contractual character.

On the facts of the present case Mr. Foster has under his third head argued for the same result. He submits, first, that it ought not to be inferred that the respondents knew that the National Provincial Bank were asking for the reference for the use of a customer. If the respondents did know that, then Mr. Foster submits that they did not intend that the reference itself should be communicated to the customer; it was intended only as material upon which the customer's bank could advise the customer on its own responsibility. I should consider it necessary to examine these contentions were it not for the general disclaimer of responsibility which appears to me in any event to be conclusive. I agree entirely with the reasoning and conclusion on this point of my noble and learned friend, Lord Reid. A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake. For this reason alone, I would dismiss the appeal.

LORD PEARCE. My Lords, "although liability for negligence "in word," said Lord Haldane in *Nocton* v. *Lord Ashburton*,[267] "has in material respects been developed in our law differently "from liability for negligence in act, it is none the less true that "a man may come under a special duty to exercise care in giving "information or advice. I should accordingly be sorry to be "thought to lend countenance to the idea that recent decisions "have been intended to stereotype the cases in which people can "be held to have assumed such a special duty. Whether such a "duty has been assumed must depend on the relationship of the "parties, and it is at least certain that there are a good many

[266] 1916 S.C. 46, 58.

[267] [1914] A.C. 932, 948.

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"cases in which that relationship may be properly treated as "giving rise to a special duty of care in statement."

The law of negligence has been deliberately limited in its range by the courts' insistence that there can be no actionable negligence in vacuo without the existence of some duty to the plaintiff. For it would be impracticable to grant relief to everybody who suffers damage through the carelessness of another.

The reason for some divergence between the law of negligence in word and that of negligence in act is clear. Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage. How far they are relied on unchecked (by analogy with there being no probability of intermediate inspection—see *Grant* v. *Australian Knitting Mills Ltd.*[268]) must in many cases be a matter of doubt and difficulty. If the mere hearing or reading of words were held to create proximity, there might be no limit to the persons to whom the speaker or writer could be liable. Damage by negligent acts to persons or property on the other hand is more visible and obvious; its limits are more easily defined, and it is with this damage that the earlier cases were more concerned. It was not until 1789 that *Pasley* v. *Freeman*[269] recognised and laid down a duty of honesty in words to the world at large—thus creating a remedy designed to protect the economic as opposed to the physical interests of the community. Any attempts to extend this remedy by imposing a duty of care as well as a duty of honesty in representations by word were curbed by *Derry* v. *Peek*.[270]

In *Cann* v. *Willson*[271] it had been held that a valuer was liable in respect of a negligent valuation which he had been employed by the owner of property to make for the purpose of raising a mortgage, and which the valuer himself put before the proposed mortgagee's solicitor. Chitty J. there said[272]: "It seems to me "that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use "reasonable care in the preparation of the document called a "valuation. I think it is like the case of the supply of an article "—the supply of the hairwash in the case of *George* v.

[268] [1936] A.C. 85.
[269] (1789) 3 Term Rep. 51.
[270] 14 App.Cas. 337.
[271] 39 Ch.D. 39.
[272] Ibid. 42–43.

"*Skivington*,[273]" later approved in *Donoghue* v. *Stevenson*.[274] Thus in the case of economic damage alone he was drawing an analogy from a case where physical damage to the wife of a purchaser was held to give rise to an action for negligence.

Cann v. *Willson*[275] was, however, overruled by *Le Lievre* v. *Gould*[276] on the ground, erroneous as it seems to me, that it could not stand with *Derry* v. *Peek*.[277] The particular facts in *Le Lievre* v. *Gould*[278] justified the particular decision, as Denning L.J. explained in *Candler* v. *Crane, Christmas & Co.*[279] But the ratio decidendi was wrong since it attributed to *Derry* v. *Peek*[280] more than that case decided. In *Nocton* v. *Lord Ashburton*[281] this House pointed out that too much had been ascribed to *Derry* v. *Peek*.[282] Lord Haldane said[283]: "The discussion of the case "by the noble and learned lords who took part in the decision "appears to me to exclude the hypothesis that they considered "any other question to be before them than what was the neces- "sary foundation of an ordinary action for deceit. They must "indeed be taken to have thought that the facts proved as to the "relationship of the parties in *Derry* v. *Peek*[284] were not enough "to establish any special duty arising out of that relationship "other than the general duty of honesty. But they do not say "that where a different sort of relationship ought to be inferred "from the circumstances the case is to be concluded by asking "whether an action for deceit will lie. I think that the authorities "subsequent to the decision of the House of Lords, show a "tendency to assume that it was intended to mean more than "it did. In reality the judgment covered only a part of the "field in which liabilities may arise. There are other obligations "besides that of honesty, the breach of which may give a right to "damages. These obligations depend on principles which the "judges have worked out in the fashion that is characteristic of "a system where much of the law has always been judge-made "and unwritten." Lord Haldane spoke to a like effect in *Robinson* v. *National Bank of Scotland Ltd.*[285]: "I think, as "I said in *Nocton's* case,[286] that an exaggerated view was taken "by a good many people of the scope of the decision in *Derry* v.

[273] L.R. 5 Ex. 1.
[274] [1932] A.C. 562.
[275] 39 Ch.D. 39.
[276] [1893] 1 Q.B. 491.
[277] 14 App.Cas. 337.
[278] [1893] 1 Q.B. 491.
[279] [1951] 2 K.B. 164, 151.
[280] 14 App.Cas. 337.
[281] [1914] A.C. 932.
[282] 14 App.Cas. 337.
[283] [1914] A.C. 932, 947.
[284] 14 App.Cas. 337.
[285] 1916 S.C.(H.L.) 154, 157.
[286] [1914] A.C. 932.

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"*Peek*.[287] The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the court may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur." Lord Haldane was thus in terms preserving unencumbered the area of special relationships which created a duty of care; and he was not restricting the area to cases where courts of equity would find a fiduciary duty.

The range of negligence in act was greatly extended in *Donoghue* v. *Stevenson*[288] on the wide principle of the good neighbour; sic utere tuo ut alienum non laedas. It is argued that the principles enunciated in *Donoghue* v. *Stevenson*[288] apply fully to negligence in word. It may well be that Wrottesley J. in *Old Gate Estates Ltd.*[289] put the matter too narrowly when he confined the applicability of the principles laid down in *Donoghue* v. *Stevenson*[290] to negligence which caused damage to life, limb or health. But they were certainly not purporting to deal with such issues as, for instance, how far economic loss alone, without some physical or material damage to support it, can afford a cause of action in negligence by act. See *Morrison Steamship Co. Ltd.* v. *Greystoke Castle* (*Cargo Owners*),[291] where it was held that it could do so. The House in *Donoghue* v. *Stevenson*[292] was, in fact, dealing with negligent acts causing physical damage, and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words. That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence.

How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may

[287] 14 App.Cas. 337.
[288] [1932] A.C. 562.
[289] 161 L.T. 227.
[290] [1932] A.C. 562.
[291] [1947] A.C. 265.
[292] [1932] A.C. 562.

be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection.

In this sphere the law was developed in the United States in *Glanzer* v. *Shepherd*,[293] where a public weigher employed by a vendor was held liable to a purchaser for giving him a certificate which negligently overstated the amount of the goods supplied to him. The defendant was thus engaged on a task in which, as he knew, vendor and purchaser alike depended on his skill and care and the fact that it was the vendor who paid him was merely an accident of commerce. This case was followed and developed in later cases.

In the *Ultramares* case,[294] however, the court felt the undesirability of exposing defendants to a potential liability "in "an indeterminate amount for an indefinite time to an indeter- "minate class." It decided that auditors were not liable for negligence in the preparation of their accounts (of which they supplied thirty copies, although they were not aware of the specific purpose, namely, to obtain financial help) to a plaintiff who lent money on the strength of them.

In South Africa, under a different system of law, two cases show a similar advance and subsequent restriction (*Perlman* v. *Zoukendyk* [295] and *Herschel* v. *Mrupi* [296]).

Some guidance may be obtained from the case of *Shiells* v. *Blackburne*.[297] There a general merchant undertook voluntarily and without reward to enter a parcel of the goods of another, together with a parcel of his own of the same sort, at the Customs House for exportation. Acting, it was contended, with gross negligence, he made the entry under a wrong denomination whereby both parcels were seized. The plaintiff failed on the facts to make out a case of gross negligence. But Lord Loughborough said [298]: " . . . where a bailee undertakes to perform a gratuitous " act, from which the bailor alone is to receive benefit, there the " bailie is only liable for gross negligence; but if a man gratuitously " undertakes to do a thing to the best of his skill, where his " situation or profession is such as to imply skill, an omission " of that skill is imputable to him as gross negligence. If in " this case a ship-broker, or a clerk in the Custom House, had " undertaken to enter the goods, a wrong entry would in them " be gross negligence, because their situation and employment

[293] 233 N.Y. 236.
[294] 255 N.Y. 170.
[295] 1934 C.P.D. 151.
[296] 1954 (3) S.A. 464.
[297] 1 H.Bl. 158.
[298] Ibid. 163.

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"necessarily imply a competent degree of knowledge in making "such entries." Heath J. said [299]: ". . . the surgeon would "also be liable for such negligence, if he undertook gratis to attend "a sick person, because his situation implies skill in surgery; but "if the patient applies to a man of a different employment or "occupation for his gratuitous assistance, who either does not "exert all his skill, or administers improper remedies to the best "of his ability, such person is not liable."

In *Gladwell* v. *Steggall* [300] an infant plaintiff, 10 years old, recovered damages for injury to health from a surgeon and apothecary who had treated her. She did not sue in contract but brought an action ex delicto alleging a breach of duty arising out of his employment by her, although it was her father to whom the bill was made out. And in *Wilkinson* v. *Coverdale* [301] Lord Kenyon accepted the proposition that a defendant who had gratuitously undertaken to take out an insurance policy, and who did it negligently, could be liable in damages.

In those cases there was no dichotomy between negligence in act and in word, nor between physical and economic loss. The basis underlying them is that if persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession, they have a duty of skill and care. In terms of proximity one might say that they are in particularly close proximity to those who, as they know, are relying on their skill and care although the proximity is not contractual.

The reasoning of *Shiells* v. *Blackburne* [302] was applied in *Everett* v. *Griffiths*,[303] where the Court of Appeal held that a doctor owed a duty of care to a man by whom he was not employed but whom he had a duty to examine under the Lunacy Act. It was also relied on by Denning L.J. in his dissenting judgment in *Candler* v. *Crane, Christmas & Co.*[304] He reached the conclusion that in respect of reports and work that resulted in such reports there was a duty of care laid on "those persons such as "accountants, surveyors, valuers and analysts, whose profession "and occupation it is to examine books, accounts and other things, "and to make reports on which other people—other than their "clients—rely in the ordinary course of business." The duty is, in his opinion,[305] owed (apart from contractual duty to their empoyer) "to any third person to whom they themselves show the accounts,

[299] 1 H.Bl. 158, 162.
[300] 5 Bing.N.C. 733.
[301] 1 Esp. 75.
[302] 1 H.Bl. 158.
[303] [1920] 3 K.B. 163, 182, 217.
[304] [1951] 2 K.B. 164, 179.
[305] Ibid. 180–181.

"or to whom they know their employer is going to show the "accounts, so as to induce him to invest money or take some "other action on them." He excludes strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to hand their accounts. "The test of "proximity in these cases is: did the accountants know that the "accounts were required for submission to the plaintiff and use "by him?" [306] (It is to be noted that these expressions of opinion produce a result somewhat similar to the American Restatement of the Law of Tort, vol. III, p. 122, para. 552.) I agree with those words. In my opinion, they are consonant with the earlier cases and with the observations of Lord Haldane.

It is argued that so to hold would create confusion in many aspects of the law and infringe the established rule that innocent misrepresentation gives no right to damages. I cannot accept that argument. The true rule is that innocent misrepresentation per se gives no right to damages. If the misrepresentation was intended by the parties to form a warranty between two contracting parties, it gives on that ground a right to damages (*Heilbutt, Symons & Co.* v. *Buckleton* [307]). If an innocent misrepresentation is made between parties in a fiduciary relationship it may, on that ground, give a right to claim damages for negligence. There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

Was there such a special relationship in the present case as to impose on the defendants a duty of care to the plaintiffs as the undisclosed principals for whom the National Provincial Bank was making the inquiry? The answer to that question depends on the circumstances of the transaction. If, for instance, they disclosed a casual social approach to the inquiry, no such special relationship or duty of care would be assumed (see *Fish* v. *Kelly* [308]). To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer. It is conceded that Salmon J. rightly found a duty of care in *Woods* v. *Martins Bank Ltd.* [309] but the facts in that case were wholly different from those in the present case. A most important circumstance is the form of the inquiry and of the answer. Both were here plainly

[306] [1951] 2 K.B. 164, 181.
[307] [1913] A.C. 80, H.L.
[308] 17 C.B.N.S. 194.
[309] [1959] 1 Q.B. 55.

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stated to be without liability. Mr. Gardiner argues that those words are not sufficiently precise to exclude liability for negligence. Nothing, however, except negligence could, in the facts of this case, create a liability (apart from fraud, to which they cannot have been intended to refer and against which the words would be no protection, since they would be part of the fraud). I do not, therefore, accept that even if the parties were already in contractual or other special relationship the words would give no immunity to a negligent answer. But in any event they clearly prevent a special relationship from arising. They are part of the material from which one deduces whether a duty of care and a liability for negligence was assumed. If both parties say expressly (in a case where neither is deliberately taking advantage of the other) that there shall be no liability, I do not find it possible to say that a liability was assumed.

In *Robinson* v. *National Bank of Scotland Ltd.*[310] also the correspondence expressly excluded responsibility. Possibly that factor weighed with Lord Haldane when he said[311]: "But when "a mere inquiry is made by one banker of another, who stands "in no special relation to him, then, in the absence of special "circumstances from which a contract to be careful can be in-"ferred, I think there is no duty excepting the duty of common "honesty to which I have referred." I appreciate Mr. Gardiner's emphasis on the general importance to the business world of bankers' references and the desirability that in an integrated banking system there should be a duty of care with regard to them, but on the facts before us it is in my opinion not possible to hold that there was a special duty of care and a liability for negligence.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Evill & Coleman; Franks, Charlesly & Co.*

F. C.

[310] 1916 S.C.(H.L.) 154.

[311] Ibid. 157.