MASTER AND SERVANT—DUTY OF MASTER—DEFECTIVE TOOL

In Davie v. New Merton Board Mills, Ltd. [1959] 2 W.L.R. 331—already noted: at first instance [1957] C.L.J. 184, in the Court of Appeal [1958] C.L.J. 27—despite an equal division in the lower courts, the House of Lords was unanimous in holding that an employer was not liable for the injury caused to his workman by a defect in a tool supplied by him when that defect, though due to the negligence of the manufacturer, was not discoverable by any examination reasonably to be expected either of the retailer from whom it was bought or of the employer and his servants. Their Lordships expressly stated, and by overruling Donnelly v. Glasgow Corporation 1953 S.C. 107 made it clear, that the result would have been the same if the tool, being of a normal standard type, had been bought direct from the manufacturer; but the case of a special tool ordered from the manufacturer was left open.

This note is not concerned with the social or other desirability of the result attained by their Lordships, nor with the queries explicitly, and therefore deliberately, left unresolved by them. It is concerned with the legal mechanism operating (but not, at any rate explicitly, employed) to produce the result, and with the unexamined consequences of that operation. The student should be encouraged to detect, and to reflect upon, the process of decision. The decision in Davie's case depends upon the view taken of the central and simple point—the nature of the master's duty to the servant. Admittedly a considerable body of authority seemed prima facie to suggest that the master's duty to the servant was a limited duty of care; but it is equally clear that this duty had historically been very markedly stepped up. Davie's case constituted a critical instance: how, at this point, would the development go?

In the absence of any explicit choice of category, if the court, in Cardozo's phrase, seeks merely to "match coloured threads," the direction taken will largely depend upon the category into which the duty at issue is automatically or unconsciously classed. If the mind directs itself to the law of torts and to the nature of the duty ordinarily there owed, it is led to the category of vicarious liability, and would tend to conclude that, the default of the manufacturer being outside the scope of vicarious liability as normally understood, the employer is not liable. The student should note the degree to which their Lordships' reasoning in Davie's case is dominated by the notion of vicarious liability. If, however, we think in terms of contractual duty—and there was a
contract between the employer and his servant—the standard of
duty is almost automatically pitched higher. In the context of
contract we do not usually have recourse to the notion of vicarious
liability; for it is not only fault or imputed fault which makes a
contractor liable. For example, a person letting out the Davie
tool for hire would, at common law, be liable for the negligent
defect in its manufacture, even though he was not the manufacturer
and even if he had bought it on the open market as a standard
tool—unless, perhaps, he let it under a trade-name—in spite of
the fact that, on the better view, there is no absolute warranty
of fitness for a purpose on the hire of such a chattel (Hyman v.
Nye (1881) 6 Q.B.D. 685).

It is noteworthy that the most categorical of the statements
in the House of Lords denying the master’s liability—that of
Viscount Simonds—classes the duty most absolutely in tort, not
only stating quite blankly that “this action was founded in tort,”
but adding that “it can only lead to confusion, if, when the action
is in tort, the court embarks on the controversial subject of
implied contractual terms.” Lord Reid’s decision is a good deal
less absolute; and it is again to be noted that he is much more
cautious in his classification: he said: “A master’s duty to his
servant with regard to the safety of the plant supplied should,
I think, be regarded as a part of the law of tort. . . . It was
common at one time to regard it as depending on the contract of
employment. . . . No doubt this view leaves the court much
scope. . . .” Lord Tucker and Lord Keith are content, without
specification, to refer to the master’s “common law obligations,”
and Lord Morton speaks of the duty owed by the master “at
common law”; but it would seem in the context that the common
law adverted to is predominantly tortious. On the other hand,
in the previously leading case of Wilsons and Clyde Coal Co.,
Ltd. v. English [1988] A.C. 57, which extended the master’s duty,
the emphasis of Lord Wright was (see, e.g., p. 78) on the “fundamental
obligations of a contract of employment.”

How should the master’s or the servant’s duties be classified?
How will they in future be classified? There is, after all, much
authority, some of it very recent, for regarding these duties as
based upon and arising out of the contract of employment. In
the very recent case of Lister v. Romford Ice and Cold Storage
Co., Ltd. [1957] A.C. 555 not only was the contractual nature
of the servant’s duties stressed but Viscount Simonds himself said:
“. . . I think it right to say that I concur in what I understand
to be the unanimous opinion of your Lordships that the servant
owes a contractual duty of care to his master and that a breach
of that duty founds an action for damages for breach of contract. . . . It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.” Surely if a servant’s duty is contractual, the master’s correlative duty can and should be regarded as similarly contractual? Indeed, most recently of all, in *Matthews v. Kuwait Bechtel Corporation* [1959] 2 Q.B. 57—noted infra, p. 163—the Court of Appeal, relying, *inter alia*, upon *Lister’s* case, has expressly held that the claim for personal injuries by a servant against his master is properly pleadable in contract.

If the contractual aspect of the master and servant relationship had been more present to their Lordships’ minds in *Davie’s* case, it would not, perhaps, have been said, as it was at page 343, that the servant’s claim—which after all had obtained the approval of Jenkins L.J., as he then was—“was against reason, contrary to principle, and barely supported by authority.” Indeed, the contractual duty which Jenkins L.J. believed to exist in *Davie’s* case has a very considerable common law pedigree and was stated with great sobriety and accuracy by, for example, Montague Smith J. in the Exchequer Chamber in *Francis v. Cockrell* (1870) L.R. 5 Q.B. 501, 513: “I think, in conformity with the decision in *Readhead v. Midland Ry.*, that there was no warranty or insurance that the stand was absolutely safe; but, I think, that there was an implied undertaking on the part of the defendant that due care had been used in the construction of it. It seems to me that, in cases of this kind which relate to things and not to personal services, the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so.” Surely in *Davie’s* case also, a thing—there, a tool—was supplied for use under a contract which cast upon the defendant a duty of due care, and, to adopt the impersonal form recommended, due care and skill had not been used in the construction of that thing, even though the contractor himself, the master, and all the persons for whom he might be vicariously liable in tort, had been subjectively very diligent.

However the matter may now stand resolved, what the academic student should note is the practical consequences of an
apparently theoretical classification of duties, and the constraining
effect of such a classification, especially when it amounts to the
instinctive acceptance of a category—that is to say, of a series of
imperfectly examined analogies. The instinctively accepted analo-
gies compel as apparently inevitable a conclusion which, considered
without commitment, will be seen to have been anything but
inevitable.

C. J. Hamson.

CONTRACT—CONSIDERATION—RETAIL PRICE—COPYRIGHT

"Consideration" is still a concept which can evoke different
responses in different judges; and the judges in Chappell & Co.,
Ltd. v. Nestlé Co., Ltd. [1959] 3 W.L.R. 168 (H.L.) were no
exception. The point at issue in the case, said Lord Tucker,
"though short, is one of considerable difficulty." It concerned
section 8 (1) of the Copyright Act, 1956, which permits a person
to make a record of a musical work for the purpose of its being
sold retail, if he gives notice to the owner of the copyright and
pays to him as a royalty 6½ per cent. of the "ordinary retail selling
price." The appellants held the copyright in "Rockin' Shoes,"
a musical work of which H. Co. had manufactured cheap, thin
records, which were to be mounted on cardboard discs that carried
advertisements for Nestlé chocolate. Nestlé, Ltd., advertised these
records for sale to the public at 1s. 6d., stating that three wrappers
of their sixpenny bars of chocolate should be sent in with the postal
order. The wrappers were always thrown away by them; but the
purpose of selling records like "Rockin' Shoes" was undoubtedly
to sell more chocolate. H. Co. offered the appellants the statutory
royalty on 1s. 6d. per record. They refused the offer, and sought
an injunction to restrain the manufacture and sale of the records.

Upjohn J. accepted the contention that this was not "an
ordinary retail sale with an ordinary selling price" and did not
fall within the section. The majority of the Court of Appeal
disagreed. They thought that this was a retail sale for 1s. 6d.,
and that the demand for wrappers was only a "condition"
limiting the class of offerees to those who produced three of them
with their money. In the House of Lords all their Lordships
agreed that this was a sale "by retail." But, whereas Viscount
Simonds and Lord Keith went on to agree with the majority of
the Court of Appeal that the wrappers were no more than a
"qualification" and not part of the consideration to be advanced
by the purchaser, the majority took the opposite view and decided
that they were a part of the price. In the result, therefore, the