Vendor's "Duty" to Inspect Chattels A Reply

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In the March number of the Dickinson Law Review, Professor Donald J. Farage has crossed lances with me upon the question of the duty of a vendor of a chattel to inspect it before selling it. In my former article, I expressed the view that it is socially undesirable to impose a duty of inspection upon a vendor (as distinct from the manufacturer or other creator) of a chattel. I also said that until quite recently it has generally been thought that a vendor is not liable (in the absence of a warranty) for harm caused by a defect "where he did not know it existed or was not possessed of information which should have made him suspicious." Unfortunately, in Professor Farage's article his quotation of my view as to the existing state of the law inadvertently omits the above quoted words. Professor Farage also overlooks my statement, "There may be a rare and exceptional situation where a defect will cause a catastrophe and even an off chance that the chattel may be defective is such as to demand some looking into by the vendor. But such cases will be few and far between." Aside from these qualifications, Professor Farage accurately states my view that the vendor who has no knowledge or suspicion that the chattel is dangerously defective, should not be required to make an inspection to discover unknown defects. Professor Farage disagrees with this and argues that the vendor should be under some duty of inspection, the extent of which he does not make clear. The reader will have to arrive at his own conclusions concerning the relative weight and merit of these two opposing arguments.

If Professor Farage's article did no more than present a view which is opposed to mine there would be no need for this reply; but he goes further and, in effect, says that I have misunderstood the authorities which I cite and that I failed "to cite a single case flatly holding for (my) views." Such a statement cannot go unchallenged.

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1Farage, Must a Vendor Inspect Chattels Before Their Sale?—An Answer (1941) 45 Dickinson L. Rev. 159.
2Eldredge, Vendor's Tort Liability (1941) 89 U. of Pa. L. Rev. 306.
3Ibid at p. 322.
445 Dickinson Law Rev. at p. 163.
645 Dickinson L. Rev. at p. 166.
Secondly, Professor Farage draws certain analogies which seem to me to be false analogies. I shall first discuss this point before referring to the actual decisions. Professor Farage says:

"In any event, I find difficulty in understanding why, although the vendor is conceded by Mr. Eldredge to have sufficient economic interest in his trade to justify the imposition of a duty to make a 'reasonable' inspection of the premises for the protection of customers, the same vendor is deemed not to have a sufficient economic interest in the same trade which may justify the imposition of a duty to 'reasonably' inspect stock for the benefit of the same customers."7

Professor Bohlen has suggested that there is a real distinction in the two situations so far as this question of benefit is concerned.8 Also, I do not believe there is any true analogy between the duty of inspection of land owed by a possessor of business premises to his business guest and the duty of the vendor of a chattel to his customer. Certain well known affirmative duties of inspection attach to the possession and use for business purposes of both land and chattels. The analogy to the inspection duty of a possessor of land to his business guest is found in the inspection duty of one who supplies chattels to be used for his own business purposes, and which is sometimes referred to as the rule of Heaven v. Pender.9 There are affirmative duties which attach to the possession of both land and chattels, and which drop from the shoulders of the defendant when he doffs the cloak of possession or ownership.

If an analogy, involving land, is sought to the vendor of a chattel, the closest analogy is that of the vendor of land. Insofar as decided authority goes, it seems clear that the vendor of land is under no duty to inspect it for the purpose of discovering defects which are dangerous to the purchaser or to persons coming upon the land, or even to persons outside the boundaries of the land.10 Indeed, it is not clear whether the vendor of land is even under a duty to disclose known discoverable defects. As a general rule, when the vendor of land gives up title and possession he ceases at that moment to be subject to liability for harm thereafter caused by dangerous conditions upon the land, not created by his own active con-

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7bid at p. 160.
8BOHLEN, STUDIES IN THE LAW OF TORTS (1926), pp. 85-86.
duct. If the person who sells land is under no duty to inspect it to discover dangerous defects lurking in it, and is not liable for harm caused after possession and title have passed, I see no additional controlling reason for imposing upon one who sells a chattel the duty to inspect it to discover dangerous defects.

The really serious charge which Professor Farage has leveled at me is that I have misrepresented the state of the decided cases. He challenges my statement that "In two cases involving observable defects but in which the vendor did not inspect and learn of them, he was held not to have any such duty." The case I principally relied upon is the leading English case of Longmeid v. Holliday. Professor Farage says, "There is no statement in the report that the defect was reasonably observable." The original report, which Professor Farage did not have access to when he wrote his article, shows that the plaintiff averred that the lamp was "cracked and leaky, dangerous, unsafe, and wholly unfit and improper for use." It is further stated, "There was evidence that the lamp was defectively constructed, but no proof that the defendant knew of the defect." The plaintiff failed because the defendant did not have actual knowledge of the defect.

In discussing Longmeid v. Holliday Professor Bohlen has commented as follows:

"But the vendor is not bound to inspect the articles which he sells in order to discover any possible defects which may unfit them for use. In Longmeid v. Holliday it was contended that ignorance of a defect in the article sold which could have been discovered by inspection was equivalent to knowledge thereof. * * * It was held that there being no actual fraud shown and 'no misfeasance toward the wife (plaintiff) independently of the contract,' she could not recover. * * * The defendant, therefore, did not himself or by his servants create the defective condition, he was not the maker, but the vendor merely; the case, therefore, is authority only as to the obligation of a vendor to his vendee arising out of the act of transferring the title and possession of property. To such a relation no higher duty attaches than to the gratuitous transfer of an article, as by gift or loan. * * * This case decides, at most, this: that in the absence of fraud or conscious concealment of a known though latent defect, the vendor's only liability is upon warranty express or implied, which being purely consensual, can extend no further than the vendee. It

1289 U. OF PA. L. REV. at p. 323.
13 Exch. 761 (1851).
1445 DICKINSON L. REV. at p. 164.
16 Exch. at p. 762.
settles that there is no duty by a vendor, as such, to inspect a chattel before he sells it. * * *"18

In Bottomley v. Bannister17 Lord Justice Greer of the Court of Appeals of England, after quoting at length from Longmeid v. Holliday, said: "It would serve no useful purpose to go through the various decisions in detail, but in my judgment it has not yet been decided by any authority binding on this Court that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract, by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous."18

The second case which I cited is Moore v. Jefferson D. & D. Company.19 As I read the case, the court held (1) that the defendant did not owe any duty to the plaintiff with respect to the unknown gasoline fumes in the oil drum and (2) that the act of the third person who lighted the match exploding the fumes was a superseding cause. I concede that this case is not as strong, on its facts, as the other.

Professor Farage quotes my statement, "there is a considerable body of case law in which vendors who did not inspect chattels which, by reason of hidden defects, caused harm, have been absolved from liability."20 He then comments, in italics for emphasis, "No cases are cited at this point."21 I submit that the seventeen cases which are cited in footnote 80 at the end of the next following sentence, the five cases which are cited in footnote 82 and the two cases which are cited in footnote 84 do literally support my quoted statement. In each one of those twenty-four cases a vendor who did not inspect a chattel which, by reason of hidden defects in it, caused harm, was absolved from liability.

With respect to the seventeen cases I cited in footnote 80, Professor Farage comments:

"These, however, obviously do not support the view that a vendor owes no duty to inspect chattels. At best they hold that the duty to inspect must not be 'unreasonably' onerous. Indeed, the next sentence of the article concedes this to be so by saying, 'As to these cases it may be said that the vendor could not have discovered the defect even if he had used 'reasonable care' in inspecting them.'"
Up to this point, therefore, Mr. Eldredge fails to cite any holding in support of his view. He does thereafter refer to dicta in seven cases upholding his position, at the same time conceding, however, that other cases use language which might be construed against his position. The dicta are therefore not persuasive either way."

I do not agree that I have failed to cite any holding in support of my view. I believe that only through the medium of benevolent yearning can the statements in the "seven cases" be dismissed as dicta. Let us examine those cases.

The first case is Peaslee-Gaulbert Co. v. McMath's Admr. It is an important, carefully considered opinion in which the court sharply distinguishes between the situation of a manufacturer and the situation of a vendor. The suit was to recover damages for the death of a person who was killed when a can of Japan dryer exploded. The defendant was a paint dealer who had sold the dryer to the deceased's employer. On appeal from a judgment for the plaintiff, the court held that the lower court should have sustained the defendant's motion for a directed verdict in its favor. In his opinion Judge Carroll said: "And it is earnestly insisted that although the evidence may not show that Peaslee-Gaulbert Company knew the explosive and dangerous quality of the dryer, they are yet liable if by the exercise or ordinary care they could have known its explosive and dangerous character." This language indicates that the plaintiff endeavored on appeal to hold his verdict and judgment by contending that the defendant's duty was to discover those dangers which were discoverable "by the exercise of ordinary care." The court's answer to this contention is found in the following language:

"But the dealer who purchases and sells an article in common and general use, in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not. He may take it as he finds it on the market. He is not required to investigate

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22With respect to the remaining ten of the seventeen cases I cited in footnote 80 I pointed out in footnote 81 that some of them contained statements to the effect that the vendor neither "knew nor by the exercise of ordinary care could have known" of the defect. I also commented upon the difficulty of evaluating such language. To my mind it is not a statement, by way of dictum, of a rule of law but a statement of the factual situation confronting the court. In these cases no inspection had been made of the chattel which caused the injury. The courts did not say that the vendor was under a duty to inspect, and liable for harm caused by the failure to discover "observable" defects, and then add that, on the facts, the failure to inspect at all was immaterial because the required inspection would not have disclosed the particular defect in the case before the court. The courts held that defendants who had not inspected were not liable for harm caused by the unknown defect. In analyzing the facts the courts made the factual statement that "ordinary care" in making an inspection would not have disclosed the defect. I do not believe Professor Farage is justified in considering these cases as definite dicta imposing a duty to inspect.

23148 Ky. 265, 146 S.W. 770 (1912).

24148 Ky. at p. 271.
its qualities or endeavor to ascertain whether it is dangerous, for the use intended before he can absolve himself from liability in the event injury results from its use. There are many necessary articles and things in common and general use throughout the country that are dangerous unless used with care, but the dealer who buys and sells them in the open market in the usual and ordinary course of his business, and who makes no representations or concealments, and who does not know that the article is explosive or dangerous in its ordinary use, is not to be made liable merely because some person is injured or killed while handling it. The merchant or dealer can only be made responsible in damages to a party who has no contractual relations with him when the article is imminently or inherently dangerous in the ordinary use for which it is intended or the use to which it may reasonably be expected the article will be put or applied; and, when with knowledge of this fact he sells or puts it on the market without giving notice to the purchaser of its dangerous quality, or, when he represents the thing as being safe for the use intended, when in fact it is not."

This language cannot be dismissed as a mere dictum. On the record presented to it the court found that the defendant did not have knowledge of the dangerous qualities of the Japan dryer and held that in the absence of such knowledge he was under no tort liability whatever.

In Belcher v. Goff Bros, the plaintiff appealed from an adverse judgment and the principal assignments of error were to the refusal of the plaintiff's points for charge. The Supreme Court of Virginia held that the trial court had properly rejected these points for charge and said:

"If the seller had known, before the sale to the plaintiff, that the kerosene was mixed with gasoline, and failed to disclose it, and that was the proximate cause of the injury to the plaintiff, without negligence on her part, then the defendants would have been liable. But the evidence does not support that conclusion, and the instructions tendered by the plaintiff were fatally defective in failing to state that the defendants knowingly sold to the plaintiff a mixture of gasoline and coal oil, or gasoline for coal oil."
In Tourte v. Horton Manufacturing Co. the court affirmed a judgment of nonsuit and said, "The basis of the liability is the seller's superior knowledge and concealment of the latent defects."  

In Noble v. Sears Roebuck and Co. the case arose on the defendant's demurrer to the complaint. Judge Bowen said: "The question presented on this demurrer is whether or not a seller of an article of merchandise manufactured by another, not known to the seller to be imminently or inherently dangerous to the life or limb of any one who may use it for the purpose for which it is intended, is liable to a third person for injuries resulting from manufacturing defects."  

Having stated this question Judge Bowen answered it in the following language: "A seller of an article of known or described manufacture, manufactured by another, is not liable to the purchaser for damages resulting from latent defects when the article is not known to the seller to be inherently dangerous to the life or limb of any one who may use it for the purpose for which it is intended."  

In Tsbell v. Biederman Furniture Co. the lower court sustained the defendant's demurrer to the plaintiff's complaint. The plaintiff appealed from the judgment on the demurrer. The plaintiff had been injured by the collapse of a bed which had been purchased from the defendant by her husband. The complaint averred that "a piece on which boards or slats of this bed rested was weak and contained a knot and was insufficiently attached."  The court referred to "a distinction between the liability on the part of the manufacturer of articles * * * and the liability which might attach to a retail dealer of the two classes of articles," and then quoted with approval the statement from Corpus Juris that "A distinction between a dealer and a manufacturer is sometimes noted, and it is held that a dealer is under no duty or obligation to examine the articles which he sells to ascertain whether there are defects therein, and that he is not liable for an injury arising from such defects where he had no actual knowledge thereof."  

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29108 Cal. App. at p. 24. The court also said: "The motion for nonsuit was made upon the ground that the evidence showed no legal liability upon respondent's part. The motion was properly granted. The rule of law involved is found in 24 Ruling Case Law, page 509, which reads: 'The dealer who purchases and sells an article in common and general use in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not.' In 45 Corpus Juris, 893, we find the same rule stated: 'A dealer is under no duty or obligation to examine the articles which he sells to ascertain whether there are defects therein, and . . . is not liable for an injury arising from such defects where he had no actual knowledge thereof.'
31Ibid at p. 181. Italics added.
32Ibid at p. 181. Italics added.
33115 S.W. (2d) 46 (Mo. App. 1938).
34Ibid at p. 47.
It is particularly interesting to compare Professor Farage's statement that I fail to cite "any holding" denying a duty of inspection with the very recent decision of the Court of Appeals of Louisiana in the case of Boyd v. J. C. Penny Co., Inc. The plaintiff purchased a dress from the defendant which contained some deleterious substance which injured her skin. The court below dismissed her action and this was affirmed on appeal. The court said:

"Under our interpretation of the law applicable to this case, we do not consider it necessary to determine whether the dress contained any injurious substances and that the irritation and rash on plaintiff's body were caused by these deleterious and poisonous substances, for the reason that, if these facts be conceded, it is shown that defendant had no knowledge of any defects and vices of the article sold by it in the regular course of its retail business."

The court then quoted from an article of the Louisiana Civil Code which expressly restricts liability, and added, "The liability of the seller who does not know of the vices and defects in the article sold is liable only for the return of the price and the expenses of the sale."

This limited statutory liability can hardly be considered a tort liability for a "negligent" failure to inspect.

Two other cases which I discussed in my former article under the heading "Honest Misrepresentation of Chattel's Safety," and of which Professor Farage says nothing, (except for his preliminary statement that he has "no fault to find" with the views expounded under that subheading) deserve notice. In State to use v. Consolidated Gas, E. L. & P. Co. the court sustained a demurrer to the declaration. It averred that defendant supplied plaintiffs with gas, that it sold to them a certain gas heater and represented that it "could be used with perfect safety," that "the warranty" was untrue and that "the heater so sold was defective" in that it produced carbon monoxide which killed plaintiffs' son. The theory was that defendant was liable for harm caused by breach of warranty of fitness "for the particular purpose for which (the heater) was sold." The court held that, as the son had not been a party to the contract of sale he could not have sued on the warranty and therefore, under the Maryland death statute, the parents could not maintain the action. The court thought that the facts averred did not constitute the basis for any recovery in tort on a theory of negligence. The court said:

"The declaration here does not allege that the defendant was
the manufacturer of the gas heater which is alleged to have caused the death of the infant, and the authorities, in this State and elsewhere, which hold that a manufacturer is liable for injury to strangers resulting from the sale of articles inherently dangerous, do not apply to cases like the one under consideration. * * *

"As above stated, the defendant here was not the manufacturer; it was the vendor of an article not in itself inherently dangerous, which it sold in the same condition as received from its vendor, and there is no allegation of any knowledge on its part that same was not perfectly safe, nor any allegation that the article was purchased from an irresponsible or incompetent manufacturer." 42

It is submitted that the Supreme Court of Maryland held that even the defendant's positive representation that the heater was perfectly safe did not establish a tort liability in the absence of an averment that the defendant knew it "was not perfectly safe."

In Camden Fire Insurance Co. v. Peterman 43 the court reversed a judgment for the plaintiff insurer, which had paid a fire loss and was suing as assignee of the property claim. Defendant sold a gasoline range to the insured, after showing it to him in the store and saying it was "foolproof." Defendant's servants delivered the stove, set it up, and lighted the burner. Flames shot up, a defective control valve prevented shutting off the flames and the customer's house was destroyed by fire. The defective valve was not an "apparent defect in the stove as it sat in the store," 44 but it was quite apparent the minute the operation of the stove was tested by lighting it, as the defendant's servants so quickly discovered. In denying liability the court said:

"In the case at bar the defendant sold a gasoline stove, which as it remained in the store without gasoline in it was not a dangerous article; the defects that it had were hidden and unknown to the seller and could not be readily ascertained without the use of gasoline. It was sold in the condition in which the buyer purchased it from the manufacturer without any suspicion upon the part of the seller of its defects. Under such circumstances the seller may not be called to respond in damages for the resultant injury, * * *." 45

It may be noted that the defect could have been "readily ascertained" with "the use of gasoline" as the event proved.

42146 Md. at pp. 397-98. Italics added.
44278 Mich. 615, 270 N.W. at p. 808.
Professor Farage endeavors to avoid the weight of some of the cases by arguing that they have merely perpetuated the now discarded theory of *Huset v. J. I. Case Threshing Machine Co.* It seems to me that Professor Farage is confusing the liability of the manufacturer with that of the vendor of a chattel. The early view was that, in the absence of privity of contract, neither the manufacturer nor the vendor was under any liability to a person who was injured by a defective chattel. So far as the manufacturer's liability is concerned that view, which was forcefully stated by Judge Sanborn in the *Huset* case, is now pretty thoroughly discredited, and rightly so. The recent cases emphasize that the basis of the manufacturer's liability is his active negligence in carelessly creating a dangerous instrumentality. As I pointed out in my preceding article, the same argument cannot be advanced with respect to the vendor of the chattel. In Judge Sanborn's opinion he stated three so-called exceptions to the then "general rule" of non-liability in the absence of privity of contract. One of them dealt with the liability of a vendor who sold a dangerous chattel *knowing* of the defect. It is significant to note that the exception only applied where there was actual knowledge and in the *Huset* case Judge Sanborn stressed the fact that the declaration had averred actual knowledge. It was for that reason, and only for that reason, that the declaration was held to state a cause of action. In that case, however, the defendant vendor was also the manufacturer.

With respect to the non-liability of a vendor who is not a manufacturer or other creator of the dangerous instrumentality, I doubt that the *Huset* case is discredited. The statement in the *Huset* case of the vendor's non-liability in the absence of knowledge is merely a restatement of what had been decided much earlier in *Longmeid v. Holliday*. The extent of the liability of the vendor to his own customer (where privity of contract exists) is in some confusion. He is undoubtedly under a contractual liability to the purchaser where there is a breach of contract. In some situations he may be liable for breach of implied warranty of wholesomeness or of merchantability. Most of the actions based upon such breach of warranty are brought in assumpsit. To the extent that a breach of implied warranty is looked upon as a tort, the court is imposing an absolute liability and in no sense a liability based upon negligence. I do not believe that a tort duty of exercising "due care" by making an inspection of a chattel, which is reasonably believed to be harmless when used in its normal and proper way, is imposed upon a vendor even with respect to his own customer. Professor Bohlen thought that under the law as announced in *Longmeid v. Holliday* "the vendor's only liability

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46 120 Fed. 865 (C.C.A. 8th, 1903).
47 89 U. of PA. L. Rev. at pp. 306-07.
48 Note 13.
is upon warranty express or implied * * *."49 In my article which Professor Farage criticizes I pointed out that there are two decisions in New York, in the Appellate Division, and one in Pennsylvania which take a contrary view.50

Professor Farage apparently agrees with me that the two New York cases were wrongly decided on their facts because he says "His criticism of the first two of these cases, on the ground that the particular inspection required in the specific instances was 'unreasonably' onerous, may be conceded to be sound."81 But Professor Farage continues, "That criticism in itself, however, does not invalidate the argument for imposing at least a 'reasonable' duty." I do not follow this reasoning. To my mind the decision of a court is either sound upon the record presented to it or it is unsound. If Professor Farage agrees that the New York decisions were decided wrongly upon the records presented, I do not see how he can go on to argue that they should still be accepted as authority for imposing liability on some other set of facts. If Professor Farage agrees that the vendors in the two New York cases should not have been under any duty of inspection on the facts of those cases then, by his own reasoning, the court's decision to the contrary is either unsound or should be considered a mere dictum. Indeed, I consider those two cases my prize exhibits of the trouble a court is likely to get into once it formulates the rule that there is some general duty of inspection and that, where the facts or inferences are not clear, the issue of compliance with that duty must be settled in the jury box.

So much for the authorities. Professor Farage also says:

"One more argument, which Mr. Eldredge advances in favor of a rule requiring the vendor to have 'actual knowledge' as a condition to liability, must be considered. He says:

'Further, the issue of the vendor's knowledge is easily understandable while a rule of law requiring inspection for observable defects but not for unobservable defects draws a line very difficult of application. Does observable mean visible to the eye from the outside? Does it mean observable only if you look for it seeking danger, or observable by the casual glance given in the usual unpacking and handling? Does it require the removal of easily removable parts to see what is visible underneath? Does it mean visible as you view the chattel from a normal standing or sitting posture or visible as you get down and look all over it? Does it

5145 Dickinson L. Rev. at p. 166.
mean detectable by the sense of feel, or smell, or hearing, or taste as well as sight? Must the vendor look at, handle, smell, taste and listen to the chattel? Must he palpate the chattel inside to feel the defect? Must he tap it with a handy hammer to hear the defect? If an equally simple and not inconvenient test, such as using litmus paper, will make the defect observable by sight, as palpation makes it observable by feeling, is this required?"

The difficulties posed by these questions seem awe-inspiring until it is recalled that by far the greatest part of the law of negligence rests upon the conveniently vague formula that the conduct required of members of society must conform to the 'standard of the reasonable man.' In advance it is usually impossible to give legal advice as to the precise forms of conduct required in order to avoid tort liability."

I do not think this is a satisfactory answer to my questions. It is one thing to say to a man that he must answer for his active conduct which creates a foreseeable risk of harm if it falls below "the conveniently vague standard of the reasonable man"; i. e. if the utility of the activity is outweighed by the magnitude of the risk. But in the case of the vendor, who neither knows nor suspicions that the chattel he sells is dangerously defective, he is not doing anything which, on the facts known to him, contains a foreseeable risk of harm. The duty of inspection, if imposed, is a duty which requires the vendor to do something. If a vendor is to be compelled to do something in order to escape liability the law should be sufficiently definite to enable the vendor to know when he has done enough to satisfy the required standard. The law does not permit a man to be convicted of the "crime" of violating a statute which contains a standard so vague one cannot tell in advance what is required in the way of compliance. The fact that certainty in the law is not always possible (and that some vaguely defined affirmative duties do exist) does not detract from the fact that it is highly desirable, and sometimes essential in order to avoid unfairness. In this situation "the knowne certaintie of the law" is the only "safetie of all" vendors. If Professor Farage desires to compel vendors to do some inspecting common fairness requires him to state with some particularity how much is enough.

52ibid at p. 169.
53Restatement, Torts, (1934) sec. 291.
54Courts are reluctant to impose such duties. See Restatement, Torts, (1934) sec. 314. This reluctance seems to be the basic reason behind a decision such as Zayc v. John Hancock M. L. Ins. Co., 338 Pa. 426, 13 A. (2d) 34 (1940), holding that the failure to accept a pending life insurance application within "a reasonable time" is not tortious.
Suppose the owner of a retail hardware store consults his lawyer and says, "I hear that unless I do some inspecting of my stock I may be held liable for substantial damages. Tell me what I should do." The lawyer replies, "You must conform to the 'conveniently vague formula' of the reasonable man. Whether you have conformed in a particular instance cannot be determined finally until the court of last resort of this state has announced its judgment, and that judgment may require you to pay out a lot of money."

Who would blame the client (unacquainted as he is with the sacred mysteries of the law, but having some familiarity with Dickens) for paraphrasing Mr. Bumble and retorting, with a slight show of asperity, "If the law says no more than that, the law is a ass."

PHILADELPHIA, PA. LAURENCE H. ELDREDGE

NOTE

I have read Professor Farage’s manuscript which is printed immediately following this article. I have no desire to prolong an already too extended discussion. For clarification I merely add the following footnotes to what he says as final comment.

(a) The word "catastrophe" was used in the sense in which it is used in Restatement, Torts, § 293, comment d, where it is said: "Higher duties of care are imposed in the use of * * chattels * * where carelessness is likely to lead to some catastrophe which will involve in one common destruction a number of persons rather than a single person." (See Professor Farage’s article immediately following. Page 283, line 19).

(b) The context shows I did not "principally rely" on Longmeid v. Holliday, in general, but only as support for one sentence to which the case was cited as a footnote. (See Professor Farage’s article. Page 294, line 20).

(c) "Negligence" involves the idea of a breach of duty. If there is no duty to inspect or otherwise check up there is no proof of "any negligence." (See Professor Farage’s article. Page 290, line 7).

(d) Where there is "contractual privity" there may be liability for breach of warranty, although there is no duty to inspect. In the absence of such "privity" there may be no basis for any liability. (See Professor Farage’s article. Page 290, line 53).

(e) There may be, I suppose, a "reasonably observable latent defect" to quote Professor Farage’s "conveniently vague" words without such defect being "obvious." (See Professor Farage’s article. Footnote 13).

(f) The quotation showed Professor Bohlen’s analysis of the holding in Longmeid v. Holliday. A possible change of "views" does not alter the analysis of the case. (See Professor Farage’s article. Footnote 14).

(g) I did not consider it necessary, in the second article, to make again all the points of the first. (See Professor Farage’s article. The last sentence of footnote 14).

(h) I reiterate: The language is not definite. (See Professor Farage’s article. Footnote 22).

(i) Section 388 deals with the liability of a supplier of a chattel known to be dangerous. This type of case was discussed at length in my original article and in Professor Farage’s first article he expressed his complete approval with what I said. I do not understand how Section 388 "Rejects the doctrine of the Huset case." Judge Sanborn recognized, in substance, a rule of law stated in Section 388 and announced it as his third exception to the so-called general rule of non-liability. Indeed, the demurrer to the complaint was specifically overruled upon the authority of this third exception. (See Professor Farage’s article. Footnote 43).

(j) The other two exceptions have nothing to do with a vendor. (See Professor Farage’s article. Footnote 45).

L. H. E.