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VENDOR'S DUTY TO INSPECT CHATTELS - A REJOINDER

D. J. FARAGE*

Preliminary to a consideration of the contentions of Professor Eldredge in the previous article in this issue,¹ I wish to acknowledge the inadvertent omission of thirteen words in a quotation I made in my earlier paper² from his original text.³ The original statement made by Mr. Eldredge was as follows:

"Because of these reasons and until quite recently, it has generally been thought that a vendor had no duty of inspection; and that he was 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."

Because of a stenographic error, the words "where he did not know it existed or was not possessed of information" were omitted in my quotation. While I have no objection⁴ to Mr. Eldredge's pointing out this omission, I should like to correct the possible implication that this omission resulted in a misrepresentation of his views or that it affected the merits of our controversy. It is agreed here and was agreed in my first answer that a vendor of a chattel is liable if there is, to use Mr. Eldredge's words, "actual knowledge of the defect or of facts pointing to it."⁵ Indeed, I repeated these exact words in my previous article.⁶ Since these words in substance supply the inadvertent omission in the aforesaid quotation, I take it that it is clear that Mr. Eldredge's position was not misrepresented. In any event, it should be clear that those words have no bearing upon the point in dispute, which concerns the propriety or impropriety, the existence or non-existence, of a vendor's duty to make some inspection of chattels he sells.

In his present reply, Mr. Eldredge alleges a failure on my part to note a "qualification" he attached to his views against imposing a duty of inspection. He refers to his statement that:

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¹In order that the present articles may make complete sense, the reader should have first read the prior articles: Eldredge, Vendor's Tort Liability (1941) 89 U. OF Pa. L. Rev. 306; Farage, Must A Vendor Inspect Chattels Before Their Sale?—An Answer (1941) 45 DICKINSON L. Rev. 159.
²Farage, supra note 1, at 163.
³Eldredge, supra note 1, at 322.
⁴Albeit I promised, as soon as the error was pointed out, to put a correction in this issue.
⁵Eldredge, supra note 1, at 329.
⁶Farage, supra note 1, at 160.
"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."

If this was intended as a qualification of his "no-duty-of-inspection view," I do not so understand it, in the light of this additional statement:

"If danger to the customer and others imposes a duty of inspection, danger from the unobservable but discoverable defect is even greater because the purchaser cannot observe it. If the presence of an unobservable defect may bring death why not require the vendor to employ the facilities of modern testing laboratories to discover it? Into such a maze do we get once we depart from the rule that the vendor's liability is predicated upon his knowledge of the danger creating defect or of other facts from which he has reason to suspect its existence."

This would seem to make it clear that he is advocating a flat rule against ever imposing liability for failure to inspect. If "death" is not a sufficient "catastrophe" to bring his "qualification" into play, I am unable to understand the scope or content he attributes to this "qualification." In view of his insistence upon certainty in the law for the vendor, further amplification of this "qualification" would seem to be in order. One wonders whether the injection of this qualification is not, to use Mr. Eldredge's own language, a matter of retroactive "benevolent yearning." As I understand the alleged qualifying statement, it was merely a statement of fact, not law, by way of argument to the effect that "catastrophes" and the like are so rare that no account should be taken of them in determining whether there should be a duty of inspection. Moreover, while Mr. Eldredge's article many times reiterated his advocated rule requiring actual knowledge of dangers or of suspicious facts, he did not repeat the alleged qualification anywhere else, not even in his conclusion. If Mr. Eldredge did mean to suggest that the degree of danger is a factor in determining the existence of a duty to inspect, and that there should be such a duty if the danger threatened is serious enough, then we stand on more common ground, even though such a statement does not afford the certainty upon which my friend is insistent.

Professor Eldredge next alleges that my contention that a vendor does realize an economic benefit from the sale of a chattel, supporting an affirmative duty of inspection, is founded upon a "false" analogy to the duty owing by a possessor

7Eldredge, supra note 1, at 321.
8id. at 330. Italics added.
of land to business guests. I submit again that from the standpoint of whether the vendor derives an economic benefit, the two cases are not only analogous, but identical. I repeat that:

"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 'reasonably' to inspect stock for the benefit of the same customers. There may be other reasons, perhaps, for imposing the duty in the one case and denying it in the other, but the absence of benefit to the vendor seems a doubtful basis for distinction."  

In other words I have never suggested that the analogy is complete; I have insisted only that the benefit is identical; that whether the customer is injured because of a defect on the premises, or because of a defect in the chattel, the vendor would seem to derive the same benefit from the sale, Mr. Bohlen and Mr. Eldredge to the contrary notwithstanding.  

This brings us once more to the matter of authorities. Mr. Eldredge has "principally relied" upon Longmeid v. Holliday, 11 in which the defendant-vendor sold a defective lamp to A, whose wife B suffered harm because of the defect. I stated in my first article that "there is no statement in the report that the defect was reasonably observable."  

Mr. Eldredge attempts to refute this point by referring to an "averment" that the lamp was "cracked and leaky," etc. Even if the "averment" corresponded to the facts (the court's opinion states only that the "lamp was defectively constructed"), it does not necessarily follow that the "crack" was reasonably discoverable. Whether it was would depend upon its size and location. Such a defect in a new lamp is not necessarily obvious. At

9Farage, supra note 1, at 160. Italics added.
10The analogy to sales of land suggested by Mr. Eldredge is not helpful, because historically concepts of feudal law which have permeated the law of real property have restricted the scope of the owner-vendor's liability. Thus, the owner of land has been held to owe no duty of inspection either before a sale or a lease of the premises. On the other hand the duty in chattel cases has been broader. Thus, a lessor of a chattel has been treated in some cases as being under a duty to make a reasonable inspection of a chattel before leasing: Collette v. Page, 44 R. I. 26, 114 A. 136 (1921); Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72 (1928) ("We intend only to hold that he must exercise reasonable diligence to know the condition of his machines before letting them into the hands of drivers for use on the highways. He must in that regard exercise such simple and available tests as the intended use would suggest to sensible and right-minded persons—the jury being at last the judges.") This view is followed by Restatement, Torts (1934) § 408, comment a.
12Farage, supra note 1, at 164.
any rate, the defect was either latent or patent. If latent, whether it was reason-ably discoverable will forever remain a mystery; and to say it was reasonably discoverable is a gratuitous assumption. On the other hand, if the defect was patent, the case would fall under the principle of Restatement, Torts § 388, comment i, which provides that vendor need not disclose even known defects, much less look for them, if they are obvious on casual inspection. Whether the defect was latent or patent, therefore, the case does not support Mr. Eldredge’s contention that it denies the existence of a duty to discover reasonably observable latent defects.13

Quite apart from whether the defect was reasonably observable, the plaintiff sued only on the theory that the defendant had been guilty of “intentional fraud,” and judgment was given for the defendant because fraud was not proved. The question of whether a vendor owes a duty to make a reasonable inspection, it is submitted, was not squarely raised. In the third place the court stresses the lack of contractual privity between the plaintiff and defendant, that is, the theory of the Huset case.14 Mr. Eldredge quotes from Bottomley v. Bannister,15 which in the course of dicta16 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."17

Mr. Eldredge, in using this quotation to support his construction of Longmeid v. Holliday, underlines the words "which he did not know to be dangerous." I should

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13Note that the jury expressly found that the “averment” that vendor had knowledge of the defect was unfounded. If the defect was obvious as Mr. Eldredge suggests, why did not the jury find it "practically certain the vendor did know of it," and why was not his denial "met with incredulity by the jury" as Mr. Eldredge argues would be the case when defects are “plain on the outer face of the chattel”? See Eldredge, supra note 1, at 329.

1420 Fed. 865 (1903). I repeat, in answer to Mr. Eldredge’s quotation from Mr. Bohlen in 1905, that whatever Mr. Bohlen’s views may have been at that time, in 1930 when the Restatement was drafted he professes uncertainty; he was not certain one way or the other: 8 Proc. A. L. I. 239 (1930). Moreover, he drafted sections 399 and 402 of the Restatement, the former imposing liability where the vendor had knowledge of the danger or facts pointing thereto, the latter flatly imposing in blackletters a duty to make a reasonable inspection. It is noteworthy that in his second article Mr. Eldredge no longer presses for the view that § 402 should be construed as merely an iteration of § 399. See Farage, supra note 1, at 169.

15(1932) 1 K. B. 458; Eldredge, Vendor’s "Duty" to Inspect Chattels—A Reply (1941), 45 Dickinson L. Rev. 272.

16The case involved the liability owing by a vendor of land for a defective appliance installed by him thereon. (Scrutton, L. J., says at p. 474: "My view of the law is that the installation being part of the reality, the cases as to chattels do not apply . . . ").

17(1932) 1 K. B. 458, 460. Italics added.
continue the underlineation under the words "to a person with whom he has made no contract." That Bottomley v. Bannister was concerned with the theory of the Huset case and its exceptions is made clear by the next two sentences of the court's opinion, which Mr. Eldredge fails to quote, and which deal with the exception as to articles "inherently dangerous":

"As pointed out by Hamilton J. in Blacker v. Lake & Elliott, Ld., the question whether an article belongs to a dangerous class is, when there is no dispute of fact as to the nature of the article, a question of law for the judge. In my judgment, the judge in the present case ought to have held the Halliday boiler without a flue not to be an article dangerous per se."

The next case cited by Mr. Eldredge as supporting him, Moore v. Jefferson D. & D. Co., 19 I discussed fully in my first article. He now concedes that is not a strong case, although in his first article he cited it as flatly supporting him.19 However, he still construes it as denying any duty of inspection. My answer is to ask for reference to one single statement in the opinion, even by dictum, which denies a duty of inspection other than because of lack of contractual privity.

With respect to the seventeen cases cited by Professor Eldredge in footnote 80,20 he conceded in his first article that:

"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.21 (However, in seven of them ... the court flatly said that the vendor's duty did not extend beyond revealing known defects. ...)"22

If this is not an admission that these cases do not flatly hold in support of his view, I do not understand the meaning which he intends one to ascribe to those words. He now apparently contends that those cases do hold in his favor,23 but limits discussion to only several of them.

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18169 La. 1156, 126 So. 691 (1930).
19Eldredge, supra note 1, at 323, footnote 84.
20id., at 322.
21ibid.
22ibid. footnote 81. Italics added. With Mr. Eldredge's statement (in footnote 22 of his article in this issue respecting certain cases he cited in note 80 of his original article) that "I do not believe Professor Farage is justified in considering these cases as definite dicta imposing a duty to inspect", compare his previous statement in footnote 81 of his original article: "It may be that the court was merely stating the case most favorably to the plaintiff and holding, even then, that he had no case. On the other hand, it is possible to argue that the language implies some duty of inspection." (Italics added).
23Eldredge, supra note 15, at 273. If the cases in footnote 80 of his original article "do literally support (his) quoted statement", they do not do so by way of holding. Because of limitations of space, I shall discuss only those he does. I am prepared, however, to distinguish all the other cases he cited.
His first is *Peaslee-Gaulbert v. McMath's Adm'r.* Suit was to recover damages for the death of a person killed when a can of "Japan dryer" (apparently a kind of varnish) exploded because the user brought it in contact with a lighted flame. *The dryer was in no respect defective, nor would any inspection have disclosed defects since there were none...* The court stated that

"... the substance of all the evidence is that this dryer was not explosive, or inflammable, unless brought in contact with a lighted flame, and was not inherently or imminently dangerous or dangerous at all if handled or used with ordinary care; that 'No. 1 T Japan Dryer' was manufactured substantially by the same formula all over the country and sold to the trade generally as an article of common use in the varnish business; that none of the manufacturers or dealers ever placed on their cans containing this dryer any danger or caution sign or mark or other thing to indicate that care should be used in handling it. It might also be here remarked that there is no statute in this state requiring a danger or caution mark of any kind to be placed on articles like this."  

In other words, the only question was whether the defendant-vendor should have used a label warning of dangers which were well known to the trade at large. There was absolutely no question raised by the facts as to the vendor's duty of inspection, because there was no evidence of any defect which caused the injury. It is submitted, therefore, that whatever the court says about the non-existence of a duty to inspect is pure *dictum.*

The next case cited by Mr. Eldredge is *Belcher v. Goff Bros.* Defendant-vendor sold a mixture of gasoline and kerosene as kerosene, and plaintiff suffered injuries from an explosion occurring because of its use as kerosene. There is no evidence or statement of fact anywhere in the opinion that the fact of admixture was reasonably discoverable by the vendor. Moreover, the decision turned upon whether it was error to refuse plaintiff's points for charge. These requests in effect sought to impose absolute liability upon the vendor as under warranty. None of the requested charges rested upon the theory that defendant owed a duty of inspection which would have disclosed the danger. Again, therefore, what the court says about the non-existence of a duty to inspect would seem to be *dictum.*

In *Tourte v. Horton Mfg. Co.* a vendee of a washing machine was injured because of a wringer which was defective for lack of oil. She knew before the
accident of the defect and its cause; the vendor did not know. Under those facts the question of whether the vendor owed a duty of inspection was not at all essential to the determination of the case. Had he inspected, his sole duty would have been to warn. Since the vendee was aware of the defect, the warning would no longer be required. Under these circumstances, how can the court’s language about whether the vendor must inspect be anything but dictum?

The next case cited by Mr. Eldredge is Noble v. Sears-Roebuck & Co. A steam pressure cooker exploded, injuring purchaser’s employee. On demurrer to plaintiff’s declaration, the court held:

"The complaint does not allege as against the seller, or at all, that the cooker was inherently dangerous to the life or limb of any one using it, nor that such dangerous condition, if any, was known or should have been known to the seller, nor that the seller in any way failed to exercise good faith and fair dealing." If there was not even an allegation, much less evidence, that the vendor knew or should have known of the defect, or even that the article was dangerous, how can this case possibly hold that the vendor owes no duty of inspection?

In Isbell v. Biederman Furniture Co. the wife of a purchaser of a bed was injured when the bed collapsed because of a knot in the wood rendering weak the board on which the slats rested. The court denied recovery because "the wife, not being a party to the contract of purchase, cannot maintain this action." In addition, the court stresses the fact that the vendee could "see the knot in the slat as well as the dealer himself." This being so, the case falls under the rule of RESTATEMENT, TORTS §388, comment i, which provides that a vendor need not disclose even known defects if they are reasonably observable by the vendee. Either the theory of lack of contractual privity, or the theory that the defect was observable by the vendee, makes entirely unnecessary any consideration of whether a vendor must inspect chattels. What the court says in that regard, therefore, can hardly be accepted as a holding.

28 "If the safety devices needed oiling, the absence of oil was known to appellant and not to respondent. . . . When this knowledge is with the buyer and the defect is unknown to the seller, the latter is not liable." 290 Pac. 919, 920. Compare RESTATEMENT, TORTS (1934) §388, comment i, stating that the supplier need not give warning of observable defects, even when vendor has actual knowledge. Even had vendor briefly operated the machine, it is doubtful if such operation would have disclosed the danger, since the vendee testified that the machine operated "perfectly" for her for an hour.

30 id., at 182.
31 115 S. W. (2d) 46 (Mo. App. 1938).
32 id., at 49. The court cited many cases including Huset v. Case Threshing Mach. Co., 120 Fed. 865 (1905), which the court then discusses.
33 ibid.
34 Discussed supra, note 28.
Boyd v. J. C. Penney Co., Inc.\textsuperscript{85} is conceded by Professor Eldredge to rest entirely upon a special statute limiting the liability of a vendor to contractual damages. What the court might have held about the duty of inspection in the absence of statute is beside the point. Moreover, the court expressly states:

"If there were any defects and vices in this dress, or if it contained any injurious and deleterious substances that could have caused plaintiff's injuries, the defendant did not know of these at the time the dress was sold to the plaintiff, nor did it have any reasonable means of knowing or ascertaining before selling the dress that it contained any injurious or poisonous substances. It could hardly be contended that it was the duty of the defendant to have each one of the dresses which it purchased from a manufacturer analyzed and inspected for deleterious substances before offering the dresses for sale."\textsuperscript{36}

Mr. Eldredge is critical of the fact that I omit a discussion of two cases, State to use v. Consolidated Gas, etc. Co.\textsuperscript{87} and Camden Fire Ins. Co. v. Peterman,\textsuperscript{88} which he discussed in his original paper under the heading "Honest Misrepresentation of Chattel's Safety." What was stated under that caption, I supposed, was intended to deal only with the effect of an honest misrepresentation \textit{per se} as a possible form of active misconduct and not with the duty of inspection.\textsuperscript{89} Since he discussed these two cases only in relation to the aforesaid title, I refrained from discussing them in my first article only lest I be accused of charging him with citing the case for a point not intended by him. Since he now relies upon them, I shall be glad to consider them. The first involved an action for the death of an infant resulting from a defective chattel purchased by the infant's parents. A demurrer to the declaration was sustained, but only because there was no privity of contract between the child and the vendor.\textsuperscript{40} Again, the theory on which the court

\textsuperscript{85}195 So. 87 (La. App. 1940).
\textsuperscript{86}Id. at 88. (Italics added).
\textsuperscript{87}146 Md. 390, 126 A. 108 (1924).
\textsuperscript{88}278 Mich. 615, 270 N. W. 807 (1937).
\textsuperscript{89}The two cases were discussed by Mr. Eldredge as illustrating the statement that: "Consequently a vendor's honest representation that a chattel is free of defects, when based upon reliable past experience, cannot be branded as a negligent act merely because the vendor has not personally investigated the chattel. Such a representation is in accord with practically universal human conduct." Eldredge, \textit{supra} note 1, at 319. In the light of the surrounding context, as I construed that sentence, it meant only that an \textit{honest misrepresentation} is not \textit{per se} actionable as \textit{affirmative misconduct} merely because the "vendor has not personally investigated the chattel". At least, I could not feel certain that Mr. Eldredge meant to consider, \textit{at that point}, the effect of the \textit{omission} of inspection apart from misrepresentation, since he addresses himself to that problem in his next subheading.

\textsuperscript{40}The court expressly states, "... there is no privity of contract between the deceased infant and the defendant, and there is no allegation of such privity of contract set out in the declaration. This allegation was a necessary part of the declaration, and doubtless would have been made, had it not been for the fact that the evidence which could be adduced would not support such an allegation." 126 A. 105, 107.
denied recovery was that of the Huset case, and not that a vendor owes no duty of inspection. In the second case, an action was brought by an insurance company against a vendor for damages paid on a policy for personal injuries suffered by the insured because of a defective gasoline stove. Defendant moved for a directed verdict not on the theory that no duty of inspection was owing, but "upon the theory that while an accident happened, no proof was adduced to show any negligence upon the part of defendant in connection with said accident." The upper court, in sustaining the position of the defendant, states that "the defects that it (the chattel) had were hidden and unknown to the seller and could not be readily ascertained without the use of gasoline." Apparently the court felt that it was unreasonable to require the vendor to burn gasoline in a new stove before selling it as such. In my judgment the case holds not that the vendor owes no duty of reasonable inspection, but merely that there was no negligence or violation of the duty.

So much for the authorities relied upon by Professor Eldredge. Both he and I have given our construction of the cases, and it is for the reader to decide whether there is a single clear-cut decision which flatly holds that a vendor owes no duty of inspection. It is also for the reader to decide for himself who is guilty of "benevolent yearning" regarding the effect of the cases.

The next point which Professor Eldredge makes, I submit, is a "red herring" having nothing to do with our controversy. He suggests that when I refer to the doctrine of the Huset case (which denies recovery for personal injuries resulting from a defective chattel to one not in contractual privity with the supplier unless the case falls within one of Judge Sanborn's three classic exceptions to the rule) I am confusing its applicability to manufacturer-vendors with the application of the doctrine to vendors of chattels manufactured by others. He proceeds to suggest that while the doctrine of the Huset case has been discredited as applied to the former, it has not been discredited as applied to the latter. With this point I had and have no concern. What is important is that as Professor Eldredge concedes, some courts still continue (notwithstanding MacPherson v. Buick Motor Co.) to require contractual privity between the vendor and the plaintiff. If a vendor owed no duty of inspection to either those in or out of contractual privity, there would be no need for courts to resort to the requirement of contractual privity.

41270 N. W. 807, 808.
42Ibid. Italics added.
48Note, however, that RSTATEMENT, TORTS (1934) § 388 (see especially lines 3-6 of black-letter and comment k, last sentence) rejects the doctrine of the Huset case as applied to all suppliers of chattels, to the extent that it suggests that contractual privity is normally a prerequisite for liability; and that § 394 (specifically applicable to manufacturers) and §§ 399 and 402 (specifically applicable to vendors of chattels manufactured by third persons) all incorporate § 388 by reference.
44217 N. Y. 382, 111 N. E. 1050 (1916).
in order to deny recovery for failure to inspect, in tort actions alleging such a duty.

In my first article I referred to two New York cases which, Mr. Eldredge concedes, hold against his view, but which he criticized because in the particular cases the duty of inspection imposed was too onerous. To my observation that it may be conceded that the particular burden was unreasonably onerous without invalidating the argument in favor of imposing a reasonable duty of inspection, Mr. Eldredge replies:

"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." The suggestion that these cases may involve mere dictum scarcely deserves consideration, since Mr. Eldredge definitely conceded in his original article that they were flatly against him. His inability to follow my reasoning can be explained by his obvious attachment for the Aristotelian rule of formal logic (the "law of excluded middle") that everything is either A or not-A. An opinion, he feels, can be only right or wrong; it cannot be partially right and partially wrong. An opinion which announces sound rules of negligence, but unsound rules of causation or of damages for him must be entirely wrong. Similarly, if a court requires adherence to a too-high standard of care, that fact must of itself contaminate all other holdings and parts of the opinion. Whether this view is sound is a matter of philosophical faith which has often been challenged and discredited. For my part, I am willing to accept sound parts of an opinion, even if I feel that other parts must be rejected. Accordingly, I am willing to accept the holdings of the New York cases that there is a duty to make a reasonable inspection, while at the same time rejecting their holdings that the particular standard of care imposed was reasonable.

48Professor Eldredge stresses the fact that one of Judge Sanborn's exceptions to the rule requiring contractual privity involves a vendor who sells a chattel knowing of the defect. He contends that this is significant as suggesting that there is no duty to inspect. He refrains from referring to the other two "exceptions" which do not necessarily require actual knowledge for their application. 


47Eldredge, supra note 15, at 279. Italics added.

48Bell, The Search For Truth (1934) 100 et seq.
Finally, Professor Eldredge still insists that a duty should not be imposed upon a vendor to make a reasonable inspection of chattels he sells, because it is impossible in advance to specify exactly the nature and extent of the vendor’s inspection. The fact that the bulk of tort law is predicated upon the conveniently vague formula of the “reasonable man” he rejects as an unsatisfactory answer. In this connection he distinguishes “active” conduct causing harm from omission or non-feasance resulting therein. As far as I can see, the RESTATEMENT fails to distinguish between these two types of wrong when it talks about the standard of the “reasonable man.”

Be that as it may, Professor Eldredge puts the case of the owner of a retail hardware store who seeks advice from his lawyer concerning the duty to inspect chattels. He finds utterly absurd the reply, to the effect that the “standard of the reasonable man” must be observed, because he feels such an answer is too vague and meaningless as a rule of law. He says, “In this situation 'the knowne certainty of the law' is the only 'safetie of all' vendors.”

In his original article Mr. Eldredge referred, apparently with approval, to the well-established rule that a possessor of land owes a duty to business guests to make a reasonable inspection of his land. I suppose, too, he would accept the holding of MacPherson v. Buick Motor Co. that the manufacturer of a car who buys parts prepared by other people must make a reasonable inspection of these articles before using them. I suppose also that he accepts the holding of Saunders System Birmingham Co. v. Adams that a lessor of chattels for hire owes a duty to inspect the chattels. I say “I suppose,” because otherwise Mr. Eldredge would be placing himself in the position of denying that there is ever a duty to inspect anything under any circumstances. If he accepts as true that a duty to inspect is owing by a possessor of land to his business guests, by a manufacturer to inspect parts prepared by others, and by a lessor of a chattel for hire, I take it (since he apparently identifies good law with rules that make for certainty) that Professor Eldredge is prepared to give specific answers to the following questions involving such persons:

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 unpacking and handling of appliances installed by the possessor of business premises, or of parts procured by manufacturers from others? Does it require the re-

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49 Eldredge, supra note 1, at 321, footnote 76, citing RESTATEMENT, TORTS (1934) § 342.
50 217 N. Y. 382, 111 N. E. 1050 (1916), adopted by RESTATEMENT, TORTS (1934) § 395, comment f.
51 217 Ala. 621, 117 So. 72 (1928). Mr. Eldredge has also endorsed the duty of inspection imposed by Heaven v. Pender, 11 Q. B. D. 503 (1883): Eldredge, supra note 1, at 331.
moval of easily removable parts to see what is visible underneath? Does it mean visible as you view the chattels or premises from a normal standing or sitting posture, or visible as you get down and look all over them? Does it mean detectable by the sense of feel, or smell, or hearing, or taste as well as sight? Must a lessor, or a manufacturer using another's parts, or a possessor of business premises, look at, handle, smell, taste, and listen to the chattels or premises? Must they palpate chattels inside to feel the defects? Must they tap them with a handy hammer to hear the defect. If an equally simple and not inconvenient test, such as using litmus paper will make the defects observable by sight, as palpation makes them observable by feeling, is this required? Must a possessor of business premises pull up floors to examine rafters? Must he inspect stairways hourly, daily, weekly, monthly, or yearly? Must he stand on high ladders to examine ceilings, or need he notice only such defects as are observable from a standing posture? If a department store provides chairs for customers who are looking at goods, must the chairs be turned upside down during inspection? Must . . . etc., etc? ad nauseam.62

Mr. Eldredge’s argument requiring certainty of standard before imposing a duty of inspection proves too much. For it would deny the existence of any duty on anyone’s part to make a reasonable inspection under any circumstances. Query, can the vague standard of the “reasonable man” be separated, even from cases involving omission or failure to inspect, as Professor Eldredge suggests? Need it be reiterated that the standards to which the actor must conform are in the bulk of cases not determined as a matter of law by courts, but are determined by the jury along with the facts of the cases.63 The lawyer who can always anticipate precisely what standards the juries will impose must be possessed of oracular powers.

Professor Eldredge’s reliance upon the analogy of the United States Supreme Court decision holding a criminal statute unconstitutional has doubtful basis. In the first place criminal cases are not necessarily decided on the same principles as those involving torts. In the second place we are concerned with a common law duty; I am not aware that even in the criminal cases any court has ever set aside a conviction on a charge of a common law crime because the common law principles pertaining thereto were not yet fully developed and explicit. Courts still have difficulty in deciding upon the necessary elements of many crimes. Indeed,

62The writer is indebted to Professor Eldredge for suggesting many of these questions, most of them being quoted almost verbatim from his original article: Eldredge, supra note 1, at 329, 330.
63See quotation from Saunders System Birmingham Co. v. Adams, supra note 10.
the development of the law regarding common law crimes has been a gradual, never-ending process. In any event, if the analogy of the criminal statute case affects the duty of a vendor to inspect chattels, why does it not affect equally the duty to inspect owing by an owner of business premises, by a lessor of chattels, or by the defendant in MacPherson v. Buick Motor Co.? If a rule requiring a vendor of chattels to make a "reasonable" inspection would be so vague as to make the law "a ass," why are not the rules requiring the foregoing persons to make a "reasonable" inspection equally vague so as to render the law "a ass" likewise?

To conclude, I should like to repeat the closing remarks in my first article: "What has been said here may not be conclusive as to whether a duty should be imposed to make any inspection. It is submitted, however, that neither the cases to date nor the RESTATEMENT rule out such a duty, and that the arguments advanced thus far against its imposition rest upon at least debatable grounds."

CARLISLE, PA.                                D. J. FARAGE