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Surety--Contractor's Bond--Liability to Materialmen

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been cited more than any other Kentucky case on the subject, and has been followed in *Ky. Ind. Oil Co.* v. *Schnitzler*, Adm'r., 208 Ky. 508, 271 S. W. 570 (1925). Because of the impractibility of applying this test by placing the different articles in their proper class this distinguishing process is highly undesirable. The courts usually prefer to take the first exception stated by Judge Sanborn and treat that as the basis of liability. *Osheroff* v. *Rhodes-Burford Co.*, 203 Ky. 408, 262 S. W. 583, (1924).

Practically every Kentucky opinion rendered in this field of negligence contains the words, "imminently, inherently or intrinsically" dangerous, and many of them make that the test of liability. This is most unfortunate. The extreme difficulty in determining just what the character of the article, the act of the defendant, and the relation of the parties must be to permit a proper application of these adverbs as a test will be seen in the cases. Articles treated as "imminently or inherently" dangerous: a brake rod on a railroad coach, *Ward* v. *Pullman Co.*, 138 Ky. 554, 128 S. W. 606 (1910); an automobile, *Olds Motor Works* v. *Shaffer, supra;* gasoline poured into a retailer's kerosene tank, *Ky Ind. Oil Co.* v. *Schnitzler, Adm'r., supra;* a steering wheel on a farm tractor, *Goullon* v. *Ford Motor Co.*, 44 Fed. (2nd) 310 (1930); hair dressing, *Cahill* v. *Inecto, Inc.*, 203 N. Y. S. 1 (1924). Articles treated as not "imminently or inherently" dangerous: an elevator, *Simons* v. *Gregory*, 120 Ky. 116, 85 S. W. 751 (1905); combustible oil in an oil engine, *Berger* v. *Standard Oil Co.*, 126 Ky. 155, 103 S. W. 245 (1907); a defectively installed cook stove, *Besinger Outfitting Co.* v. *Seamans, Adm'r.*, 213 Ky. 157, 208 S. W. 941 (1926); a gas flatiron, *Pitman* v. *Lynn Gas & Electric Co.*, 241 Mass. 322, 35 N. E. 233 (1922); defective circus seats, *Larcabee* v. *Des Moines Tent and Awning Co. et al.*, 189 Iowa 319, 178 N. W. 373 (1920).

The law on this subject seems to be rather definitely settled. As a consequence of the past quarter century development, very little remains of that former immunity of manufacturers from liability for negligence in the fabrication of "non-dangerous" articles. "Things of danger" in this field of the law are what a growing civilization demands them to be. Therefore it seems that more just and consistent decisions would result if the courts applied the test laid down by Judge Cardozo rather than the one followed in the principle case (*Nehi Bottling Co.* v. *Thomas*).

JAS. T. HATCHER.

SURETY—CONTRACTOR'S BOND—LIABILITY TO MATERIALMEN.—In the May, 1931, issue of the Kentucky Law Journal there may be found a case comment on the case of *Standard Oil Co.* v. *National Surety Co.*, 234 Ky. 764; 29 S. W. (2d) 29. This case was cited as controlling in the case of *Aetna Casualty & Surety Co.* v. *United States Gypsum Co.*, 239 Ky. 247; 39 S. W. (2d) 234.

By the terms of the bond in the latter (and principal) case the surety was bound to a hotel company in the sum of $241,197, the condition being: "If the principal (contractor) shall faithfully perform

the contract on his part and fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do and shall fully reimburse and repay the owner for all outlay and expense which the owner may incur in making good such default and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void. Otherwise, it shall remain in full force and effect." The court was called upon in this case to decide the following question: "Was the bond so far and so directly for the benefit of the sub-contractor that it can maintain against the surety company an action thereon?" It is suggested that the court's answer to this question amounts to a nullification, in fact if not in language, of the very essence of third party law.

Since the legal obligations which follow on the formation of a contract are voluntarily assumed it is natural that the courts should not make that obligation greater than the parties contemplated. The intention of the parties is a matter of fact to be determined from their language as interpreted in the light of the surrounding circumstances; and the intention of the parties in no case is to be reached primarily by legal logic. The conclusion as to the effect of a factual situation must be reached through a consideration of the facts themselves, and not by means of a series of legal presumptions, principles, or sylogisms which but vaguely reflect the true situation.

It is a natural inference that the parties to a contract primarily intend to benefit only themselves. However the courts have allowed the introduction of evidence and agreement to disprove this inference, and justly so; they have given to strangers a right of action where it appears that the parties intended they should have the benefit of the contract. But they have retained as the very essence of the law of third party contracts the principle that the third party must prove his right by showing that the contract was intended for his benefit. Has the Kentucky court sustained this principle, or not?

The above discussion would seem to support the contention that in any contract case the court must determine at least three vital questions:

1. Is there a promise?
2. What is the extent of the obligation created by it?
3. May the person now before the court enforce that obligation because:
    A. He is the promisee;
    B. The promise though made to another was made for his benefit?

Now it cannot be too strongly urged that number two must never be confused with number three. It would be necessary to decide number two even though there was no third party question involved; consequently the decision on this point cannot be a *sine qua non* by which to determine the distinct factual question raised by three. A promise by A to B to pay C certainly raises an obligation to pay C; but one

would be presuming a great deal if he should decide without more and in view of the burden of proof on the third party that there was an intention to benefit the latter.

In the Standard Oil case the court stated the law in regard to materialmen's rights in regard to contractor's bonds thus: "We have in Kentucky two distinct lines of decisions in cases of this character. If the bond, when read in connection with the contract, contains a provision obligating the contractor to pay for the material, or to compensate the laborers, it constitutes a provision for the benefit of the laborers and materialmen, upon which they are entitled to maintain an action directly against the surety." Cases. "On the other hand, when the bond is one solely to secure performance of the contract and contains no language from which an express covenant for the benefit of third parties may be derived, an action thereon by a stranger to the contract may not be maintained." Cases. The court here demands, in the first and controlling portion of the above, as a condition precedent to the third party's right of action:

1. A promise—"contains a provision obligating the contractor to pay";
2. The extent of the obligation—"for the material or to compensate the laborers";
3. But when we get to the vital point of issue, the right of the person now before the court to maintain an action, we find not only that there is no demand that he establish his rights, but also that the court is willing to conclusively presume that "it constitutes a provision for the benefit of" said third parties. So it is suggested that the court has destroyed the essence of third party law by holding that where a third party once had to establish an intention to benefit himself, his right will now be conclusively presumed from the existence of an obligation to anyone to pay him—and for emphasis—regardless of the actual reason the parties had for creating a promise to pay him. True the court says in the second portion of its statement that the materialmen shall have no right where there is "no language from which an express covenant for the benefit of third parties may be derived"; but the effect of the implied admission that the express covenant must be shown to have been made for the benefit of the third party is destroyed and rendered of no effect by the court's prior holding that the intention to benefit exists where there is a promise to pay. The court simply holds that two and three in the above suggested problems are one and the same; thereby making three dependent on two; with the consequence that all the third party need show is that the parties *in defining the extent of their liability* mentioned his name.

Another example of this failure to distinguish two from three is found in this statement of the court: "The true basis for the diverg-

ing decisions is found in the terms of the instruments involved." One finds it easy enough to define the extent of liability in such a manner, but more difficult to discover the *fact*—the intention to benefit—from a mere promise which makes no mention of such intention *and without reference to extrinsic factual circumstances.* In the principal case the latter is complicated even further by the fact that the extent of the liability, the words of promise according to the court, is derived not from express words of promise, but from a promise constructed from what is apparently meant to be a definition of the extent of the liability of the promise made in an earlier part of the bond. The interesting question arises as to just how a promise to *indemnify* an owner against liability to materialmen could be made without giving the latter a right of action which would seem to be what the parties attempted to do in the principal case.

W. H. DYSARD.

TORTS—LIABILITY OF A CITY FOR DEFECTS IN STREETS.—Plaintiff, a small boy, was riding his pony at a street intersection in Paducah. A hole 3 to 5 inches deep and 8 or 10 inches wide caused the pony to fall whereby the plaintiff suffered injuries. The hole had been worn in the street at a point where the concrete gutter and asphalt joined, and the evidence showed that the city knew or should have known of the hole's existence. The plaintiff was not found to be contributorily negligent and was permitted to recover. The court held that a city was not an insurer of the safety of persons who traveled its streets, but that it was bound to maintain its streets in a reasonably safe condition for the character of travel for which they were maintained. That in the absence of reasonable care the city was liable for injuries resulting from defects in its streets, of which the city had notice, actual or constructive. *Paducah* v. *Konkle*, 236 Ky. 582, 33 S. W. (2nd) 608.

The case follows both the general rule in Kentucky, and the United States. In *Evans* v. *City of Atlanta*, 139 Ga. 433, 77 S. E. 378, the court held that a city was liable for injuries which proximately resulted from its failure to keep its streets in a reasonably safe condition for ordinary travel, either at night or day, provided the injured party was not guilty of contributory negligence. The case of *Stern* v. *International Railroad Co.*, 220 N. Y. 284, 115 N. E. 759, held that a city was liable for injuries resulting from a railway pole erected in the street, on the ground that it was unreasonably dangerous. *Howard* v. *City of New Orleans*, 159 La. 443, 105 So. 443, held that a city was liable for defective streets, even though as a general rule it was not liable for injuries occasioned in the exercise of its governmental functions. In *Shreve* v. *City of Fort Wayne*, 176 Ind. 347, 96 N. E. 7, the court ruled that a city must keep its traveled ways, and those indicated as for travel, in a reasonably safe condition. Some Kentucky cases that are in accord with the principal case of *City of Paducah* v. *Konkle*, *supra*, are: *City of Louisville* v. *Hough*, 157 Ky. 643, 163 S. W. 1101; *Bickel Asphalt Paving Co.* v. *Yeager*, 176 Ky. 712, 197 S. W. 417; *Tudor* v. *City of Louisville*, 172 Ky. 429, 189 S. W. 456.