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Negligence--Liability of Manufacturer to User of Goods

James T. Hatcher
University of Kentucky

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but need not be by stealth, if the criminal intent is apparent. But regardless of its nature, there must always be a *taking*. *Alexander v. Commonwealth*, 14 Ky. 290, 20 S. W. 254; *Ross v. Commonwealth*, 14 Ky. 259, 83 S. W. 214. It may be by a non-human agency, i. e. not necessarily with the hands. *Commonwealth v. Shaw*, 4 Allen (Mass.) 308, 81 Am. Dec. 706. The taking must also be without the owner's consent. *State v. England*, 8 Jones (N. C.) 399, 80 Am. Dec. 334.

There must be some asportation or carrying away of the property and it must be under the dominion and control of the trespasser, even though it be but for an instant. *Adams v. Commonwealth*, 153 Ky. 88, 154 S. W. 381; *Thompson v. State*, 94 Ala. 535, 10 S. 520, 33 Am. St. Rep. 145.

Since Larceny at common law was confined to goods and chattels, it is now the rule that the thing taken must be personal property. *Blackburn v. Clark*, 19 Ky. L. Rep. 659, 41 S. W. 430. It must be something the law regards as property and of some value, but the least value to the owner is sufficient. *Wilson v. State*, 1 Port. (Ala.) 118; *Commonwealth v. Cabot*, 241 Mass. 131, 135 N. E. 465.

For there to be larceny the goods taken must be the property of another than the taker. *Love v. State*, 78 Ga. 66, 3 S. E. 893. Special property in another is sufficient and possession is enough as against others than the owner. *Ward v. People*, 3 Hill (N. Y.) 395; *Triplett v. Commonwealth*, 28 Ky. at 978, 91 S. W. 281; *Commonwealth v. Rourke*, 10 Cush. (Mass.) 397, 399.

Lastly, there must be a felonious intent or *animus furandi* which exists both at the time of taking and of carrying away. *State v. Holmes*, 17 Mo. 379, 57 Am. Dec. 269. Taking by mistake is not larceny. *Criswell v. State*, 24 Tex. App. 606, 7 S. W. 337. Neither is it larceny to take under a *bona fide* claim of ownership no matter how unfounded. *Ross v. Commonwealth* (Ky.) 20 S. W. 214; *People v. Schultz*, 71 Mich. 315, 38 N. W. 868; *Triplett v. Commonwealth*, 28 Ky. 974, 91 S. W. 281. Ignorance here does not excuse as it might seem, but it does negative a criminal intent.

JAMES LYNE.

NEGLIGENCE—LIABILITY OF MANUFACTURER TO USER OF GOODS.—Plaintiff purchased a bottle of pop in X's place of business and drank part of its contents. A quantity of arsenic troxide wrapped in tinfoil was in the bottle; as a consequence plaintiff became ill and received permanent internal injuries. Judgment for the plaintiff was reversed on the ground that plaintiff failed to show that X procured the pop from the defendant. However the following rule of law was laid down by the court: "One who puts articles inherently or intrinsically dangerous to life on the market owes the duty of care to all those persons who ought to have been reasonably foreseen as likely to use them". *Nehi Bottling Company v. Thomas*, 236 Ky. 684, 33 S. W. (2nd) 701 (1930).

The liability of manufacturers or vendors to the ultimate user of articles was first recognized in its present form of application in Judge Sanborn's decision in *Huset v. J. I. Case Threshing Machine Co.*, 120

Fed. 865 (1903) where the negligence on the part of the manufacturer was the placing of defective covering over the cylinder on a threshing machine. Prior to that time manufacturers were only liable to third persons when the instrumentality of injury was a dangerous article. *Thomas v. Winchester*, 6 N. Y. 397 (1852), *belladonna* mislabeled as extract of dandelion. Judge Sanborn's opinion, however, paved the way for a long line of decisions which recognized liability in cases of "non-dangerous" articles. After stating the general rule of non-liability of manufacturers to third persons he stated three exceptions to this rule. The first exception only is applicable and need be stated here: "An act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life, is actionable by third persons who suffer from the negligence." This basis of liability has been quoted in *Nehi Bottling Co. v. Thomas*, *supra*; *Payton's Admr. v. Childers Electric Co. et al.*, 228 Ky. 44, 14 S. W. (2nd) 208 (1929); and the case has been cited in the decisions of numerous other courts.

One of the most outstanding opinions ever delivered on this subject was that of Judge Cardozo in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916). The defect was in a wheel on an automobile. Until that time certain categories had been enumerated in which to place articles treated by the courts as dangerous, which enumeration was most difficult and unsatisfactory to apply. These classes were there disregarded and it was held that, "If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made it is then a thing of danger." This method of determining when liability exists had been used by the Kentucky courts in recent decisions. *Coca Cola Bottling Works v. Shelton*, 214 Ky. 118, 282 S. W. 778 (1926), where a bottle of pop was overcharged with carbon gas. The same test has been used by the courts in other states. *Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1931), where a bottle of pop was capped with a fly in it; *Colbert v. Holland Furnace Co.*, (Ill.) 164 N. E. 162 (1928), where the air grating in the floor was defectively installed; *White Sewing Machine Co. v. Feisel*, 162 N. E. 633 (1927), where a defective plug was used on the end of a cord thru which electricity passed.

In many cases the courts have attempted to classify the articles that are treated as dangerous. In *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047 (1911), the court stated that a manufacturer is liable to third persons, "(1) When he is negligent in the manufacture and sale of an article intrinsically or inherently dangerous to health, life or limb, or (2) when the maker sells an article for general use which he knows to be imminently dangerous and unsafe and conceals to the purchaser defects in its construction from which injury might reasonably be expected to happen to those using it." In that case the defect was an automobile with a defectively attached rumble seat and was held to come within the second condition. This case probably has

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 impracticability 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