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Bottler's Liability to Ultimate Consumers for Injury Caused by Defective Products

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"coupled with an interest" should. The interest seems to be equally efficacious in both cases regardless of whether it is engrafted in the thing itself. To require that a power coupled with an interest or estate in the thing to be disposed of must be held by the agent to render the agency irrevocable by the principal is an innovation which even the *Hunt* case does not support. Since no distinction between a power coupled with an interest and one given as security is recognized by the French authorities, the early Louisiana cases, or the modern trend of American legal thought, it is particularly unfortunate that the court saw fit to give lip service to it in the principal case.

J.C.W.

BOTTLER'S LIABILITY TO ULTIMATE CONSUMERS FOR INJURY CAUSED BY DEFECTIVE PRODUCTS—Plaintiff sustained certain injuries as a result of the explosion of a bottle of carbonated beverage. Plaintiff, relying on the doctrine of res ipsa loquitur,[1] received a judgment in the trial court, which judgment was set aside by the Second Circuit Court of Appeal, the court indicating that the doctrine of res ipsa loquitur was not applicable to this type of case. The Supreme Court of Louisiana, however, reversed the decision of the circuit court and reinstated the judgment of the district court. *Ortego v. Nehi Bottling Works*, 199 La. 599, 6 So. (2d) 677 (1941).

The decisions of American state courts applying to cases involving liability of manufacturers to ultimate consumers where bottled beverages have exploded or contained deleterious substances are marked by a noticeable lack of uniformity.

Courts have approached the problem upon two distinct theories of liability,[2] i.e., the tort theory of negligence and the contract theory of implied warranty. The latter has been increasingly applied in recent years.

A majority of the common law courts, in applying the negligence theory, have held that the doctrine of res ipsa loquitur is

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1. For a thorough discussion of the doctrine see the article by Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70.

2. Prosser, Handbook of the Law of Torts (1941) 688-689.

applicable to this type of case.[3] Some have held, however, that the doctrine does not apply.[4]

The theory of implied warranty, though presently recognized by a distinct minority of states, has met with considerable favor during recent years. Courts applying the warranty theory allow recovery to the ultimate consumer for breach of an implied warranty of fitness for intended use[5] and disregard the technical lack of privity. It is argued in support of this doctrine that, since the consumer is without opportunity to inspect for himself when he buys a bottled beverage, he has a right to rely upon the implied assurance of the manufacturer that the contents are fit for human consumption. It is maintained that, because of such known reliance, it is only just and reasonable to hold the manufacturer strictly liable for any injury resulting from the consumption of his product.

The *Ortego* case is the first bottling case to reach the Louisiana Supreme Court; and it was held, without apparent controversy, that negligence was the proper theory under which to bring the action. This case is in accord with those decisions of the Louisiana circuit courts which have held, without exception, that negligence is the proper ground for recovery.[6] By its deci-

3. Coca-Cola Bottling Co. of Henderson v. Munn, 99 F. (2d) 190 (1938); Albany Coca-Cola Bottling Co. v. Shiver, 63 Ga. App. 755, 12 S.E. (2d) 114 (1940); Coca-Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 778 (1926); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W. (2d) 701 (1930); Blount v. Houston Coca-Cola Bottling Co., 184 Miss. 69, 185 So. 241 (1939); Coca-Cola Bottling Works, Inc. of Columbus v. Pelty, 200 So. 128 (Miss. 1941); Rozumailkski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 Atl. 700 (1929); Parr v. Coca-Cola Bottling Works of Charleston, 121 W. Va. 314, 3 S.E. (2d) 499 (1939); Payne v. Rome Coca-Cola Bottling Co., 73 S.E. 1087 (Geo. 1912).

4. Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Perry v. Kelford Coca-Cola Bottling Co., 196 N.C. 175, 145 S.E. 14 (1928); Evans v. Charlotte Pepsi-Cola Bottling Co., 216 N.C. 716, 6 S.E. (2d) 510 (1940); Gantt v. Columbia Cola-Cola Bottling Co., 193 S.C. 51, 7 S.E. (2d) 641 (1940); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S.W. 155, L.R.A. 1916B, 877, Ann. Cas. 1917B, 572 (1915).

5. Coca-Cola Bottling Co. of South East Arkansas v. Spurlin, 137 Ark. 541, 132 S.W. (2d) 828 (1939); Coleman v. Dublin Coca-Cola Bottling Co., 47 Ga. App. 369, 170 S.E. 549 (1933); Coca-Cola Bottling Works of Greenwood v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Beyer v. Coca-Cola Bottling Co. of St. Louis, 75 S.W. (2d) 642 (Mo. App. 1934); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. (2d) 445 (1936); Nock v. Coca-Cola Bottling Works of Pittsburgh, 102 Pa. 515, 156 Atl. 537 (1931); Wilkes v. Memphis Grocery Co., 23 Tenn. App. 550, 134 S.W. (2d) 929 (1939); Coca-Cola Bottling Co. of Ft. Worth v. Smith, 97 S.W. (2d) 761 (Tex. 1936).

6. Dean v. Alexandria Coca-Cola Bottling Co., 148 So. 448 (La. App. 1933); Von Herr v. Louisiana Coca-Cola Bottling Co., 148 So. 75 (La. App. 1933); King v. Louisiana Coca-Cola Bottling Co., 151 So. 252 (La. App. 1933); Russo v. Louisiana Coca-Cola Bottling Co., 161 So. 909 (La. App. 1935); Watts v.

sion holding that the doctrine of res ipsa loquitur was applicable to this type of case the Louisiana Supreme Court resolved an existing disagreement between circuit court decisions. The first circuit had always recognized the doctrine as applicable to the bottling cases,[7] but the second circuit had manifested a contrary opinion.[8]

Louisiana courts have always held bottlers to a very high degree of care. To establish his case the plaintiff must allege and prove three things:[9] (1) that the beverage contained a harmful substance (or exploded), (2) that plaintiff partook of the contents of the bottle (or was hit by flying glass), and (3) that injury resulted. After these facts have been established the defendant bears the burden of rebutting the prima facie case of negligence thus established against him in order to escape liability.[10]

The defenses usually relied upon by the defendant bottling companies consist of endeavoring to establish due care by showing (1) that the bottling equipment is of first class quality,[11] and (2) that the deleterious substance complained of entered the bottle, if at all, *after* the product left the manufacturer.[12] The first defense is generally of no avail to the defendant unless the case made out by the plaintiff is extremely weak. The second defense will operate to excuse the defendant, but in nearly all cases this burden of proof has been found too difficult to be sustained.

The Louisiana courts have, as yet, avoided the application of the implied warranty doctrine to the bottling cases. The reluctance of our courts to recognize and apply the warranty theory in these cases is illustrated by the case of *Russo v. Louisiana Coca-Cola Bottling Company*,[13] where it was implied that such a doc-

Ouachita Coca-Cola Bottling Co., 161 So. 151 (La. App. 1936); Hill v. Louisiana Coca-Cola Bottling Company, 170 So. 45 (La. App. 1936); Freeman v. Louisiana Coca-Cola Bottling Co., 179 So. 621 (La. App. 1938); Auzenne v. Gulf Public Service Co., 181 So. 54 (La. App. 1938); Kohlman v. Jefferson Bottling Co., 192 So. 113 (La. App. 1939); Dye v. American Beverage Co., Inc., 194 So. 438 (La. App. 1940); Hollis v. Ouachita Coca-Cola Bottling Co., 196 So. 376 (La. App. 1940); Gunter v. Alexandria Coca-Cola Bottling Co., 197 So. 159 (La. App. 1940); Jenkins v. Bogalusa Coca-Cola Bottling Co., 1 So. (2d) 426 (La. App. 1941); Lanza v. DeRidder Coca-Cola Bottling Co., 3 So. (2d) 217 (La. App. 1941).

7. Auzenne v. Gulf Public Service Co., 181 So. 54 (La. App. 1938); Lanza v. DeRidder Coca-Cola Bottling Co., 3 So. (2d) 217 (La. App. 1941).

8. Ortego v. Nehi Bottling Co., Inc., 6 So. (2d) 674 (La. App. 1941).

9. Dye v. American Beverage Co., Inc., 194 So. 438 (La. App. 1940).

10. Auzenne v. Gulf Public Service Co., 181 So. 54 (La. App. 1938).

11. Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45 (La. App. 1936); Watts v. Ouachita Coca-Cola Bottling Co., 166 So. 151 (La. App. 1936).

12. King v. Louisiana Coca-Cola Bottling Co., 151 So. 252 (La. App. 1933); Dean v. Alexandria Coca-Cola Bottling Co., 148 So. 448 (La. App. 1933).

13. 161 So. 909 (La. App. 1935).

trine would place too great a burden on bottling companies who cannot afford to insure absolutely each consumer's health for the premium of five cents. Nevertheless, a survey of the Louisiana decisions readily indicates that bottlers are held to such a high degree of care under an application of the res ipsa loquitur theory that the practical result is not dissimilar to that which would be obtained if the implied warranty doctrine were applied.[14]

In the recent case of *Dye v. American Beverage Company*[15] the Orleans Circuit Court approved the effectual strict liability that had been applied in a prior decision.[16] Judge McCaleb declared:

> "We have many times said that, where the plaintiff shows by a preponderance of evidence that the beverage contained a foreign substance, that he consumed it and suffered injuries as a result, the burden of proof shifts to the defendant to excuse itself from liability *by proving to the satisfaction of the court that the foreign matter did not enter the beverage during the bottling or manufacturing process.*"[17] (Italics supplied.)

In light of the foregoing language, it would appear that proving due care or even high care in the bottling process will avail the defendant nothing. He would virtually have to prove that the deleterious substance could not have entered his product during the bottling process. It seems necessary, therefore, to conclude that, as a practical matter, the presence of foreign substance in the beverage raises an almost irrebutable presumption of negligence.

It is difficult to draw any real line of distinction between the result that is obtained by applying this type of negligence doctrine and that result which would be obtained by applying the implied warranty doctrine. For this reason it is to be doubted, regardless of the social desirability of holding the bottling company strictly liable to the ultimate consumer, whether the Lou-

14. Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45, 46 (La. App. 1936): *"the burden of proof shifts to defendant company to excuse itself from liability by proving to the satisfaction of the court that the foreign substance or glass did not enter its product during the manufacturing or bottling process."* See King v. Louisiana Coca-Cola Bottling Co., 151 So. 252 (La. App. 1933); Kelley v. Ouachita Dairy Dealers Coop., 175 So. 499 (La. App. 1937); Dye v. American Beverage Co., 194 So. 438 (La. App. 1940); Hollis v. Ouachita Coca-Cola Co., 196 So. 376 (La. App. 1940); Jenkins v. Bogalusa Coca-Cola Bottling Co., 1 So. (2d) 426 (La. App. 1941).

15. 194 So. 438 (La. App. 1940).

16. Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45 (La. App. 1936).

17. 194 So. 438, 440 (La. App. 1940).

isiana decisions will ever be based upon the implied warranty theory. By applying the unique theory which our courts have devolved from the negligence concept, bottlers are held to a liability just as strict as it would be under the implied warranty theory.

The negligence approach of the Louisiana decisions enables the courts to avoid the troublesome aspects of privity inherent in the implied warranty theory and yet achieves the same practical results. By not having committed themselves to the warranty theory the Louisiana courts provide a flexibility of decision which will permit a more equitable disposition of extreme cases.

H. C. L.

CONSTITUTIONAL LAW — APPOINTMENT BY GOVERNOR TO FILL TEMPORARY VACANCIES—On December 20, 1941, George E. Williams, criminal sheriff for the Parish of Orleans, died in office. His unexpired term was only three months and fourteen days. On the same day the judges of the criminal district court held a session en banc and under Section 93 of Article VII of the Louisiana Constitution[1] appointed John J. Williams to serve until the vacancy should be filled by election or by appointment by the Governor "as provided by law."[2] Later in the same day, the Governor appointed Campbell Palfrey for the unexpired term. On December 22, 1941, Palfrey demanded the office of Williams, but the latter refused. On the same afternoon the judges held another session and decided that, since the incumbent had contested the claim of Palfrey, and since the outcome of the contest would depend upon the validity of the appointment of Palfrey by the Governor, the court would continue to recognize Williams as temporary sheriff until and unless he should be ousted by a judgment of a civil court having jurisdiction over contests for title to public office. Palfrey filed a petition in the supreme court for supervisory writs to compel the judges of the criminal district court for the Parish of Orleans to recognize him as criminal sheriff for the

1. ". . . vacancies in the office of the criminal sheriff [for the Parish of Orleans], clerk of the Criminal District Court, clerk and constable of the city courts, shall be filled temporarily by the judges of the courts to which they are attached, and all of said appointees shall serve until such vacancies are filled by election or appointment, as provided by law."

2. "Vacancies occasioned by death, resignation or otherwise, in the office of . . . sheriff . . . where less than one year, shall be filled by appointment by the Governor, with the advice and consent of the Senate. . . ." La. Const. of 1921, Art. VII, § 69.