

treatment of disease," the "physician" in charge shall specify, for entry in the record, the nature of the disease, and where in his opinion it was contracted; the court takes the position that the information is confidential.¹⁴ This is sound since there is always a presumption that municipal authorities lawfully discharge their official duties in compliance with the statutes,¹⁵ and for the further reason that information obtained from a person admitted to the hospital for the "medical treatment of disease," is obviously information necessary to enable the physician to prescribe for the patient, such as the statute makes confidential.¹⁶ Indeed, where the relation is established, it will be presumed that any information imparted to the physician by the patient is necessary for proper treatment in a professional capacity.¹⁷

The remaining contention is that the question of privilege was waived by plaintiff's opening statement at the trial. Parties are bound by the admissions of their counsel during trial, of facts material to the issue, as such admissions dispense with the necessity of proving the doubtful fact.¹⁸ But a mere preliminary outline by counsel of what he expects the evidence will be, is not a solemn admission to take the place of proof.¹⁹ The principal case is within this rule since no reference was made, or evidence introduced, to show the treatment received or condition of the insured as a patient in the hospital.²⁰ Indeed the issues in a case are made by the pleadings and not by opening statements, and the fact that counsel does not object does not enlarge or change the pleadings.²¹ If such were not the rule, it would be often difficult to know what were the real issues in the case.²²

It is submitted that the principal case is a step forward in Missouri practice and well within the language of the statutes involved and the adjudicated cases.

J. L. A. '37.

FOODS—FOREIGN SUBSTANCE—NEGLIGENCE.—In a recent case the plaintiff became ill from drinking part of a bottle of Cocoa-Cola which was found to contain glass. The Arkansas Supreme Court held it to be a question of

¹⁴ *Vermillion v. Prudential Insurance Co. of America*, (1936 Mo. App.) 93 S. W. (2d) 45; *R. S. Mo. 1929*, sec. 9056; *Mo. St. Ann. par. 9056*, p. 4196.

¹⁵ *Wiget v. City of St. Louis*, (1935 Mo. Sup.) 85 S. W. (2d) 1038; *State ex rel Ball v. State Board of Health* (1930 Mo. Sup.) 26 S. W. (2d) 773.

¹⁶ *R. S. Mo. 1929*, sec. 1731; *Mo. St. Ann. par. 1731*, p. 4011.

¹⁷ *State v. Kennedy* (1903) 177 Mo. 98, 75 S. W. 979.

¹⁸ *Pratt v. Conway* (1898) 148 Mo. 291, 49 S. W. 1028; *Fillingham v. St. Louis Transit Co.* (1903) 102 Mo. App. 573, 77 S. W. 314; *Oscanyan v. Winchester Arms Co.* (1880) 103 U. S. 261.

¹⁹ *Russ v. Railroad Co.* (1892) 112 Mo. 45, 20 S. W. 472; *Fillingham v. St. Louis Transit Co.* supra, note 18.

²⁰ *Vermillion v. Prudential Insurance Co.*, supra, note 14.

²¹ *Moore v. Dawson* (1925) 220 Mo. App. 791, 277 S. W. 58.

²² *Supra*, note 20; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282 l. c. 299; *Fox v. Peninsular Works*, (1891) 84 Mich. 676, l. c. 680, 48 N. W. 203; *Minchin v. Minchin*, (1892) 157 Mass. 265, 32 N. E. 164.

negligence for the jury.¹ In St. Louis, Missouri, an infant drank milk from a bottle sold to the infant's mother by a dairy company and was injured by the presence of glass in the milk.² Both the Arkansas and the Missouri courts concurred that negligence was the basis of recovery³ although the verdict for plaintiff in the Missouri case was set aside because of error in instructions on a collateral point.⁴

The proper basis of recovery for injuries resulting from food or beverages containing harmful foreign substances is a matter of difference among the states.⁵ Food has been the object of special solicitude by the law from early times. English statutes as early as 1266 suggest that the sale of victuals differed from the sale of other articles in that the vendor of food might be held liable without a showing of fraud.⁶ Food is the subject of modern legislation to insure its purity and proper handling,⁷ and is recognized as within that class of articles imminently dangerous to human life thereby coming within an exception to the rule that a manufacturer or seller of a defective article is not liable for injuries to the person or property of an ultimate consumer who purchased from a middleman.⁸

Two positions have been taken by the courts. The majority adhere to the doctrine of negligence as the proper basis for liability⁹ while the minority base liability on the rule of implied warranty of fitness.¹⁰ This latter theory remained merely dicta in the United States for a long while after being introduced in the case of *Van Bracklin v. Fonda* (1815), 12 Johns 468, as an exception to the doctrine of *caveat emptor*.¹¹ Because an action based upon a warranty is generally looked upon as a contract action, there was some difficulty in stretching this theory to cover the case of a pur-

¹ *Coca Cola Bottling Co. et al. v. Hill* (1936 Ark.) 90 S. W. (2d) 210.

² *Hickman v. St. Louis Dairy Co.* (1936 Mo.) 90 S. W. (2d) 177.

³ *Supra*, note 1.

⁴ *Supra*, note 2.

⁵ 20 *Virginia Law Review* 921.

⁶ 5 *Iowa Law Bulletin* 6, 36.

⁷ R. S. Mo. 1929, sections 13003 et seq.

⁸ 2 *Cooley On Torts* (3rd ed.) 486 et seq.; 17 A. L. R. 669 note.

⁹ *Birmingham Chero-Cola Bottling Co. v. Clark* (1921) 205 Ala. 678, 89 So. 64; *Enloe v. Charlotte Coca Cola Bottling Co.* (1935) 208 N. C. 305, 180 S. E. 583; *Crigger v. Coca Cola Bottling Co.* (1915) 132 Tenn. 545, 179 S. W. 155; *Coca Cola Bottling Co. v. Barksdale* (1920) 17 Ala. App. 606, 88 So. 36; *Coca Cola Bottling Co. v. McBride* (1929) 180 Ark. 193; 20 S. W. (2d) 862; *Coca Cola Bottling Co. v. Jenkins* (1935) 190 Ark. 930, 82 S. W. (2) 15; *Coca Cola Bottling Co. v. Rowland* (1932) 16 Tenn. App. 184, 66 S. W. (2) 272; *Coca Cola Bottling Co. of Ark. v. Adcox* (1934) 189 Ark. 610, 74 S. W. (2) 771; *Aron & Co. v. Sills* (1924) 206 N. Y. Supp. 695; *Anheuser-Busch, Inc. v. Southard* (1935) 84 S. W. (2) 89.

¹⁰ *Davis v. Van Camp Packing Co.* (1920) 189 Ia. 775, 176 N. W. 382; *Coca Cola Bottling Co. v. Lyons* (1920) 145 Miss. 876, 111 So. 225; *Coca Cola Bottling Works v. Simpson* (1930) 130 So. 479; *Scruggins v. Jones* (1925) 20 Ky. 636, 269 S. W. 743; *Chysky v. Drake Bros. Co.* 182 N. Y. Supp. 459, 192 App. Div. 186 held that the purchaser of a cake containing wire could sue the manufacturer for negligence as well as breach of implied warranty. 23 *Kentucky Law Journal* 534.

¹¹ 5 *Iowa Law Bulletin* 6, 36.

chaser from a middleman because of the absence of privity between the parties.¹² The courts have supplied this technical deficiency by saying, "When a manufacturer makes bottles and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a *legal duty* to see it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the stomach, will be injurious."¹³

Some courts suggest that the manufacturer's warranty that his goods are fit for consumption is one which runs with the goods.¹⁴ These courts recognize that logic may not justify the holding and that the result may be to make the manufacturer an insurer of his product.¹⁵ This holding, however, is in line with the present tendency of the law to impose liability on those who can best bear the loss, in the light of the exigencies of social needs.¹⁶

The dominant line of cases holds that the proper basis for recovery is in tort for negligence.¹⁷ Here too, privity was a troublesome question, but it has been definitely settled that a manufacturer is answerable for his negligence even to those who have no privity of contract with him.¹⁸ The courts which recognize negligence as the basis of liability differ as to what constitutes sufficient evidence to maintain plaintiff's case. Some hold the mere presence of impurities in the food is not evidence of negligence;¹⁹ others, that the presence of impurities does give rise to such an inference.²⁰ Still

¹² 12 Michigan Law Review 919. *Salle v. Light* (1827) 4 Ala. 700, an early case holding there can be no recovery by consumer from the manufacturer on implied warranty because of lack of privity.

¹³ *Watson v. Augusta Brewing Co.* (1905) 124 Ga. 121. Italics supplied.

¹⁴ *Ward v. Morehead City Sea Food Co.* (1916) 171 N. C. 33, 87 S. E. 958; *Catani v. Swift & Co.* (1915) 251 Pac. 52; *Boyd v. Coca Cola Bottling Works* (1914) 132 Tenn. 23, 177 S. W. 80; *Mazetti v. Armour & Co.* (1913) 75 Wash. 622; *Ward Baking Co. v. Trizzino* (1928) 27 Ohio App. 475, 161 N. E. 557 hold that the manufacturer's warranty to the retailer inures to the benefit of the consumer.

¹⁵ *Parks v. Pie Co.* (1914) 93 Kan. 334, 144 Pac. 202; *Watson v. Augusta Brewing Co.* (1905) 124 Ga. 121, 52 S. E. 152, 1 *Williston On Sales* (2nd ed.) 239. 20 *Minnesota Law Review* 527. *Smith v. Carlos* (1923) 215 Mo. App. 488, 247 S. W. 468, holds that necessity requires that public purveyors of food, such as restaurateurs be held as insurers against injury occasioned by their failure to furnish pure and wholesome food. Opposite view shown in *Thomason v. Ballard & Ballard* (1935) 208 N. C. 1, 179, S. E. 30 which says that the manufacturer of food for human consumption is liable for failure to exercise a high degree of care in the manufacture and preparation of the food, but is not an insurer of his product.

¹⁶ Pound, 27 *Harvard Law Review* 195, 233.

¹⁷ *Supra*, note 9.

¹⁸ 5 *Iowa Law Bulletin* 6, 36. *Boyd v. Coca Cola Bottling Works* (1914) 132 Tenn. 231 sums up the stand taken by the courts when it says, "practically all the modern cases are to the effect that the ultimate consumer of foods . . . may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles." *Coca Cola Bottling Co. v. Barksdale* (1920) 17 Ala. App. 606, 88 So. 36.

¹⁹ 20 *Virginia Law Review* 921; *Swenson v. Purity Baking Co.* (1929) 183 Minn. 289, 236 N. W. 310.

²⁰ *Kroger Grocery & Baking Co. v. Schneider* (1933) 249 Ky. 261, 60 S. W. (2d) 594; *O'Brien v. Louis K. Liggett Co.* (1933) 282 Mass. 438, 185

others have held that proof of the presence of foreign matter in food or beverages warrants recovery on the doctrine of *res ipsa loquitur*.²¹ Because of the difficulties of proving that the agency causing the injury was under the exclusive control of the defendant; that the injury was one which would not ordinarily occur if the defendant had used due care; and, that evidence of the cause of the injury is more readily available to defendant than plaintiff, this doctrine is not generally used.²² Most courts take the view that the presence of such foreign matter as glass, in itself, is evidence of negligence, hence there is no need for the doctrine of *res ipsa loquitur*, for the case is one for the jury without its aid.²³ Direct proof of actionable negligence on the part of the defendant is not required, however, since such negligence may be inferred from relevant facts and circumstances.²⁴ E. C. '37.

INJUNCTION—ENJOINING THE PROSECUTION OF A SUIT IN ANOTHER JURISDICTION.—In the case of *McConnell v. Thomson*¹ the appellant, an Indiana citizen, was enjoined from prosecuting a threatened action in the city of St. Louis, Missouri, to recover damages under the Federal Employers' Liability Act² on account of injuries alleged to have caused the death of appellant's deceased husband while he was in the employ of the appellee. The alleged tort took place in Patoka, Indiana. All the witnesses and records were at Evansville, Indiana. *Held*, the Indiana equity courts may enjoin the prosecution of actions in other states where it is shown that it would be inequitable for the action to be brought in another jurisdiction.

The general rule is that where a party to a suit is within the jurisdiction of one court he may, "on a proper showing," be enjoined from prosecuting an action in a court of another state.³ The power to so enjoin a citizen rests upon the power of equity to act *in personam*,⁴ for the court simply enjoins the person from prosecuting the suit and not the foreign court from trying the suit.⁵ A court will not issue an injunction to restrain an

N. E. 28; *Minutilla v. Province Ice Cream Co.* (1929) 50 R. I. 43, 144 Atl. 884; *Bourcheix v. Willow Brook Dairy* (1935) 268 N. Y. 1, takes the view that the presence of glass in a bottle of cream in violation of a statute prohibiting the sale of adulterated cream constituted negligence as a matter of law.

²¹ *Eisenbeiss v. Payne* (1933 Ariz.) 25 P. (2d) 161; *Atlanta Coca Cola Bottling Co. v. Sinyard* (1932) 45 Ga. 272, 164 S. E. 231; *Liggett & Myers Tobacco Co. v. Rankin* (1932) 346 Ky. 65, 54 S. W. (2) 612.

²² 20 *Minnesota Law Review* 527; *Enloe v. Charlotte Coca Cola Bottling Co.* (1925) 208 N. C. 305, 180 S. E. 582.

²³ 23 *Michigan Law Review* 785.

²⁴ *Enloe v. Charlotte Coca Cola Bottling Co.* (1935) 208 N. C. 305, 180 S. E. 582; *Hampton v. Thomasville Coca Cola Bottling Co.* (1935) 208 N. C. 331, 180 S. E. 584.

¹ (Feb. 18, 1936) 200 N. E. 96.

² 45 U. S. C. A. secs. 51-59 and particularly sec. 56.

³ 14 R. C. L. 412.

⁴ *O'Haire v. Burns* (1909) 45 Colo. 432, 101 Pac. 755, 132 A. S. R. 191, 25 L. R. A. (N. S.) 267 and note.

⁵ *Gordon v. Munn* (1910) 81 Kans. 537, 106 Pacific 286, 25 L. R. A. (N. S.) 917.