

2643
190-360
Record No. 3561

Containing also Brief for Defendant in Error

In the
Supreme Court of Appeals of Virginia
at Richmond

**THE NEWPORT NEWS COCA-COLA
BOTTLING COMPANY, INC.**

V.

ELAINE BABB

FROM THE CIRCUIT COURT OF ELIZABETH CITY COUNTY.

RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

190 VA 360

RULE 14—BRIEFS

1. **Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

(d) Argument in support of the position of appellant.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. **Form and contents of appellee's brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate reference to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

3. **Reply brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him, not referred to in his petition or opening brief. In other respects it shall conform to the requirements for appellee's brief.

4. **Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

(c) *Stipulation of counsel as to filing.* Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

5. **Number of copies to be filed and delivered to opposing counsel.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

6. **Size and Type.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

7. **Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he cannot be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

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SUPREME COURT OF APPEALS

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RICHMOND, VIRGINIA

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 3561

THE NEWPORT NEWS COCA-COLA BOTTLING COM-
PANY, INCORPORATED, Plaintiff in Error,

versus

ELAINE BABB, Defendant in Error.

PETITION FOR WRIT OF ERROR AND
SUPERSEDEAS.

*To the Honorable Chief Justice and Justices of the Supreme
Court of Appeals of Virginia:*

Your petitioner, The Newport News Coca-Cola Bottling Company, Incorporated, respectfully represents to this Honorable Court that it is aggrieved by a final judgment entered by the Circuit Court of Elizabeth City County, Virginia, on the 6th day of December, 1948, against your petitioner in an action at law in which Elaine Babb was plaintiff, and your petitioner, The Newport News Coca-Cola Bottling Company, Incorporated, was defendant. The plaintiff recovered against the defendant the sum of Twenty-five Hundred Dollars (\$2,500.00) with interest and costs.

The transcript of the record with original exhibits is 2* herewith *presented. The parties will be referred to according to their relative positions in the trial court. The page references in this petition are to the pages of the manuscript record.

STATEMENT OF PLEADINGS IN THE TRIAL COURT.

The plaintiff proceeded by way of notice of motion for judgment against the defendant to recover damages which she claimed she suffered as result of consuming a bottle of Coca-Cola, or a portion thereof, which contained a decomposed snail or slug. She claimed to have drunk a portion of the bottled Coca-Cola while she was at work as a civilian employee at Fort Monroe, Virginia, on or about October 10, 1947; that she had purchased the Coca-Cola from a vending machine owned by the Post Exchange at the Fort, which vending machine was in a different building from that occupied by the plaintiff. The defendant pleaded the general issue and the case was tried on April 30 and May 1, 1948, before Honorable Frank A. Kearney, Judge of the Circuit Court of Elizabeth City County, Virginia. The jury returned a verdict for the plaintiff in the amount of Twenty-five Hundred Dollars (\$2,500.00), which defendant moved to set aside and render final judgment for the defendant or grant a new trial. The Court overruled the motion and rendered final judgment on the verdict against this defendant on December 6, 1948, to which the defendant excepted.

ASSIGNMENTS OF ERROR.

The Court erred in the following particulars:

1. In refusing to strike the evidence of the plaintiff.
2. In submitting the case to the jury on any instructions that *would permit a finding for the plaintiff.
- 3* 3. In granting plaintiff's Instructions Nos. 1 and 2.
4. In permitting, over objection of counsel for defendant, the questions and answers beginning at question on page 53, line 25, page 54, to the bottom of page 55, of the record, as being purely hearsay evidence.
5. In overruling the motion of the defendant to set aside the verdict and enter final judgment for the defendant; or grant a new trial, and further erred in entering judgment for the plaintiff on the verdict.

QUESTIONS INVOLVED.

The Principal Point.

I. The real question involved in this case is exactly similar to that involved in the case of *Pepsi-Cola Bottling Company*

of *Norfolk, Incorporated v. Addie Lee McCullers*, decided by this Court March 7, 1949, opinion by Justice Eggleston. The facts in this case are almost identical with the facts in the Pepsi-Cola case, and the instruction given in that case, is word for word as given in this case. "Plaintiff's Instruction No. B" in the Pepsi-Cola case is verbatim with Plaintiff's Instruction No. 2 in the instant case, which is as follows:

"The Court instructs the jury that they may infer negligence from the fact that foreign substance was found in the bottle, and the law does not require the plaintiff to show the particular dereliction."

This Court said that this instruction was erroneous for the reason that there could be no inference of negligence on the part of the bottling company from the mere presence of the obnoxious substance in the bottle, *unless it was predicated upon a finding that the bottle was not tampered* 4* *with* *after it left the custody of the bottling company, and that the obnoxious substance was in the bottle at the time the defendant parted possession with it.

Because of the fact that this Court reversed the trial court solely on account of this erroneous instruction, this petition will deal with principally the evidence showing that this case is on all fours with the Pepsi-Cola case referred to, and that, therefore, the trial court must be reversed for the reason that this case is absolutely controlled by the decision in the Pepsi-Cola case. As a matter of fact, counsel for petitioner deliberately awaited the decision in the Pepsi-Cola case, and also the case of *Norfolk Coca-Cola Bottling Works, Incorporated v. Land*, which was argued simultaneously with the Pepsi-Cola case, and decided on the same day as the Pepsi-Cola case,—opinion also by Justice Eggleston. Counsel was familiar with the fact that "Instruction No. B" was given in the Pepsi-Cola case and was identical with "Instruction No. 2" in the instant case, and being of the opinion that the instruction was erroneously given in both cases, counsel for petitioner awaited the opinion of this Court in the Pepsi-Cola case and the Land case,—hence the delay in filing this petition.

Other Points Involved.

II. There is no evidence of actionable negligence on the part of the defendant bottling company.

III. There is no substantial evidence that the physical con-

dition of the plaintiff resulted solely from the presence of the obnoxious substance in the bottle.

IV. The verdict was excessive.

5* *V. If this Court adheres to the "inference of negligence theory" in these bottling cases, which was proven to be a hardship on the industry, and has been a definite aid to what has assumed the proportions of a racket, then the Court ought to add to such theory a modification of such *quantum* or character of proof, which will give rise to such inference of negligence. In other words, it is now too easy for a jury to disregard the high degree of care exercised by most bottling plants, and notwithstanding that the bottle in question had been out of the possession of the bottler for weeks at a time, on the open market, passing through many hands, in storage in warehouses and on the dealer's shelf, in vending machines, and the like, very susceptible to being tampered with, and, from the mere presence of the obnoxious substance, willy nilly, find a verdict for the plaintiff.

THE FACTS.

The plaintiff, Elaine Babb, was the wife of a soldier in the Army, who was stationed at Fort Monroe, in October, 1947, during which time the plaintiff was a clerk in the Finance Office at Fortress Monroe. In the afternoon she and some of the other clerks had Coca-Colas and the men clerks, as a rule, would go out of the building in which the Finance Office was located, down the back steps, across an open court yard from twenty-five to forty yards distant to another building, where a Coca-Cola vending machine was located. In this instance, a Mr. Toulson, a clerk in the Finance Office on the 10th of October, went across the street to where the vending machine was located and purchased three Coca-Colas, including his own. *He opened the Coca-Colas and retraced his steps back across the open court yard, up the back steps and into the office occupied by him, Mrs. Babb and the other clerks,*

6* carrying the *opened bottles of Coca-Cola. He placed one bottle on the desk of Mrs. Babb, the plaintiff, and distributed the other bottles to the other clerks. She testified that she had taken a few sips out of the bottle of Coca-Cola that Mr. Toulson had brought to her opened, across the court yard and up the back steps, and she felt something slimy in her mouth, hitting against her teeth. She stated that she immediately spit out into the trash can and stated to someone, "there's something in this bottle". She went to the wash room, where she stated she had gone because she had become ill, and when she came back she was told,

"it looks very much like a snail or worm or something and somebody told me to see a doctor and get a lawyer" (R., p. 49).

She then stated that she

"took it over and Sergeant Denton and some doctor took it down to the laboratory and they came back and gave me this thing that's in the little bottle."

Mr. Toulson testified R., p. 35:

"Q. When you came down the steps to get the Coca-Cola you came down the back end of your building?

"A. Yes, sir, that's the way I come in.

"Q. You go in from the road? The closest entrance is towards Engle's Road? That's the main road. You went down the back steps, across the courtway, so to speak, to a building over to your right where the vending machine was, is that correct?

"A. Yes, sir.

"Q. And you walk along the walkway; that was completely out of doors, was it not?

"A. Yes, sir.

"Q. Would you say it was anywhere from 75 to 100 yards from your building?

"A. No, sir.

7* "Q. How far would you say?

"A. 25 yards.

"Q. 25 yards?

"A. That is what I say. I never measured it.

"Q. You never measured it?

"A. I never measured it.

"Q. You wouldn't think that it was closer to 80 yards?

"A. I don't think so.

"Q. You would not say that isn't correct?

"A. No, sir, I don't say it isn't correct but I don't think it is.

"Q. You think it was 25 or more yards; about 25 yards?

"A. Yes, sir.

"Q. But you wouldn't say that is correct?

"A. No, sir, I wouldn't say.

"Q. You went across and you went to the vending machine and got the three or four bottles of Coca-Cola?

"A. Yes, sir.

"Q. And you opened them? Did you stay there any time or did you come right back?

"A. I came right back.

"Q. Opened the Coca-Colas, held them in your hand or two hands. It was either three or four bottles you think?

"A. I don't remember it exactly. About three or four.

"Q. Enough for you to carry. You didn't have any little satchel or box? You carried them in your hands?

"A. Yes, sir.

"Q. And came back to your desk and gave Mrs. Babb a Coca-Cola and whoever else had purchased the Coca-Cola and sat down at your desk and started to drink yours, isn't that correct?

8* **"A. Yes, sir."

The witness Toulson also testified concerning the drinking of the Coca-Cola by the plaintiff at R., p. 38:

"Q. Do you know how much she drank?

"A. You mean how much of the Coca-Cola altogether?

"Q. Yes, out of the bottle.

"A. I don't know exactly how much she drank out of it.

"Q. Would you say a fourth, a third, to the best of your judgment, of course.

"A. I'd say she drank a third at least.

"Q. And then she put it down?

"A. Yes, sir.

* * * * *

"Q. When did you see that?

"A. As soon as she started to spitting, whatever she was doing. I went over and looked in the bottle and seen it and I said, 'It looks like a worm to me.'"

So according to the plaintiff's testimony that the object, whatever it was, was sticking into her mouth, or at least against her lips, and the testimony of Mr. Toulson that he looked into the bottle and saw the object whatever it was, shows conclusively that the worm, or whatever it was, was floating in the Coca-Cola; that is, it was not stuck to the side of the bottle as if it had been in there a great length of time.

Mr. Ralph Hutson testified (R., p. 122) that he was civilian manager of the Post Exchange at Fort Monroe, which position he had occupied for about twenty-five years. He purchased his Coca-Cola from the Coca-Cola Bottling Company in Newport News and sold it part over the counter and 9* some through *vending machines. They had twelve vending machines and all under his supervision. He testified at page 122:

"Q. Do you have, or did you have the vending machine in the Finance Office in October of last year?

"A. There was one in the building adjacent to the Finance Office.

"Q. Will you describe the position of that building in reference to the Finance Office proper.

"A. It was a small building, small temporary building diagonally across the street from the Finance Office.

"Q. About how far would you say?

"A. I would say about 30 or 40 yards.

"Q. The vending machine was in that building?

"A. Yes, sir.

"Q. What else was in the building?

"A. I don't recall anything else in the building except some records."

He testified further that the vending machine in the building near the Finance Office was serviced about one a day; that the Coca-Cola was taken from the Exchange main house located in the rear of the main Exchange building inside the Fort. The Coca-Cola was delivered by the Coca-Cola truck to the warehouse about twice a week, getting about thirty or forty cases each trip. He stated they then would be stored in the Exchange warehouse under the supervision of a warehouseman. There were about sixty cases stored at a time and he replenished his stock about twice a week as needed. There was a Mr. Asque in charge of the warehouse and there were two truck drivers who had access to the warehouse,—one man named Lane and the other named Trapp. They used an

Exchange truck and loaded the Coca-Cola cases from 10* the Exchange *warehouse onto the truck and Mr. Lane, without a helper, would take the Coca-Cola around and serve it to various machines on the Post. When he went into the building to service a machine, the truck was left unattended with the remaining cases of Coca-Cola thereon (R., p. 125).

Elijah Lane testified that he was employed by the Post Exchange at Fort Monroe, and his duties were to serve the Coca-Cola machines and later on to deliver groceries. He serviced the Coca-Cola in the morning and delivered groceries in the afternoon. He secured the Coca-Cola from the warehouse, which was open in the morning, and he would load up and go out and serve the machines and bring the empties back. He did not have a helper. He testified at R., p. 127:

"Q. When you loaded up the truck and served the machines,

how did you serve them? Go around to different places?

"A. Yes, sir.

"Q. Who took care of the truck while you served the machines?

"A. I just parked the truck, and take the cokes off and bring the empties back.

"Q. How long did it take you as a rule?

"A. I started at nine in the morning and be through about eleven.

"Q. How many Coca-Cola bottles would be in the average machine, say in the Finance Office machine?

"A. It holds 108.

"Q. How long did it take you to service them?

"A. Five or ten minutes.

"Q. Depending on the number of bottles, I presume?

"A. I had to go around to the different buildings and I—

*"A. Yes.

11* "Q. You would go around to the different buildings and pick up empties?

"A. Yes.

"Q. How long would it take?

"A. Ten or fifteen minutes. There was about three buildings I had to go to."

The Medical Testimony.

The plaintiff did not introduce as witnesses any of the doctors who treated her at the hospital, or any doctor that treated her anywhere else, with the exception of a psychiatrist, Dr. Ransone. She testified that after she had swallowed the Coca-Cola, she became sick and vomited and thereafter could not eat anything, and, therefore, lost weight. About a week or ten days after the occurrence, she went into the Fort Monroe Hospital and was discharged in three or four days. Exactly thirty days after the drinking of the Coca-Cola, that is, on November 10, 1947, she visited the psychiatrist. He saw her one other time, that is, on December 10th, exactly thirty days later, and had not laid eyes on her from that time until the day before she testified in Court, which was on April 30, 1948. This psychiatrist totally ignored the fact that about a year before this occurrence the plaintiff had been in the Fort Monroe Hospital very seriously ill, with the loss of considerable blood, on account of an abortion. When asked whether it was self inflicted she answered, "Not necessarily". He gave her symptoms as being very tense with large pupils, and hands wet, with the general appearance of a person very frightened and very angry. He saw her thirty

days later and said that she was just as tense as before, and that in addition to that, she had a neurotic condition, which he said was reasonably sure nutritional. He *had no 12* hesitancy in fixing the onset of this condition exactly thirty days prior to the time he saw her, which would have put it on October 10th, the very day she drank the Coca-Cola. He did not see her again for more than six months and said that her condition was the same; that it would remain so for six or seven more months. He went on to exaggerate again and said that her condition could go into other diseases, such as duodenal ulcers and arthritis. In other words, he supplied all the necessary ammunition in the absence of her medical doctors who treated her at the time of this occurrence. It was just a typical psychiatric performance that is common to certain types of cases, of which this is an example. No wonder it is that the jury went out and gave a verdict of Twenty-five Hundred Dollars (\$2,500.00) for this so-called injury. The verdict was entirely excessive and should have been set aside by the Court on that ground alone.

Hearsay Testimony.

Over objection of counsel for the defendant, the Court permitted the plaintiff to testify as to what some people at the Post had told her a day or so before the trial. It was purely hearsay testimony and was given for the sole purpose of inflaming the minds of the jury against this defendant. The testimony is set out in full, beginning at the bottom of page 53, all of page 54 and down to the bottom of page 55 of the record. After the testimony was in and the damage was done, The Court tried to explain it away by saying that he had admitted the testimony only for the purpose that the statement was made to her and that it had upset her, in addition to having already been upset, according to her previous testimony. That explanation did not cure the damage that was already done. The Court should have heard the testimony in chambers, and seeing the damaging nature of it, should have not permitted it to go to the jury for any purpose. It was no part of this case, and had occurred only a day or so before the trial. In any event, it was all hearsay and should not have been permitted by the Court.

12A* *"Q. When you were on the Post yesterday, were you embarrassed by anything that occurred down there in reference to this case?

"A. Yes. I was quite embarrassed. Socebody came up and asked me—

"Mr. Ford: I object, if your Honor please.

"Court: Let's find out. Tell me who came up?

"A. Mrs. Potter and Sergeant Potter.

"Court: Who are they?

"A. He's the Post Sergeant Major.

"Court: All right. Go ahead. I overrule the objection.

"Mr. Ford: It is hearsay, if your Honor please.

"A. Mrs. Potter came up and asked me if I had been in jail. I asked her what she was talking about. 'Somebody was investigating you' and just then Sergeant Potter told me—

"Mr. Ford: I object to what Sergeant Potter said.

"Court: I overrule the objection.

"A. I mean it was just embarrassing to have people checking on my character, checking on my background as though I were a criminal or something.

"Q. What was some of the other questions, if there were any, that Sergeant Potter said were asked of him?

"A. He said he was asked what kind of people we were, if we were quiet, if we were noisy, if we caused trouble and where we came from and where I went to. I don't know all he told me. I was so upset about that.

"Mr. Ford: Same objection and move to strike.

"Court: Overruled.

"Q. Did Mrs. Kelly tell you anything about this case too?

"Court: Don't answer the question. The question is leading.

12B* *"Q. Did you have any conversation with Mrs. Kelly?

"A. Yes, I had a telephone conversation with Mrs. Kelly and she told me that Mr. Brown—

"Mr. Ford: Objected to as being hearsay.

"Court: Overruled.

"Mr. Ford: Exception.

"A. Told me Mr. Brown had been to see her and that she told him what happened there and that he had asked everybody around there and that I should take any settlement Mr. Brown offered me.

"Mr. Ford: Same objection, if your Honor please.

"Q. All right. Now Mrs. Babb—

"Court: Gentlemen of the jury, with reference to these reports that came to this woman, I've admitted them in the evidence for one purpose alone; that is not as to the truth of the statements but the fact that some people made this statement to her, which she said upset her, in addition to what she already testified to that upset her."

13*

*ARGUMENT.

Because it appears that it is almost certain that this Court must grant *certiorari* in this case, in order to be consistent with the ruling in the case of *Pepsi-Cola Bottling Company of Norfolk, Incorporated v. Addie Lee McCullers*, which was decided March 7, 1949, opinion by Mr. Justice Eggleston, counsel for petitioner does not deem it necessary to enter into any elaborate discussion of this case. As the evidence in this case discloses, the Post Exchange at Fortress Monroe purchased its Coca-Cola from the Newport News Bottling Company, and stored it in its Exchange warehouse, where it was kept for a period of time, depending upon the amount of Coca-Cola that was consumed by the various vending machines. It was handled in the warehouse, and at least three people had access to the warehouse from early in the morning to the afternoon. The Exchange truck was loaded in the morning and the driver would go to the various buildings where the machines were located, and without the aid of a helper, would unload the Coca-Cola and pick up the empties, taking from ten to fifteen minutes to service each machine. During that time the truck was left unattended and, of course, no supervision over the Coca-Cola bottles remaining on the truck. It should be particularly noted, too, that the plaintiff did not open the bottle of Coca-Cola herself. As a matter of fact, she did not go to the vending machine herself and procure the Coca-Cola from the machine. She had her agent, Mr.

14* Toulson, who was another clerk in the Finance Dept., get the Coca-Cola *for her, along with two other bottles, which apparently were found to be in perfect condition.

It will be noted that the vending machine was not in the Finance Office, but was some twenty-five to forty yards away, across an open court and in another building. Mr. Toulson testified that he walked to this building and procured three bottles of Coca-Cola, opening all three of them. Then, with the opened bottles of Coca-Cola, he retraced his steps back

across the court yard, from twenty-five to forty yards, up a pair of back steps leading to the office of the Finance Department on the second floor, and across the office floor, where he deposited the bottle of Coca-Cola on Mrs. Babb's desk. So that, not only during the time that the Coca-Cola had left the possession of its bottler, the defendant, it was in the possession of the Post Exchange for a matter of days, or even weeks; in the warehouse, frequented by at least three people; on the truck, handled by one truck driver, who serviced the vending machines; left unattended in the streets, while he was in the building from ten to fifteen minutes servicing each machine; and then handled by Mr. Toulson, across an open court yard, with the caps off the bottles, so that anything could fall or be dropped into the bottle on the way from the vending machine building back to the Finance Office, where Mrs. Babb received the opened bottle of Coca-Cola.

Thus it is, that in the opinion of counsel for petitioner the facts in this case are even stronger than they were in the Pepsi-Cola case decided by Justice Eggleston on March 7, this year. In the Pepsi-Cola case the plaintiff's son purchased the Pepsi-Cola from a grocer and delivered the bottle to her, tightly capped and sealed, and that she opened it in the presence of her son. It took a period of some fifteen minutes, she stated, to drink the Pepsi-Cola, and it was then

that she observed the presence of some foreign *object
15* in the bottled drink. The facts there are not nearly as strong as in the instant case, where Toulson, the plaintiff's agent, carried the open bottle all the way across the court yard and up the back steps into the office where Mrs. Babb was working. The instruction given in this case, which is complained of, that is, Instruction No. 2, was exactly the same instruction that was given in the Pepsi-Cola case, which was their Instruction No. B, word for word, the instruction follows:

"The Court instructs the jury that they may infer negligence from the fact that foreign substance was found in the bottle, and the law does not require the plaintiff to show the particular *derelection*."

This Court said:

"In our opinion this issue was not properly submitted to the jury."

Page 6 of the Court's opinion is as follows:

"This instruction was erroneous. As we pointed out in the *Land Case*, the inference of negligence on the part of the defendant bottling company from the presence of the obnoxious substance in the bottle should have been predicated upon a finding that the bottle was not tampered with after it left the custody of the defendant bottling company, and that the obnoxious substance was in the bottle at the time the defendant parted with possession of it.

"As given, the instruction deprived the defendant of the defense that the mouse may have gotten into the bottle either while it was in the possession of the local grocer or while it was in the custody of the plaintiff herself.

"Moreover, the instruction was defective in that it failed to tell the jury that the inference of negligence on the part of the defendant bottling company from the presence of the obnoxious substance in the bottle might be rebutted by evidence that the defendant had exercised a high degree of care in the cleansing and filling of its bottles."

16* *Objection was made to the granting of this Instruction No. 2 and the record will show the same at page 149, where counsel states:

"Mr. Ford: We object to this instruction for the reasons assigned to Instruction No. 1 where it is applicable; that is that the continuity of possession was broken. Apprehending that the instruction will be given in this case, I suggest that an amendment be made as follows, following the end of the sentence after the word 'dereliction'.

" 'The court instructs the jury that such inference of negligence may be overcome by evidence, if any, on the part of the defendant, showing that it had exercised a high degree of care, which is the measure of its duty toward the plaintiff.' "

"I think that if this instruction is going to be given, that that additional amendment ought to be made."

But the Court overruled the objection and granted the instruction as presented. This Court will note that the suggested amendment made by counsel is almost precisely the same as the third paragraph of the opinion on page 6, copy of which was obtained from the Clerk soon after the opinion in the Pepsi-Cola case was written.

The Court there said:

"Moreover, the instruction was defective in that it failed

to tell the jury that the inference of negligence on the part of the defendant bottling company from the presence of the obnoxious substance in the bottle might be rebutted by evidence that the defendant had exercised a high degree of care in the cleansing and filling of its bottles."

This case, like the Pepsi-Cola case and the Land case, decided at the March term, stands or falls on the principles laid down in the case of *Norfolk, etc., Co. v. Krausse*, 162 Va. 107. In the Krausse case, the facts of which are familiar to this Court, there is no indication of the existence of any opportunity for the glass to have gotten into the bottle *at 17* any time after it left the custody of the bottling company. Unlike this case, or unlike the Pepsi-Cola case, there was no evidence there that the bottle stood open at any time after the original cap was removed. In the Pepsi-Cola case the evidence was that it took about fifteen minutes for the plaintiff to consume the contents of the bottle, and in this case, admittedly the plaintiff's agent traversed in the open, across the court yard, and up the back steps, and across the office with the bottle cap off, and the contents exposed to anything that might fall into the bottle. Of course, the essence of the Krausse case and the real basis for its decision is that the bottle was positively shown not to have been tampered with from the time that it left the custody of the bottling company to the very time of the discovery of the piece of glass in the bottle.

The Court then stated at page 121:

"Foreign substances in food packages *not tampered with* are in themselves evidence of negligence. When that is shown, *prima facie* case has been made out, which, if not overborne by evidence for the defendants, is sufficient to sustain a verdict for the plaintiff. Evidence of a high degree of care may be sufficient, but such evidence is in conflict with a *prima facie* case, and should go to the jury. Its verdict must be sustained unless 'plainly wrong.' " (We have italicised the words "not tampered with").

This instruction denies the defendant of the defense that the obnoxious matter may have gotten into the bottle either while it was in the Post Exchange warehouse, or on the truck while being delivered, or while being carried from the warehouses to the truck, or while being carried across the open court yard in the open, and up the back steps with the cap off, or even while it was in the custody of the plaintiff her-

self. That was the reason this Court reversed the lower court in the Norfolk Pepsi-Cola Bottling case at the March term, this year, and it is for that reason that this Court 18* *ought to grant *certiorari* and reverse the lower court for having given the same instruction, which was erroneous in the Norfolk Pepsi-Cola Bottling case.

This Court reaffirmed its opinion in the Krausse case, in both the Pepsi-Cola Bottling case and the Land case, which, as stated, was decided at the March term, and this Court had previously considered two other similar cases, one *Campbell Soup Company v. Davis*, 163 Va. 89, and *Middlesboro Coca-Cola Bottling Company v. Campbell*, 179 Va. 693. In both cases the Court quotes as the basis for its decision that part of the opinion from the Krausse case, last quoted above here. In other words, those two cases, like the two last above mentioned cases, affirmed the holding in the Krausse case that the existence of foreign substance in a food package or bottle of beverage is in itself evidence of negligence, provided, and provided only, that it is shown that the bottle had not been tampered with. Unquestionably, this proviso is the very essence of the rule. The plaintiff in this case made not the slightest attempt to show that the bottle had not been tampered with from the time it left the custody of the bottling company until the contents of the bottle were drunk by the plaintiff. And under the instruction as given by the Court, it made no difference how the foreign substance got into the bottle. They were told that the mere fact that it was found in the bottle was basis for inference of negligence. No other instruction in the case cured this error.

We also objected, and excepted to the granting of "Plaintiff's Instruction No. 1". We thought then, and we think now, that that instruction leaves too much to a jury, and places too much emphasis on the finding of the foreign substance in the bottle. It left to the jury to determine 19* whether *or not the foreign substance was in the bottle, but said it in a way in which the jury could easily become confused. In other words, right in the middle of the instruction, it simply says,

"and that as a result of the negligence of the Coca-Cola Bottling Works of Newport News, Incorporated, the said bottle of Coca-Cola so purchased contained a foreign substance."

This comment was made on the giving of this instruction.

"Mr. Ford: I object to any instructions being given on

the part of the plaintiff that would permit a finding on the grounds that I principally stated in my motion to strike the evidence, if your Honor please. Without waiving that, I specifically object to Number 1 offered by the plaintiff for the reason that the evidence does not show that the bottle of Coca-Cola was in the possession of the defendant company after it left the plant or rather after it was delivered to the Post Exchange and that there was reasonable opportunity for tampering with the bottle after it left the Coca-Cola plant or after it was delivered to the Post Exchange. Therefore, there can be no inference upon which to base an instruction which this instruction does; and further that the evidence shows that the defendant has fulfilled its duty of a high degree of care and that there isn't any issue to go to the jury and no finding could be based as set out in Instruction No. 1."

Apparently the same instruction was given in the Norfolk Pepsi-Cola Bottling case decided last March. This Court did not discuss that instruction, however. Apparently the instruction upon which the case turned was so glaringly erroneous, that is, Instruction No. B in the Pepsi-Cola case, which is Instruction No. 2 in this case, that the Court did not see fit to comment upon the other instruction. However, for future guidance, it would be highly desirable if this Court would comment on this instruction if it thinks it is erroneous.

20* **The Court Erred in Permitting, Over the Objection of Counsel for the Defendant, the Questions and Answers Beginning on Page 53 and Continuing on Page 54 to the Bottom of Page 55.*

On pages 12A and 12B of this Petition we set out in full the questions and answers objected to. We think no further comment is necessary, as it is palpably plain that the permitting of these questions and answers thereto was erroneous, as being pure hearsay. It is thought that the purpose was to prejudice the mind of the jury, and we think it had its effect.

Verdict Excessive.

This plaintiff testified that she was earning \$37.50 a week at the Fortress Monroe Finance Office. It was only temporary appointment for six months, and she stated she planned to work the full period, but that she had not had any steady employment since. She testified that she tried working and found out she couldn't do it. She had been in Chicago since the

occurrence and she did not testify as to when or where she tried to work, or why she couldn't do it, except she stated she wasn't eating properly, and she couldn't work without eating. It is in line with the psychiatrist's testimony and, while it is, of course, a matter for the jury it is possibly an exaggeration. Along with the insufficient medical testimony and the hearsay testimony, it is perfectly obvious that the jury was trying to penalize the owner of the bottling plant, rather than fairly compensate this plaintiff. It is submitted that there is no reasonable relationship between the damages 21* shown and practically no expenses shown, *and the amount of this verdict of Twenty-five Hundred Dollars (\$2,500.00).

This Court Ought to Re-Examine the So-Called "Inference of Negligence Theory".

This Court does not have to read the newspapers to see the number of this type of cases that is now coming into the Virginia courts. It can ascertain that fact from the number of those cases that are actually appealed to the Supreme Court. To say that it has assumed the proportions of a "racket" is in no sense exaggerating the situation. This Court knows that the possibility of fraud as the motivating principle in these foreign substance bottle cases is very difficult to discover and expose. The question arises, then, as to whether the Court goes far enough in the Krausse case, in stating that the evidence must show that the bottle was not tampered with, in order to raise a presumption of negligence. In several of these cases it was shown that the bottle passed through many hands since it left the possession of the bottling company, and, even so, the jury found for the plaintiff, despite evidence that the highest degree of care known to the industry had been exercised in handling the bottles. That was true in the Land case, just decided last March, in which the erroneous instruction, complained of here, and also in the Pepsi-Cola case *was not given*. From the record of the juries that give verdicts for plaintiffs in these cases in the past few years *non constat*, that the jury in the instant case would have given a verdict for the defendant, or in the Pepsi-Cola case, where the erroneous instruction was given. However, in this case *it was given*, and as petitioner claims, it is entitled to *certiorari*.

A discussion of this matter was had in the case of 22* *Coca-Cola Bottling Works v. Sullivan*, a Tennessee case reported in 171 A. L. R. 1200, also in 158 S. W. (2d)

721. The Court, in that case, after discussing the *Campbell Soup Company v. Davis*, 163 Va. 89, and approving the application of the doctrine in that type of a case, went on to say:

“But, there is a fourth class of cases, in which this instant case falls, which presents the difficulty with which we here have to deal; the cases of soft drinks, or milk bottles or the like, enclosed by caps which it is possible to remove and replace by the use of care. We have here a distinctive element of fact which breaks the conclusive continuity of the control between the bottler and the consumer, when the physical possession has been in a third party, such as an intermediary vendor.”

The Court further says:

“To close this gap of control so as to make fairly applicable the rule of presumptive or *prima facie* negligence on the part of the bottler or manufacturer, we are of the opinion that a higher degree of proof must be made that there has been no reasonable opportunity for tampering with the bottle, or its contents, in the interim between the physical control of the bottler or manufacturer, and that of the consumer.”

In other words, instead of just throwing it at the jury for their consideration, or rather, we should say a sympathetic consideration, the Tennessee case takes the position that because of the nature of the case, that is, the great possibility of fraud being the motivating principle, they take the position that not only must there be some proof of no tampering, but there must be a high degree of proof that there has been no reasonable opportunity for tampering with the bottle or its contents. The Court goes on to say in its opinion:

“We, therefore, hold that before the defendant may be charged with a presumption of negligence on the ground that the bottle with its injurious contents was put out by the defendants, with the effect of shifting to the defendant the obligation of disproving negligence, there must not only
23* be *‘some’ evidence that neither the bottle or its contents had been tampered with, after it passed from the control of the defendant, but it must be made to appear, by a clear preponderance of the evidence, that there has been no such divided or intervening control of the bottle as to afford any reasonable opportunity for it or its contents to have

been tampered with by another after it left the possession or control of the defendant or its agents. Until this is thus made to appear, the burden remains on the plaintiff to prove negligence on the part of the defendant. Only by exacting this higher degree of proof that the bottle has come from the defendant to the plaintiff in its harmful condition, without substitution or subsequent tampering with, can we fairly apply the presumption, or inference of negligence rule."

Therefore, we submit to this Court that it ought to re-examine the inference of negligence rule, not only as laid down in the Krausse case, but all the other so-called foreign substance cases in this State. This Court ought to, in our opinion, lay it down as a fundamental rule of evidence that the juries just cannot simply find a verdict on simple ordinary evidence that there has been no opportunity for tampering, but that a high degree of proof must be shown; and it must appear from a clear preponderance of the evidence that there has been no such divided or intervening control of the bottle, as to afford any reasonable opportunity for it, or its contents, to have been tampered with after it left the possession or control of the bottling company. This is shown by the fact that in the Pepsi-Cola case, decided last March, the bottle was shown to have been open for a period of fifteen minutes, and yet the jury found a verdict for the plaintiff, which this Court had to set aside. In the instant case, as had been stated several times, the open bottle was carried over the court yard and up the back steps, and yet the jury found for the plaintiff, despite the fact that there was plenty of opportunity, both in the warehouse and on the truck, in 24* the hands of *persons who had no relation to this defendant, and over whom he had no control, and yet there was a verdict for the plaintiff.

CONCLUSION.

From what has been said, we feel that the lower court clearly erred to the prejudice of your petitioner in its rulings and in its failure to set aside the verdict in this case. We submit that the evidence fails to show actionable negligence on the part of the defendant; and we further submit that the Court definitely erred in granting "Plaintiff's Instruction No. 2". As has been seen, that instruction is identical with "Plaintiff's Instruction No. B" in the Pepsi-Cola case, decided last March. This Court held, as is stated in the opinion by Mr. Justice Eggleston, that the granting of that

instruction in the facts in that case was prejudicial error. The evidence in this case is equal to, if not greater, than in the Pepsi-Cola case, in that there were any number of opportunities for tampering with this bottle, in addition to the fact that it was carried uncapped in the open by the plaintiff's own agent, exposing it to anything that might be put into, or dropped into the bottle. To have left out of plaintiff's Instruction No. 2, in this case, the duty on the part of the plaintiff to show that the bottle was untampered with, deprives this defendant of the defense of showing that the foreign substance may have gotten into the bottle while it was in the possession of the Post Exchange, or in the warehouse, on the truck, in the vending machine, or in the hands of the plaintiff's agent, the witness Toulson. Moreover, it was defective

because it failed to tell the jury that any such inference 25* of negligence on the part of the defendant might be rebutted by evidence that the bottling company had exercised a high degree of care in the cleansing and filling of its bottles. In addition to this, the Court erred in admitting the damaging hearsay testimony of the plaintiff, as set out on pages 53, 54, and 55 of this record; it erred in refusing to strike the evidence of the plaintiff.

Wherefore, it is respectfully submitted that the verdict of the jury and the judgment of the Court should be set aside, and that final judgment be rendered for the defendant, your petitioner. To this end, your petitioner prays that this Honorable Court grant a writ of error and *supersedeas* to the judgment aforesaid, and that it review and reverse such judgment, and render final judgment in favor of your petitioner.

A copy of this petition was mailed to Mr. Charles H. Gordon, Hampton, Virginia, counsel of record for the plaintiff, on the 2 day of April, 1949. The petitioner adopts this petition as its opening brief and counsel desires to state orally the reasons for reviewing the decision of the lower court.

This petition is being presented to Mr. Justice Eggleston, in the City of Norfolk, on the 4 day of April, 1949.

THE NEWPORT NEWS COCA-COLA
BOTTLING CO., INC.,
By CHARLES E. FORD,

Counsel.

MURRAY, FORD, WEST & WILKINSON,
First National Bank Building,
Newport News, Virginia.

26* *I, Charles E. Ford, Attorney at Law, practicing in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, it is proper that the judgment and decision complained of in the foregoing petition should be reviewed by this Court.

CHARLES E. FORD,
First National Bank, Building,
Newport News, Virginia.

Received Apr. 4, 1949.

J. W. E.

April 20, 1949. Writ of error and *supersedeas* awarded by the court. No additional bond required.

M. B. W.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 3561

THE NEWPORT NEWS COCA-COLA BOTTLING COMPANY, INCORPORATED, Plaintiff in Error,

versus

ELAINE BABB, Defendant in Error.

REPLY TO PETITION FOR APPEAL.

(BRIEF FOR DEFENDANT IN ERROR.)

Reply to petition for appeal to the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

This is an action by notice of motion, it alleges that the defendant offered for sale for human consumption a certain bottled soft drink known as Coca-Cola, which was purchased by the plaintiff and without her knowledge contained a decomposed snail or slug; it further alleges that it was the duty of the defendant to use due and proper care in the making of the soft drink, or the container, and to have the same free from a decomposed snail or other foreign substances, and further alleges that the defendant negligently failed to use

due and proper care and that the defendant knew or could by their use of reasonable care, have known that the said drink sold this plaintiff contained a snail or other foreign substances.

This notice of motion alleges an action based on implied warranty, and also charging the defendant with negligence.

The defendant alleges that this case is very similar 2 to the case of *Norfolk Coca-Cola Bottling Works, Inc.*, versus *Chloe Land*, Record No. 3445, decided by this Court March 7, 1949, opinion by Justice Eggleston. The following is instruction number one (1) as offered by the plaintiff:

“The Court instructs the jury that they may infer negligence from the fact that foreign substance was found in the bottle, and the law does not require the Plaintiff to follow the particular dereliction.”

The evidence shows that there was nothing unusual about the cap which was on the bottle of Coca-Cola, as it was opened by the messenger who brought it to the plaintiff's desk. The plaintiff testified that there was no flat taste to the Coca-Cola which would indicate that it had not been tampered with before it was purchased from the machine. At the time the bottle was introduced as evidence there was still particles of this decomposed snail against the inside of the bottle and in the bottom of the bottle. This would indicate that at least part of this obnoxious matter was in the bottle at the time it was capped; and further would indicate that it was in the bottle at the time it was in the custody of the manufacturer, this within itself is evidence of negligence. The jury must have believed that the foreign substance was in the bottle at the time it left the manufacturer because the follow is instruction “G” for the defendant:

3* “The Court instructs the jury that the burden is upon the plaintiff to prove by a preponderance of the evidence that the foreign substance was in the bottle of Coca-Cola when it left the custody of the defendant bottling company. You have a right to consider that the bottle in question was stored and handled by the Post Exchange people, was handled opened by the person who carried the bottle from the vending machine to the plaintiff, and to consider all the other facts and circumstances and evidence in determining whether or not the defendant was negligent.

“Therefore, if, after hearing all the evidence, you are not satisfied from a preponderance of the evidence, or you are

in doubt as to whether the foreign substance was in the bottle when the same left the custody of the defendant company; or if it appears to the jury that it was equally as probable that the foreign substance was not in the bottle when the defendant gave up control of the same to the Post Exchange and its employees, as that it was in the said bottle, then it is your duty to find your verdict for the defendant bottling company."

Having concluded, as the jury must have done, that the snail or slug was in the bottle when it left the custody of the defendant company, it was for the jury to say whether the evidence of the high degree of care used by the defendant company in cleansing, bottling and inspecting the beverage was sufficient to overcome the plaintiff's *prima facie* case. *Norfolk Coca-Cola Bottling Works v. Krausse, supra*; *Middleboro Coca-Cola Bottling Works v. Campbell, supra*.

Even if there is an error in the plaintiff's instruction Number One (1), other instructions offered by the defendant would remedy this error. This not a finding instruction, but merely is a statement of the law. In answer to the defendant's contention that the verdict is *excessive, we submit the fol-

4* lowing:

"The law furnishes no measure for pain and suffering, and leaves the amount of compensation for injuries of this character to the sound discretion of a jury. It recognizes no authority in a Court to substitute its opinion for that of a jury. *Landon v. Fan*, 140 S. E. 141."

"When the case reaches the Supreme Court of Appeals it will affirm the judgment, upon the presumption of its correctness, in the absence of evidence to the contrary; but when the evidence is certified and it appears that the verdict is not so excessive as to warrant the belief that the jury was influenced by partiality, prejudice or corruption, or have been misled by some mistaken view of the merits of the case, and it also fails to disclose any standard by which the trial court could have measured the reduction, the Supreme Court of Appeals will uphold the verdict of the jury because it is the tribunal appointed by law to ascertain the damages sustained."

E. I. Dupont de Nemours & Co. v. Taylor, 124 Va. 750.

In the argument of attorney for the defendant who is so positive that this Court will grant *certiorari* in this case,

the plaintiff alleges that the facts in this case are as alleged in the defendant's petition "on all fours" with the facts in the case of the *Coca-Cola Bottling Works v. Chloe Land*. There was no evidence throughout the trial of this case which

would indicate any tampering with the bottle *of Coca-5* Cola in question, and if there was any evidence this would be a matter for the jury to decide just as it may in any other case. It is common knowledge that a soft drink is not purchased directly from the manufacturer at the plant, but must travel into many hands before it is actually consumed by the individual purchaser. It is hard to conceive that anyone would go to the trouble to open a soft drink, place a foreign substance in the bottle and then place the cap back on the bottle. The Court will take judicial notice that when you open a bottle of soft drink, the gas immediately escapes, the color changes, and usually the substance runs over the neck and down the side of the bottle. All of these witnesses and the plaintiff are employed by the United States Government in the finance office. These employees have to be loyal and honest before they are placed in these positions of trust. Judge Eggleston ruled in the "Land Case" that when the jury's determination of the issue in favor of the plaintiff is supported by the evidence that the bottle was capped and sealed when received by the retailer from the defendant company and was sold to the plaintiff in the same condition, and that a portion of the foreign substance was found stuck to the inside of the bottle near the bottom and remained in that position until the time of trial, that a *prima facie* case has been made out, which, if not overborne by evidence for the defendant, is sufficient to sustain a verdict for the plaintiff. We contend that the same exist in this case,

and that even at this *time one may examine the exhibit 6* of the bottle and see foreign substance inside of the bottle near the bottom. There is not any evidence that these Government employees put the foreign substance in the bottle nor did the plaintiff.

Having concluded, as the jury must have done, that the snail or slug was in the bottle when it left the custody of the defendant company, it was for the jury to say whether the evidence of the high degree of care used by the defendant in cleansing, bottling and inspecting the beverage was sufficient to overcome the plaintiff's *prima facie* case. *Norfolk Coca-Cola Bottling Works v. Krausse, supra; Middlesboro Coca-Cola Bottling Works v. Campbell, supra.*

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Court below should be affirmed and that this Court should enter judgment in favor of the plaintiff against the defendant, the Newport News Coca-Cola Bottling Company, Incorporated, for the sum of Twenty-five Hundred (\$2,500) Dollars, with interest thereon from the 1st day of May, 1948, until paid, the date of the verdict.

This reply is being presented to Mr. Justice Eggleston in the City of Norfolk on the 13th day of April, 1949.

Filed 4-14-49.

Respectfully submitted,
CHARLES H. GORDON,
Counsel for Defendant in Error.
J. W. E.

RECORD

Pleas before the Circuit Court of Elizabeth City County, Virginia, January 24th A. D. 1949.

Be it remembered that heretofore, to-wit: on the 21st day of February, 1948, came Elaine Babb, plaintiff, by Charles H. Gordon, her attorney, and filed her notice of motion for judgment against Coca-Cola Bottling Works of Newport News, Virginia, Incorporated, a corporation existing under and by virtue of the laws of the State of Virginia, defendant, which notice of motion for judgment is in words and figures as follows, to-wit:

Virginia:

In the Circuit Court for the County of Elizabeth City.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News, Va., Incorporated, A corporation existing under and by virtue of the laws of the State of Virginia.

To: R. M. Brown, Pres.
3200 Huntington Ave.
Newport News, Va.

You are hereby notified, that on the 5th day of April, 1948, between the hours of 10 o'clock A. M. and 5 o'clock P. M. or as soon thereafter as it may be heard, I shall move the Circuit Court of the County of Elizabeth City, Virginia, at the Court House thereof for a judgment against you in the sum of Ten Thousand (\$10,000.00) Dollars, which sum page 2 } is due and owing by you to me for the damages, wrongs, and injuries and hereinafter set forth, to-wit:

That hereinafter, to-wit: On October 10, 1947, you, the Coca-Cola Bottling Works of Newport News, Virginia, Incorporated, offered for sale for human consumption in the County of Elizabeth City, Virginia, a certain bottled drink known as Coca-Cola, that on the said date the undersigned plaintiff purchased from the said defendant a bottle of the said drink known as "Coca-Cola", that the said drink, without the knowledge of the plaintiff, contained a partially decomposed snail or slug and other obnoxious foreign matter; that it became and was the duty of you, the said defendants, to use due and proper care in the making of the said drink or container to have the same free from a snail or slug and obnoxious foreign matter; that you, the said defendants, failed to use due and proper care and knew, or could, by the exercise of reasonable care, that the said drink sold by you to this plaintiff contained a snail or slug and other obnoxious matter and the said plaintiff in drinking the said drink, did swallow a portion of the decomposed snail or slug and other obnoxious foreign matter, whereby and by reason whereof, she became sick and sore and suffered great pain and mental anguish and still so does suffer, whereby she has expended sums of money endeavoring to be healed and cured of such sickness, and was discharged from her employment, to the damage of the undersigned for Ten Thousand (\$10,000.00) Dollars.

Given under my hand this day of February, 1948.

ELAINE BABB,
By CHARLES H. GORDON,
Her Counsel.

page 3 } Upon the back of which appears the following
words and figures, to-wit:

In the Circuit Court of the County of Elizabeth City, Virginia.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News, Va., Incorporated, a corporation existing under and by the virtue of the laws of the State of Virginia.

Received in Clerk's Office 2-21-48.

R. E. WILSON, Clerk.
by DIANA C. LOCKWOOD,
Dep. Clk.

Fee 75c Pd.

Writ Tax	5.00
Dep.	5.00

\$10.00 Pd. 2/21/48.

R. E. WILSON, Clerk.
by J. I. FROST, Dep. Clk.

Executed February 19th, 1948, in the city of Newport News, Virginia, by delivering a true copy of the within Notice to R. M. Brown, President of Coca-Cola Bottling Works of Newport News, Virginia, Incorporated, in person.

P. W. HALL,
City Sergeant.
By J. E. EDGERTON,
Deputy Sergeant.

Feb. 21st, 1948. Notice of motion returned executed Feb. 19, 1948, by Sergeant City Newport News.

Feb. 21, 1948. Writ tax and deposit paid and cause duly docketed for hearing April 5th, 1948, the day to page 4 } which it is returnable to Court.

We the jury find for the Plaintiff and assess her damages at \$2,500.00.

(Signed) S. R. CHISMAN, Foreman.

page 5 } And at another day, to-wit:

At the Circuit Court of the County of Elizabeth City, Virginia, at the Court House of said Court, in said County, on Monday, the fifth day of April, in the year of our Lord one thousand nine hundred and forty-eight and in the one hundred and seventy-second year of the Commonwealth.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News, Inc.

MOTION FOR JUDGMENT.

This day came the parties, by their attorneys, and the defendants requested of the plaintiff her bill of particulars, in writing. Whereupon the plaintiff, by counsel, doth rely on her notice of motion.

page 6 } And at another day, to-wit:

Circuit Court of the County of Elizabeth City, Virginia, on Friday, the thirtieth day of April, in the year of our Lord one thousand nine hundred and forty-eight.

MOTION FOR JUDGMENT.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News, Inc.

This day came the parties by their attorneys and the defendant entered a plea of "not guilty" and thereupon came a jury, to-wit: K. F. Rubert, C. H. Fraley, H. S. East, Roy Russell, Eric J. Anderson, S. R. Chisman and S. J. Watson, who were sworn well and truly to try the issue joined and the truth of and upon the premises to speak, and having heard the evidence the defendant by counsel, in the absence of the jury, moved the Court to strike the evidence of the plaintiff on the grounds that she had failed to prove negligence against the defendant Company, which is required by law, and for the further reason that the inference of negligence was adequately rebutted by the defendant, which motion the Court doth overrule and to which ruling of the Court the defendant by counsel noted their exception; and whereupon, the defendant by counsel moved the Court for a view by the jury of the de-

fendant Company's plant, which motion the Court doth overrule and to which ruling of the Court the defendant by counsel noted their exception and the Court doth adjourn the jury over until tomorrow morning at 10:00 o'clock for the further hearing of this cause.

page 7 { And on the same day, to-wit:

Circuit Court of the County of Elizabeth City, Virginia, on Friday, the thirtieth day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Elaine Babb

v.

The Newport News Coca-Cola Bottling Company, Incorporated

ORDER.

This day came the defendant by its attorney, and it appearing by affidavit of the said attorney that certain hospital records and charts pertaining to the hospitalization and treatment and alleged illness of the plaintiff, Elaine Babb, during the period of about October 10, 1947, to October 30, 1947, are in the possession of Colonel Kirksey at the hospital on the United States Army Reservation at Fort Monroe, Virginia, said Colonel Kirksey not being a party to the matter here in controversy, and that the said hospital records and charts are material and proper to be produced before this Court, it is thereupon ORDERED that the Clerk of this Court issue a *subpoena duces tecum* to compel said Colonel Kirksey to produce said hospital charts and records before this Court at the courtroom thereof on the 30th day of April, 1948, at ten o'clock A. M.

page 8 { And at another day, to-wit:

Circuit Court of the County of Elizabeth City, Virginia, on Saturday, the first day of May, in the year of our Lord one thousand nine hundred and forty-eight.

Elaine Babb

v.

The Newport News Coca-Cola Bottling Company, Incorporated

MOTION FOR JUDGMENT.

This day again came the parties by their attorneys and the jury adjourned over from yesterday and having heard the arguments of counsel retired to their room to consult of a verdict, and after some time returned into Court having found the following verdict, to-wit: "We, the jury, find for the plaintiff and assess the damages at Twenty-five hundred dollars (\$2,500.00). (Signed) S. R. Chisman, Foreman."

Whereupon, the defendant by counsel moved the Court to set aside the verdict of the jury in this cause rendered on the grounds that the same is contrary to the law and the evidence; because of the misdirection of the jury by the Court; for the admission of evidence by the Court over the objection of the defendant, and for the further reason that the damages allowed by the jury are excessive, which motion the Court doth take under advisement; and the further hearing of this motion is continued until a later day.

page 9 } And at another day, to-wit:

At the Circuit Court of the County of Elizabeth City, Virginia, at the court house of said Court, in said county, on Monday, the sixth day of December, in the year of our Lord one thousand nine hundred and forty-eight, and in the one hundred and seventy-third year of the Commonwealth.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News, Va., Inc.

MOTION FOR JUDGMENT.

This day again came the parties by their attorneys and the Court having maturely considered the motion of the defendants by counsel made on the 1st day of May, 1948, and subsequently argued by counsel to set aside the verdict of the jury in this cause rendered on the grounds heretofore assigned, doth overrule the motion of the defendants and direct that the jury's verdict be affirmed.

Whereupon, the defendants by counsel noted their exception of the ruling of the Court and asked leave to subsequently file their bill of exceptions in writing, which leave the Court doth grant.

It is therefore considered by the Court that the plaintiff, Elaine Babb, recover of the defendants, the Coca-Cola Bottling Works of Newport News, Va., Inc., the sum of Twenty-

five hundred dollars (\$2,500.00), the damages by the jurors in their verdict fixed, with interest thereon computed at the rate of Six per cent (6%) per annum from the 1st day of May, 1948, until paid, and her costs by her about her notice of motion in this behalf expended.

And the defendants be in mercy etc.

page 11 } And at another day, to-wit:

Circuit Court of the County of Elizabeth City, Virginia, on Wednesday, the eighth day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News, Va., Inc.

This day again came the parties by their attorneys and the defendant by counsel advised the Court of its intention to appeal from the order of judgment of this Court to the State Supreme Court of Appeals, and requested the Court to set the amount of the appeal and *supersedeas* bond.

Whereupon, the Court doth allow the defendants sixty (60) days from the 6th day of December, 1948, to file its bill of exceptions and doth set the appeal and *supersedeas* bond at Thirty-five hundred dollars (\$3,500.00), with security approved by the Court.

Virginia:

In the Circuit Court of Elizabeth City County.

Elaine Babb

v.

Coca-Cola Bottling Works of Newport News

TRANSCRIPT OF EVIDENCE.

Stenographic report of all the testimony, together with the motions, objections, and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents of the First and Second Day of the trial of the case of Elaine Babb *v.* Coca-Cola Bottling Works of Newport News, tried in the Circuit Court of Elizabeth City County, on April 30 and May 1, 1948, before the Hon. Frank A. Kearney, Judge of said Court.

Doctor John Taylor Ransone.

Present: Mr. Charles H. Gordon, Attorney for the plaintiff.

Mr. Charles E. Ford, Attorney for the Defendant.

Morris Schneider
Stenotype Reporter
Law Building
Newport News, Va.

page 2 } The jury was selected and sworn.

All witnesses were sworn and were excluded.

Mr. Gordon began his opening statement.

Court: Is Doctor Ransone going to be your first witness?

Mr. Gordon: Yes.

Mr. Ford: Is he the attending physician?

Mr. Gordon: Yes.

Mr. Ford: I think the doctor should be requested to leave the room.

Mr. Gordon: He is my first witness. I'll be putting him on in a few minutes.

Court: You can stay.

Mr. Ford: Note an exception.

Mr. Gordon made his opening statement to the jury. Mr. Ford made his opening statement to the jury.

DOCTOR JOHN TAYLOR RANSONE,
called as a witness by the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Will you please state to the court your name?

A. Doctor J. T. Ransone.

Q. What is your profession, Doctor?

A. Physician, specializing in psychiatry.

Q. And how long have you been licensed to practice medicine?

page 3 } A. Since 1927.

Q. Doctor, do you know the plaintiff in this case, Mrs. Elaine Babb?

Doctor John Taylor Ransone.

A. Yes, sir.

Q. Will you please state to the court and to the jury, in terms of which they can understand, just when this lady first came to see you, for what you treated her, when she last visited you and what is her condition today, if you know; and from the history what you found to be wrong with her when you started treating her?

A. I received a telephone call from Captain Irvin who had told me that she had been in the hospital there for four or five days for treatment following drinking a Coca-Cola in which a snail or some sort was in it and that he had examined her thoroughly and was convinced there was no illness due to any cause except psychogenic which means, in plain language, emotional upsets for all practical purposes, I mean. It's not a technical definition. Emotional upsets were the cause of her symptoms, consisting of her vomiting and within a few days, November 10, I believe, she came into my office very tense, pupils large, hands wet and general appearance of a person very frightened or very angry. They look remarkably alike, incidentally, and seemed after studying her carefully, it seemed to be obvious that the vomiting and menstrual flow disturbance which she complained of were

part and parcel of her emotional tension; and just
page 4 } the same as it is the cause of the frequent vomiting
they had in the trenches when subjected to too much
tension for too long a time and she had pain in her posterior
thighs and buttocks; and was due to neuritis which, I am reasonably sure, was nutritional. In that way, it was secondary to the vomiting and also to the emotional upset. She then—I saw her again December 10 and in spite of my efforts, she was still quite tense and she had moved away and I saw nothing more of her until yesterday. She came in and I saw the same tenseness and got the history that she had menstrual periods lasting about ten days and irregular and she was vomiting for ten day periods at least once a month and it seemed to her, and I'm sure she believe it, that everything she ate was vomited during the ten days and she lost weight. Left out a while ago and she remains as you see fairly emaciated, weighing 115 with a street dress on last night.

Q. Doctor, from the history of this case, prior to October 10, '47, do you find any condition that might have impaired her health?

Mr. Ford: I object, if your Honor please. It is purely hearsay.

Doctor John Taylor Ransone.

Q. From your examination of this woman, can you state whether or not what you were able to examine, whether or not this was a condition which took place within a short page 5 } time or can you tell whether or not it was over—

A. In my opinion, it took place in a short time.

Q. Prior to your examination?

A. Yes.

Q. In comparison to what you believe was present at that time and today, is she still in the same condition that she was when she first visited you?

A. Approximately, except these habits of being tense have lasted six or seven months and they are going to be very hard to get rid of.

Q. You know whether or not she's married?

A. Yes.

Q. And does she have any children that you know?

A. Two children.

Q. Now, could you say, from your experience, the many years you have had practicing, it is possible that this condition might be permanent?

A. It is quite possible and quite possible to go into other conditions, as diseases, duodenal ulcers and essential tension and much of arthritis are believed—are due primarily to long emotional tension.

Q. Does she complain about the taste of the food?

A. Anyway, that to my mind meant only a lack of appetite or distaste for food, yes.

Q. And you say you have just recently examined her?

A. Yes.

page 6 } Q. She has not been discharged from you as cured?

A. No indeed.

CROSS EXAMINATION.

By Mr. Ford:

Q. Have you seen other people in your practice with practically the same symptoms, Doctor, over a period of years?

A. Yes.

Q. And they come from how many different—for how many different reasons, would you say?

A. One reason is emotional upsets. I expect the court or the jury don't want me to list all the different reasons that could cause emotional upsets.

Doctor John Taylor Ransone.

Q. You just tell us a few. The court will let me have a reasonable length of time, I think.

A. Anger, disgust, fear, great number of symptoms of anger, bitterness and so forth that would have little different implications and well in different types of fear. Anxiety is a word we like to use to cover a great variety of things. Judging future experiences by past experiences, and I think they cover about all of the headings that could be elaborated to any of them.

Q. Fear due to menstruation or improper menstruation might cause it?

A. Yes, or vice versa.

Q. And you did say, according to the history, page 7 } she was not menstruating properly at the time you saw her?

A. No. At the time I saw her, yes.

Q. November 10 you saw her, is that right?

A. Yes.

Q. Month to a day—

A. Approximately a month.

Q. And then you saw her another month to a day, December 10, is that correct?

A. Yes.

Q. And from that time until yesterday you had not seen her?

A. No, sir.

Q. Did you give her a thorough physical examination on November 10, 1947, when you saw her?

A. Yes, sir.

Q. What did she weigh at that time?

A. 116.

Q. And she weighs 115 now?

A. Yes.

Q. You say that she was perspiring, had dilation of the pupils at that time?

A. Yes.

Q. Does she have them at this time?

A. I wouldn't be surprised if she doesn't.

Q. I mean last night?

page 8 } A. Yes.

Q. That could be caused for any number of reasons, couldn't it?

A. Any number of emotional reasons.

Q. Some of which you have already outlined to the jury?

A. Yes.

Doctor John Taylor Ransone.

Q. You, of course, do not know and will not tell this jury what the cause of it is, would you?

A. The cause of what?

Q. What the cause of her condition was on November 10?

A. I think I have every reason to believe it was disgust and anger in which she got, following the drinking of this and I understand the rather insulting attitude of the company in that they tried not to believe her.

Mr. Ford: Just a moment.

Mr. Gordon: You asked him—

Q. Just a minute. You do not know. You cannot say with any reasonable certainty that that is correct?

A. I mean I think—I think it is quite reasonable that is correct.

Q. Can you tell with any reasonable certainty that is correct, under your oath?

A. In my medical judgment, I feel reasonable certainty.

Q. You feel that from the history she gave you—

A. Yes.

page 9 } Q. And it could have come from any other number of reasons that you have outlined to the jury other than that?

A. Always bare possibility. No diagnosis is ironed down unless you see the facts in the X-ray.

Q. I say but the reasons you have already given the jury could have been the reasons rather than the one she assigned, isn't that correct?

A. Doesn't seem likely or reasonable in this case.

Q. I say but it could have been?

A. Yes, but it's not a reasonable—

Q. It could have been?

A. Conceivably, yes.

Q. Otherwise you would not have given the reasons in response to my question, from a medical standpoint?

A. I was answering your question.

Q. And you wouldn't have answered it that way unless it could have been—just a minute—

A. Hypothetical question you asked me.

Q. I did not ask you a hypothetical question. I asked you a question to give this jury the reasons, and you did, that might cause the same symptoms that you saw in this lady.

R. M. Brown.

Court: I think, in fairness to the witness, the question was what the cause of emotional upsets were?

Mr. Ford: Yes.

Court: And he undertook to answer it.

page 10 } A. I generalized.

Court: General proposition.

Q. You have any reports from any other physicians who might have seen her?

A. Yes, Doctor Barrete of Chicago gave her a letter which he filed with me stating—

Q. Just a minute. I just asked you did you have the report?

A. Yes, sir.

Q. You did not see her, you said, from December? Am I right about that?

A. 10th.

Q. Last year until yesterday, is that correct?

A. That's right.

Court: Doctor, could you say, from your examination of this lady and the history that you have, how long the condition that you found on December 10 existed?

A. That would be—

Mr. Gordon: November 10.

A. I said November 10 I first saw her and a month duration and I think there is every reason to believe the present complaint started at that time.

Mr. Gordon: I would like to, at this time, call Mr. Brown, the president of the Coca-Cola Bottling Company, as an adverse witness.

page 11 } MR. R. M. BROWN,
called by the plaintiff as an adverse witness, being
duly sworn, testified as follows:

CROSS EXAMINATION.

By Mr. Gordon:

Q. Will you please state to the court your name?

R. M. Brown.

A. R. M. Brown.

Q. Where do you live, Mr. Brown?

A. I live in Elizabeth City County.

Q. What street number?

A. 1221 Chesapeake Avenue.

Q. Mr. Brown, what is your business?

A. Manufacturing of the Newport News Coca-Cola Bottling Company.

Q. Are you also President?

A. Yes.

Q. And what does the bottling of the drink known as Coca-Cola consist of, as far as your area in this which you serve your drink?

A. Will you state the question again?

Q. What area do you cover in your distribution of soft drinks?

A. The lower Peninsula from Toana down to the Old Point Comfort.

Q. And do you—were you engaged in that business on October 10, 1947?

A. Yes.

page 12 } Q. And prior to that time, were you serving the Coca-Cola machines on the post at Fortress Monroe?

A. No.

Q. You were not?

A. No.

Q. What bottling company was servicing the machines at Fortress Monroe in Newport News that isn't serviced by them?

A. Which machines?

Q. All machines on the post. There is only one machine in Elizabeth City County that says "Coca-Cola"?

A. Yes.

Q. That's the one?

A. All right. We did not service the machines.

Q. All right, you did not serve the machines.

Mr. Ford: Let's don't have anything of this sort at the outset, please. Let him finish.

The Court: He hasn't said he hasn't answered. He said twice he did not serve the machines.

Q. Will you tell the gentlemen of the jury if the Norfolk Bottling Company sells Coca-Cola here?

R. M. Brown.

A. No.

Q. You are protected, by every possible means, to protect your franchise?

A. We hope so.

page 13 } Q. Who puts the Coca-Cola in that machine?

A. There is a colored man who works in the post exchange who puts them in the cooler.

Q. Are you denying that the Coca-Cola is sold in your plant?

A. No, sir.

Q. The Coca-Colas that are purchased in your plant are bottled in your plant?

A. You asked me if we put the Coca-Colas in the machines. We do not.

Q. Do you bottle Coca-Cola in this area?

A. We bottle Coca-Cola in our plant in Newport News at the corner of 32nd Street and Huntington Avenue—

Q. And when you bottle—

Court: Wait a minute. He hasn't finished.

A. I believe that answers the question.

Q. After you bottle them, where do you sell them?

A. All over the Peninsula.

Q. After you bottle them, do you sell them uncapped or capped?

A. Capped.

Q. Secured?

A. Yes.

Q. Did you invent a star bottle opener that opens them?

A. We manufacture it, yes.

page 14 } Q. And you sell them capped, is that right?

A. That's right.

Q. Do you sell them to Fortress Monroe?

A. Sell to the Post Exchange.

Q. Could anybody else have sold them but you?

A. No.

Q. Then the Coca-Cola that was purchased out of the Coca-Cola machine at Fort Monroe had to come from your plant?

A. That's right.

Q. And you were engaged in that business on the 10th day of October, 1947?

A. Which business?

Q. The Coca-Cola. Is that the only business you are in?

R. M. Brown.

A. We—will you state your question again?

Q. I am asking you if you were actively engaged in the bottling of Coca-Cola and sold it to Fortress Monroe on the 10th day of October, 1947?

A. Yes.

Q. All right. Then you don't deny that this bottle was purchased in that machine came from your plant?

A. So far as we know, it did.

Q. That's right. Now, Mr. Brown, you are very much interested in this case, aren't you?

Mr. Ford: That is beside the point. Anybody being sued for \$10,000 is interested in the case. I think it is page 15 } impertinent.

Court: I wouldn't say it was impertinent. I'd say it is immaterial to the issues in this case. I sustain the objection.

Q. Mr. Brown, have you talked to people at Fortress Monroe about this case?

Mr. Ford: I submit that is irrelevant, if your Honor please. He has a perfect right to talk to whoever he pleases. It doesn't help this jury one way or the other.

Court: Overrule the objection.

Mr. Ford: Exception.

Q. Did you talk to certain people in Fortress Monroe about this case?

A. Yes, I have.

Q. I'm the one that asks you and not Mr. Ford. You look at me.

Mr. Ford: I suggest he can look anywhere he pleases in the courtroom without any admonition from counsel.

Court: I don't think he ought to look to you to see if he ought to answer the question. I'm going to try to pass on the validity of the questions.

Q. Are you the same gentleman known throughout the area as "Coca-Cola Brown"?

A. Yes.

Q. Now, Coca-Cola—have you talked to a Ser-
page 16 } geant Potter at Fortress Monroe, the adjutant at
the Post down there?

R. M. Brown.

A. Yes.

Q. Did you make any inquiries as to this lady's character from that man?

A. I told him I wanted to find out who she was, where she came from and get her background.

Court: Now, there hasn't been any objection to this. I'm perfectly willing to go into—

Mr. Ford: I have no objection. I think it's still irrelevant.

Court: The only thing I held was not objectionable was the question whether he had talked. What was said was a different proposition.

Mr. Ford: I didn't object to that. I object to the whole line but I see it is harmless.

Q. What purpose did you have in mind when you talked to Sergeant Potter about this woman's character?

Mr. Ford: I think he answered the question and I object to it because it is repetitions.

Court: Wait a minute, sir. I think he's answered the question.

Mr. Gordon: Would you read back the question please that I just asked Mr. Brown?

Mr. Ford: The Court ruled on it.

Mr. Gordon: I can ask him to read it back, can't page 17 { I, so I can follow my next question.

Court: I sustain the objection on the ground that you previously asked if he talked to the man for some purpose and he testified to it.

The last question was read to Mr. Gordon.

Q. Now, you say that you asked Sergeant Potter where she came from, is that true?

A. Yes, if he knew where she came from.

Court: Now, gentlemen, let's get straightened out on this phase of the case. You asked Mr. Brown on the witness stand whether he had gone down Fortress Monroe and talked to certain authorities and I permitted the question over the objection of counsel. Now, if we go into the question of whether he made some inquiries with the idea of preparing his defense of this suit, I don't think that's proper because he or anybody else has a right to inquire as to—

R. M. Brown.

Mr. Ford: I think the jury should be excused.

The jury left the room.

Mr. Gordon: Your Honor, I have evidence that he has gone down and said things that are detrimental to this woman's character. He asked where she came from, what is her general reputation. I have one witness summonsed here. He talked to her so many times and frightened her, she hasn't come here under summons. What good is it to get her after he went and talked to her.

page 18 } Court: The allegation and motion of judgment is that she got this, suffered this injury that you complain of by reason of drinking this Coca-Cola and not because of anything he said and if you can show that he has said anything to her—

Mr. Gordon: I wanted a continuance for one reason. He scared my witnesses and this woman goes on the Post yesterday and someone said, "You just get out of jail?" and she said, "No. Why?" They said, "A man by the name of Brown asked about you. We don't know whether he's a detective or not".

Court: If there has been any intimidation of her witnesses, I can also handle that but that would be a different matter.

Mr. Ford: I suggest you bring another suit.

Court: If that's the situation. If there has been any intimidation of witnesses, that's a different matter.

Mr. Gordon: It's a matter I want to bring to your attention at this time.

Court: Supposing we take a five minute recess.

A five minute recess was taken after which the jury returned to the jury-box.

Q. Mr. Brown, Mrs. Margaret Kelly, who was referred to in the opening statement by Mr. Charles Ford—do you know her?

A. Yes, I do.

page 19 } Mr. Ford: I called her Mrs. Wright. I meant Mrs. Kelly.

Q. When did you last see Mrs. Kelly?

A. It's been ten days or two weeks, I think.

R. M. Brown.

Q. At that time, Mr. Brown, did you know that I had summonsed her to this court for the plaintiff?

A. No, I did not.

Mr. Ford: I think it is immaterial whether he did or did not.

Court: Overrule the objection.

Q. Did you know, at the time you talked with her, that I had summonsed the witness for the plaintiff in this case?

Mr. Ford: I still object.

Court: I overrule the objection.

Q. The last time you talked to her was 10 days ago?

A. I think it is about ten days ago.

Q. Approximately how long did you talk to Mrs. Kelly? I'm going to give evidence to contradict you so I want you to be prepared. If this will help you any, Mr. Brown, I will ask you when you last saw her or when you last had any conversation with her?

A. To the best of my recollection, about ten days ago.

Q. I see. And where was that conversation held?

A. Over at our office.

Q. Over at your office in Newport News?

A. That's right.

page 20 } Q. Did you call her over there or did she call of her own free will?

Mr. Ford: I thought your Honor had ruled on the line of examination, if the purpose was to talk to whatever witnesses he could find. Your Honor ruled that that is a perfectly legitimate purpose of any law suit. If that's the same purpose, I imagine it is.

Court: That's true. I don't know what the purpose of the examination is but up to this time, the examination is all right. Go ahead.

Q. Did Mrs. Kelly come of her own free will and did *and did* you call her and ask her to come to your office?

Mr. Ford: Same objection.

Court: I overrule it.

A. I asked her to come over.

R. M. Brown.

Q. Had you called her previous to that?

A. Yes.

Q. And had she refused?

A. No.

Q. The first time you called Mrs. Kelly to come to your office, she didn't tell you that she was going out of town and couldn't come?

A. That's right.

Q. Why did you testify that she didn't refuse?

A. It wasn't the case of refusing. She couldn't
page 21 } come. She was going out of town.

Q. She said she'd come when she got back?

A. Yes.

Q. Did she come when she got back?

A. She did.

Q. After you called her or not?

A. I told her, when she told me she couldn't come over on a Friday she was going to Maryland, I think for the week-end and said she would be glad to come over when she got back and I called her. Said she would be back Sunday night and I called on Monday evening. She still hadn't gotten back and I left word where she lived for her to call me and I had no more than gotten back home before she called.

Q. Now, let me get this straight. You called her up and asked her if she would come to see you. That's the first conversation, is that right?

A. That's right.

Q. She said she was going out of town and she couldn't come over there. You called when she got back on Monday?

A. Yes, she told me she would be back on Sunday evening and she would come over when she had time.

Q. You asked her then to—you called her back the next time to come over?

A. What's that?

Q. On Monday you called her back?
page 22 }

A. Yes.

Q. Did you call in the daytime or night?

A. I called in the evening.

Q. And then she came over to your office?

A. Later. She didn't come that evening. She came later.

Q. How late after that did she come?

A. Let me see. I think it was a couple of days, to the best of my recollection; two days before she came over.

R. M. Brown.

Q. Will the calendar help you in any way to remember when she came to your office?

A. No, it wouldn't. The dates, I don't remember by dates.

Q. About how many times, prior to today was she in your office?

A. Prior to this day?

Q. That's right.

A. To the best of my recollection about ten days ago.

Q. All right, sir. Now, did you tell Mr. Ford that you were calling her over there?

Mr. Ford: If your Honor please, I just think we've gone far enough.

Court: He's got a right to take the matter up with counsel.

Mr. Ford: Or with the witnesses, I submit, sir.

Court: All right, sir. I sustain the objection.

Q. At the time she was in your office then on that page 23 { date ten days ago, didn't she tell you that she had already been summonsed as a witness for me, for the plaintiff?

Mr. Ford: I object, if your Honor please and I think your Honor ought to tell the jury that any person has a right to talk to any witness whether summonsed or not and nobody has an exclusive right over a witness.

Court: They have got a right to talk to them. I don't know whether the ruling I made first is correct in this. This woman's condition, according to the Doctor, is that of a person that is emotionally upset and he testified what, in his opinion, caused it and his testimony was that this, and the action of the company were the cause. I think, in view of that, maybe if this gets back to her and was the cause of her continued condition, I think probably they have got a right to show it.

Mr. Ford: I object to—is that your Honor's ruling?

Court: Yes.

Mr. Ford: I object to your Honor's ruling. I object to your Honor's statement to the jury that has been made. So far as the examination by this counsel is concerned, there has been evinced no such theory that your Honor has suggested.

Q. Now, Mr. Brown, in your capacity as President of this

R. M. Brown.

company, when did you first know that Mrs. Kelly was summonsed as a witness for me?

A. I think it was last Saturday, I think.

page 24 } Q. And how do you arrive at that date?

A. I talked to her over the telephone.

Q. And you talked to her then on Saturday?

A. Ahuh!

Q. Did you ask her to be a witness for you?

A. No, never have.

Q. Did you ask for a statement?

A. I asked her.

Mr. Ford: Your Honor, you understand I object to this whole line of examination?

Court: I understand.

Q. Did you ask her for a statement?

A. I asked her only to tell me what happened. I talked to Mrs. Kelly very little about the case and I only asked her what happened down to the time Mrs. Babb said that she drank the Coca-Cola.

Q. Mr. Brown, if you talked to her very little about the case, you had her in your office, you testified you called her three times. Were you making a date?

A. Hardly.

Mr. Ford: Just a moment. I object to any such insinuation.

Court: All right, sir.

Mr. Ford: Move it be stricken.

page 25 } Court: I think that question is improper (turns to the jury) and you gentlemen will disregard the question and the answer.

Q. Mr. Brown, you have testified that you talked to her three times and had her in your office once but you talked very little about the case. Had you ever known the woman before this case?

A. No, no. No, sir.

Q. But you talked very little about this case, is that right?

A. That's right. The only thing I asked her was to tell me what happened at the time this woman was supposed to drink this Coca-Cola and no other reference was made to the case.

Q. Did you later summons her to appear here?

R. M. Brown.

A. No. Oh, I don't know whether we summonsed her or not.

Q. I don't imagine you consulted your counsel because you were carrying this case yourself?

Mr. Ford: I object to statement of counsel.

Court: You gentlemen will disregard that. Let's conduct this case on orderly lines.

Q. Mr. Brown, did you talk to Mr. Toulson?

A. Yes, I did. Mr. Toulson's name was given me by the man in charge of the Finance Department. I asked Mr. Ulbrook who's in charge of the Finance Office to give me the names, tell me of anybody who was there who might have known something about it and he gave me Mr. Toulson's name, Mrs. Kelly's name and some others and that's the reason I happened to be talking to Mrs. Kelly.

page 26 } Q. He give you Sergeant Potter's name?

A. I don't know whether he gave me Sergeant Potter's name or not.

Q. Now, Mr. Brown, you have admitted that you have had three telephone conversations and had this lady in your office. Now, I summonsed her as a witness and you know that I summonsed her. Now she has not appeared today. Do you know why she didn't appear?

A. I haven't the slightest idea.

Court: Gentlemen, I think it is proper for the court to say, at this time, that the fact one side in the case summonsed witnesses isn't any reason that the other side can't talk to them. They ought not to do it in a harassing manner. If a man sees an automobile accident, there isn't any reason, no matter who gets to talk to him first, it doesn't preclude the other side from speaking to him. The same situation holds true here. There's no reason why both the plaintiff and the defendant doesn't have the same right to talk to the witnesses in the case but it should be done in a reasonable manner.

Mr. Ford: May I suggest, in connection with your Honor's remarks, that there has been no harassing and will your Honor tell the jury that there has been no evidence of any harassing of any witnesses.

Court: I will tell when the evidence is all in.

Mr. Ford: Your Honor used the word "harass."
page 27 } Will you explain to the jury that there has been no harrassing of any witness?

Court: I will, when the evidence is all in.

M. M. Toulson.

Mr. Ford: I except to your Honor's statement unless your Honor will explain to the jury.

M. M. TOULSON,
called as a witness by the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Give me your name please, sir.

A. M. M. Toulson.

Q. Mr. Toulson, this is a case in which Mrs. Elaine Babb, an employee of the Fortress Monroe is bringing suit against the Coca Cola Company for \$10,000.00 due to the damages she suffered after she drank a bottle of soft drink known as Coca Cola in which she alleges she found a decomposed worm or snail. This is alleged to have taken place in October 10, 1947, a little after three o'clock in the Finance Office at Fortress Monroe, Virginia. That's the United States Government Finance Office. You have been called here as a witness by Mrs. Babb, the plaintiff, and myself and I would like for you to state to the court and to these gentlemen of the jury just what you know about the facts in this case and please speak loud enough so his Honor and these gentlemen can hear you. What is your name?

A. Toulson.

page 28 } Q. First name?

A. Myrafa.

Q. Mr. Toulson, where were you working on October 10, 1947?

A. Fort Monroe.

Q. What department at Fort Monroe?

A. Finance Department.

Q. And where are you employed now?

A. Sears and Roebuck.

Q. And will you please state to the court what you know about this incident that happened on the 10th day of October, 1947? Start from the first and go right through.

A. In the afternoon, we usually go get Cokes out of the Coca Cola machine and to be courteous to the ladies we also brought back whoever wanted one. All of them didn't drink. Some of them did. We brought whatever they wanted back and this afternoon there was a few of the ladies wanted Coca Colas. I was going to get myself one so they all gave me a

M. M. Toulson.

nickel; the ones that wanted it, I brought the Cokes back to them so I got the Cokes out of the machine and opened them and brought them on back to the department where I was working. And, in fact, I don't think I only had three, including my own. I don't remember exactly but it was something in that order so I set one on the girl's desk and come up to Mrs. Babb's desk and set one down on her desk and then I went over and sat down at my desk right opposite page 29 } her, sort of to the back and I been sitting there just not very long. I don't know how many seconds or minutes it was but wasn't very long and she asked me how my coke taste. I said, "All right." She said, "Mine don't taste so good" and I said, "Aw, it's your imagination." I said, "It's all right." So she turned it up and drinks some more of the coke and as she did, this thing—I don't know what it was, come up in her mouth so she said—

Mr. Ford: I object. Did you see it? Unless you saw it—
Court: Say that over again.

The answer was read to the court.

Court: All right, it's all right to state what you said under those circumstances.

A. And—

Mr. Ford: I object. I except unless the witness saw it. He has not said he saw it.

Court: All right, go ahead.

A. And so she was leaning over the trash can when I saw it. I don't know whether she spit in the trash can or not. I do know that the paper was wet but I don't know what it was but I know she was leaning over the trash can and she had something—wiping her mouth. I asked her if she were all right. She said she felt a little sick and I went over and looked in the Coca-Cola bottle and I saw this object in the Coca-Cola bottle which I don't know what it was page 30 } but I mean I could say it looked like to me—I couldn't swear what it was but I know it was something in the bottle and she begin to get sick. So she said, I mean and she looked like she was nauseated. I don't know if you would call that sick or not but I mean, you know she looked liked, sort of turned—changed color like she might

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have been sick because I mean I'm not swearing. I just saying what I see, I mean what I think and she went to the rest rooms. She got up and run down. She didn't exactly run but you know pretty fast because she was sick, she said. I don't know. I'm not a doctor; so she went back and came back. I don't know, she was down there a good bit. I went on about my work and so she came back after a while. I don't know how long she was gone and that's what I know about it but I saw it in the Coke.

Q. Mr. Toulson, you have just testified that you examined the bottle. Would you look at this and see if you recognize that? (Hands witness a bottle).

A. It looks similar to the one I saw. I can't swear it is the one I saw. It looks similar to the thing I saw.

Q. And where did you see it?

A. In the Coca-Cola.

Q. And was that the same one she drank from?

A. Yes, sir. I can't swear this is the one but it looks like it.

Mr. Gordon: I'd like to offer this as an Exhibit page31 } "A" for the plaintiff.

Court: Have you any objection?

Mr. Ford: I have no objection.

Mr. Gordon: I'd like the gentlemen of the jury to examine the partially decomposed—(hands bottle to the jury).

The bottle containing the partially decomposed matter was received in evidence and marked Plaintiff's Exhibit "A."

Q. Mr. Toulson, you just testified that you personally went to the machine, obtained the Coca-Cola from the machine, opened it yourself, brought it in and set it on the desk?

A. Yes, sir.

Q. And you were the only one that handled the bottle other than Mrs. Babb?

A. Yes, sir.

Q. Other than myself and Mrs. Babb, has anyone else talked to you about this case?

A. Yes, sir.

Q. Who?

A. I talked to Mr. Brown and Mr. Ford.

Q. And where did you talk to Mr. Brown?

A. I talked to him where I worked.

M. M. Toulson.

Q. And did you tell him the same that you have testified to here today?

A. Well, to the best of my memory, I did because I don't know if I could state it the same as I did then, I page 32 } mean but the best of my memory—

Q. You told them just the same as you have testified here today?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Ford:

Q. Mr. Toulson, you came to my office at my request, a telephone call from me to tell me what you knew about this case, is that correct?

A. Yes, sir.

Q. Now, how old are you, may I ask?

A. 27.

Q. Last October you were working down at the Finance Department and quit of your own volition?

A. Yes, sir.

Q. And came up to work for Sears Roebuck in Newport News?

A. Yes, sir.

Q. Where you are now employed?

A. Yes, sir.

Q. This occasion which is set out to be October 10, you were working at the Finance Office, at that time?

A. Yes, sir.

Q. Who was in charge of your department?

A. You mean who was in charge of the whole—

Q. I am talking about the department you were in.

A. Mr. Galloway.

page 33 } Q. Who was in charge of Mrs. Babb's department?

A. Well, he was in charge of the whole department.

Q. What was Mrs. Kelly?

A. She was a supervisor.

Q. I mean immediately in charge. Mrs. Kelly?

A. Yes, but we take orders from Mr. Galloway.

Q. You and Mrs. Babb and who else around about?

A. I don't know. A lot of girls. I don't remember who they are. Not in this particular department. They come and go.

Q. You mean they come and go they were more or less on temporary duty last year?

M. M. Toulson.

A. Yes, sir, they were all temporary duty.

Q. In fact, you were on temporary duty too?

A. Yes, sir.

Q. You think it was some time in October, some part of October itself, I mean. You went to the building where this machine was and got your own Coca-Cola and the girls and whoever wanted it?

A. Yes, sir.

Q. That was customary as a rule?

A. Yes, sir.

Q. But you do know that Mrs. Babb was one of those who gave you the nickel and asked you to get the Coca-Cola?

A. Yes, sir.

Q. How far from the building where you were
page 34 } located and Mrs. Babb was located was the building where the vending machine was located?

A. Well, I'd say across the street. I mean, you know how those streets are in Fort Monroe. You don't call it a street but two cars can meet; across the street like that. You've seen the place.

Q. I know. I am very familiar with it.

A. The building that the—

Court: The trouble is that the jury does not. That's why he's asking you these questions.

Q. The building that you were located in, is it still standing?

A. Yes, sir.

Q. That's on the south side of the moat?

A. As far as I know.

Q. I mean at that time?

A. Yes.

Q. And there were three temporary buildings that were sort of perpendicular to the moat, if it could be perpendicular; is that right? Or perpendicular to the Engle's Road and you come down the curve and you hit one building and then another building and a third building. Your's was the third building? You tell me, I mean.

A. What do you mean?

Q. I am locating the building you were in and
page 35 } the building the vending machine was in. How far was the vending machine from the building you and Mrs. Babb was in?

M. M. Toulson.

A. I say it was perpendicular. Across the street. Would you say that?

Court: You say it.

A. I don't know.

Q. How to testify? When you came down the steps to get the Coca-Cola you came down the back end of your building?

A. Yes, sir, that's the way I come in.

Q. You go in from the road? The closest entrance is towards Engle's Road? That's the main road. You went down the back steps, across the courtway, so to speak, to a building over to your right where the vending machine was, is that correct?

A. Yes, sir.

Q. And you walk along the walkway; that was completely out of doors, was it not?

A. Yes, sir.

Q. Would you say it was anywhere from 75 to 100 yards from your building?

A. No, sir.

Q. How far would you say?

A. 25 yards.

Q. 25 yards?

page 36 { A. That is what I say. I never measured it.

Q. You never measured it?

A. I never measured it.

Q. You wouldn't think that it was closer to 80 yards?

A. I don't think so.

Q. You would not say that isn't correct?

A. No, sir, I don't say it isn't correct but I don't think it is.

Q. You think it was 25 or more yards; about 25 yards?

A. Yes, sir.

Q. But you wouldn't say that is correct?

A. No, sir, I wouldn't say.

Q. You went across and you went to the vending machine and got the three or four bottles of Coca-Cola?

A. Yes, sir.

Q. And you opened them? Did you stay there any time or did you come right back?

A. I came right back.

Q. Opened the Coca-Colas, held them in your hand or two hands. It was either three or four bottles you think?

A. I don't remember it exactly. About three or four.

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Q. Enough for you to carry. You didn't have any little satchel or box? You carried them in your hands?

A. Yes, sir.

Q. And came back to your desk and gave Mrs.
page 37 } Babb a Coca-Cola and whoever else had purchased
the Coca-Cola and sat down at your desk and
started to drink yours, isn't that correct?

A. Yes, sir.

Q. But you were the one who brought them back and went over and brought them back?

A. Yes, sir.

Q. You stated that you were sipping your Coca-Cola and you heard Mrs. Babb make a statement "Mine don't taste so good." She meant the Coca-Cola, I guess?

A. Yes, sir.

Q. To which you replied, "It's your imagination" or something to that effect and "It's all right."

A. Yes, sir.

Q. All right, did she take another drink of the Coca-Cola?

A. Yes, sir.

Q. Did you see her do it?

A. Well, I wasn't closely paying attention but I mean after she called my attention to it, I was sort of looking that way and she had the Coca-Cola up. I don't know whether she was drinking or not. I presume she was.

Q. She was in the act as if she was drinking. It would be a reasonable assumption. The impression was she was drinking the Coca-Cola?

A. Yes, that's the impression she left me.

page 38 } Q. Do you know how much she drank?

A. You mean how much of the Coca-Cola altogether?

Q. Yes, out of the bottle.

A. I don't know exactly how much she drank out of it.

Q. Would you say a fourth, a third, to the best of your judgment, of course?

A. I'd say she drink a third at least.

Q. And then she put it down?

A. Yes, sir.

Q. When was it that you saw this, whatever this is, in the bottle? You say you didn't see this. You saw something like this? You can't tell whether this is it or not?

A. I can't swear that is it. It looks like it.

Q. It looks like whatever this is?

A. Yes, sir.

M. M. Toulson.

Q. When did you see that?

A. As soon as she started to spitting, whatever she was doing. I went over and looked in the bottle and seen it and I said, "It looks like a worm to me."

Q. She was in the act of drinking a second time. She stopped drinking and spat out into the wastepaper basket?

A. I don't know how many times she was drinking. I went over there.

Q. You, of course, didn't see her drink that or touch it?

Of course, you can't say that?

page 39 } A. I didn't see it in her mouth.

Q. You didn't see her drinking or touch it?

A. I just saw the thing in the Coke.

Q. All you know is what she told you about that?

A. About it going in her mouth, yes.

Q. That's right. Did you see it in the wastepaper basket?

A. What?

Q. This, or anything like that? (Indicating.)

A. I didn't look that close. I didn't see it.

Q. You didn't see it in the wastepaper basket?

A. No, sir.

Q. When you saw it, it was in the bottle?

A. Yes, sir.

Q. With about a third or fourth, or whatever you said, of the contents having been drunk out?

A. Yes, sir.

Q. Did you see her at all reach into the wastepaper basket after she spat into it?

A. No, sir.

Q. Did you see her, at any time, pour any part of it into the wastepaper basket?

A. No, sir.

Q. And, of course, you don't know how this thing, whatever it is, got into the bottle? You don't know how it
page 40 } got into it?

A. No.

Q. How long was she at the desk before she called attention to this substance in the bottle? How long had she been at the desk drinking the Coca-Cola, would you say?

A. Usually, when you bring a Coke, everybody is thirsty. Usually, the first thing you do is take a sip.

Q. Some drink leisurely; others don't?

A. Right. And the best I can remember she turned it up and took a sip; I wouldn't say just as soon as I set the bottle down but pretty quick afterward.

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Q. And made that statement and then she took another drink?

A. I don't know if she made it right then. I had gone to my desk.

Q. Your desk is nearby?

A. Yes, sir. Her desk is there (indicating). Mine is here (indicating).

Q. Where was Mr. Catlett's desk?

A. His desk is on the other side of her's, at an angle sort of, like this. (Indicating.)

Q. Where was Mr. Duncan's desk?

A. Duncan?

Q. You know Mr. Duncan?

A. I mean, if it's the one I'm thinking about,
page 41 } his desk is in front of her's.

Q. Which one are you thinking about?

A. I don't remember them so well.

Q. Well, he was sort of in charge too? Wasn't he the—
what do you call him? Were you a computer or verifier?

A. I was a computer.

Q. Mr. Duncan was a verifier?

A. That's right.

Q. Where was his desk?

A. His desk was directly in front of her's.

Q. Would he be in a position to have heard what she said,
if she said it?

A. I don't even know if we were there that day.

Q. If he were there, was his desk so placed so that in a
normal course of events and hearing, would he have been in
a position to have heard?

A. I don't know. I don't guess, if he hadn't been paying
particular attention.

Q. Would he be in a position, if he were looking toward
Mrs. Babb to have seen what you say you saw?

A. No, because he had his back to her.

Q. If he had been looking at her from where he sat?

A. Could he have seen it if he been looking at—

Q. Yes.

A. If he been looking, I guess he could have seen.

Q. How about Mrs. Kelly? If she had been
page 42 } looking from where she sat, could she have seen
what you saw?

A. You mean her drinking the Coke?

Q. Yes.

A. She could have, if she was looking at it.

M. M. Toulson.

Q. That's right and how about Mr. Catlett from where he sat? If he had been looking, could he have seen what you saw?

A. He could have, yes, sir.

Mr. Gordon: Mr. Cochran is Officer in Charge of Fortress Monroe. You have the records there and I'd like to have him introduce the records.

Mr. Ford: I'd like the jury to retire, if your Honor pleases, for just a moment.

The jury left the courtroom and retired to the outer room.

Mr. Ford: If your Honor please, I had an opportunity this morning, as you saw, to examine this record in a cursory way and not in as much detail as I would like. There's more in the record than pertains to this case and I found that out by going over it. Had I known it, I would have gone over that part of it because it should be separated. In any event, I'm not satisfied that the record is admissible and I'd like to examine it with your Honor and Mr. Gordon too.

Court: How long would it take? Have you seen it?

Mr. Gordon: You summonsed it.

Court: He's entitled to look at it and he can page 43 { look at it.

Mr. Ford: You look at it. (To Mr. Gordon.) From what I saw, I don't think it's proper to be introduced. You can't just throw a hospital record to the jury and say there it is. This has no evidential value. It's an unsigned statement by some nurse or by some interne and, according to this, with initials; no person of whom is here to verify any statement made in that record. You can't introduce the hospital record perforce and say that it has evidential value.

Court: I'm going to rule that this man can testify not as to the contents of the record but he can testify that the records show that this woman was there for a period of time.

Mr. Ford: I have no objection to that.

Court: He can testify to that. What the nurse wrote on the record or what the doctor writes on that as his diagnosis, that's not proper.

Mr. Gordon: Then he can testify as to when she came, how long she stayed and not for what she was there for?

Court: No, sir.

Mr. Gordon: Could the Colonel have testified to that?

Court: If he got the records.

Wallace H. Cochran.

Mr. Ford: As I stated, so far as the identity and the authenticity of the records is concerned, this man here, as far as we are concerned, can identify them as well as the Colonel.

Mr. Gordon: If the Colonel can testify what she page 44 } was treated for, then I'll get the Colonel up here.

Mr. Ford: The Colonel doesn't know anything more about it than I do.

Court: The only thing I am going to let this witness testify to is the fact that she was a patient there, the date she was there and when she went out.

The jury returned to the jury box.

WALLACE H. COCHRAN,
called as a witness by the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Will you please state to the court your name?

A. My name is Mr. Wallace H. Cochran.

Q. And, Mr. Cochran, where are you stationed?

A. I am with the station hospital at Fort Monroe.

Q. And when did you first enter on duty at the station hospital on Fort Monroe?

A. July 6, 1946.

Q. Were you stationed there on October 10, 1947?

A. I was.

Q. And what are your duties there as an officer at the station hospital at Fortress Monroe?

A. I am—primary duty is the medical registrar. I am the custodian of all medical records.

Q. Would you tell his Honor and the jury whether you know Elaine Babb, the plaintiff in this case? page 45 }

A. Casually.

Q. Have you had occasion, in your capacity as registrar of the records, to audit or observe her record at the hospital?

A. I have.

Q. Will you please state to the court from the official rec-

Elaine Babb.

ord of the station hospital at Fortress Monroe, the date in which she was hospitalized at the hospital?

A. Mrs. Elaine Babb was admitted to the hospital as a patient on the 21st of October, 1947; was discharged from the hospital on the 25th of October, 1947.

Q. That is from the official records of the hospital?

A. From the office, War Department Government record.

Mr. Gordon: I'd like to reserve the right to call him back to the witness stand as to the other dates. At this time, answer any questions Mr. Ford might ask you.

Mr. Ford: No question.

Mr. Gordon: If your Honor please, I have one more witness who, I said before, was unable to get here due to it being payday. I'd like to reserve the right, if he comes in later, to call him.

ELAINE BABB,

called as a witness in her own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Mrs. Babb, this is a suit filed in this Court in which you, as the plaintiff, have brought suit against the Newpage 46 } port News Coca-Cola Company in the amount of \$10,000.00 for damages which you have suffered by virtue of the fact that you drank a Coca-Cola in which there was a partially decomposed worm. I would like to ask you your name, please?

A. Elaine M. Babb.

Q. And Mrs. Babb, where do you live now?

A. I live in Chicago.

Q. And are you married, Mrs. Babb?

A. Yes, I am.

Q. And do you have any children, Mrs. Babb?

A. I have two girls, two daughters.

Q. And how old are they, Mrs. Babb?

A. The oldest was just six and the youngest will be three in August.

Q. And where is your husband, Mrs. Babb?

A. Corosal, Canal Zone, Panama.

Q. Mrs. Babb, at one time did your husband and two small children and yourself live here on the Peninsula?

Elaine Babb.

A. Yes, we did.

Q. When did you first come here to live with your family, Mrs. Babb?

A. I'd say in June, 1946.

Q. And where was your husband stationed, Mrs. Babb?

A. When we came down—when I came down, he was stationed in Washington, D. C. with the AGF and he
page 47 } moved down here in September. I think it was of 1946, the end of September.

Q. And when you lived here, where did you live?

A. I lived in Newport News and from Newport News we moved out to Fortress Monroe.

Q. And your husband then was stationed at Fortress Monroe?

A. Yes.

Q. When you first came to the Peninsula, did you work, Mrs. Babb?

A. Yes, I did. I worked at Fort Eustis.

Q. For how long?

A. For about two months.

Q. And then?

A. I transferred to Fort Monroe. I got a transfer to Fort Monroe to the Library.

Q. And during the time and prior to the entering of duty with the Federal Government at Fort Eustis, were you required to take a physical examination?

A. Yes, I was.

Q. And did you pass that examination?

A. Yes, I did.

Q. Did you later enter on duty with the Federal Government?

A. Yes, I did.

Q. Mrs. Babbs, where were you working on the 10th day of October, 1947?

A. In the Finance Office in the Terminal Leave Section.

Q. And do you recall anything unusual happen-
page 48 } ing to you in the afternoon of that day?

A. About three o'clock in the afternoon, Shorty—

Q. And may I ask you who that is?

A. Excuse me. Mr. Toulson decided it was time for our afternoon Coca-Cola and everybody gave him a nickel who wanted one and he and, I think Mr. Catlett went out to get them. I am not sure if Mr. Calik was along or not with Mr. Toulson. When Mr. Toulson put the Coca-Cola on my desk, I

Elaine Babb.

took the bottle and put a Kleenx around the bottle so I wouldn't stain the desk.

Q. Will you please state, from where you are, when Mr. Toulson brought the drink in just what happened? I don't want you to drink it.

A. I took the Kleenx and I wrapped it around like this (indicating) so it wouldn't stain the desk and I set it down after I took a sip and remarked that it didn't taste right and a slight discussion followed. One of the girls said that after you drink Cokes for a while, you don't taste anything. We went back to work. I don't know how many sips I taken before I felt something, small slimy object in my mouth; something hitting my teeth which I immediately spit out into the trash can there and I said, "There's something in this bottle." I took my purse and went downstairs to the washroom where I became violently ill. I vomited quite hard and
page 49 } then I came back upstairs and I was told it looks very much like a snail or worm or something and somebody told me to see a doctor and get a lawyer. I don't remember all that they told me. I went downstairs. I called the Coca-Cola to report it. When I called the Coca-Cola Company they connected me with Mr. Brown, the president, who told me it was nothing to be worried about; everything that went into a bottle was sterilized. I told him I didn't care if it was sterilized or not. I didn't want to eat no snails or worms or anything else. He sent a representative out and the man looked at it and typed it out and said he hoped it's only a cigarette butt and he wanted to take the bottle from me. I said I would take it to the Post Hospital to be analyzed to treat me—so they could treat me if there was any poison in there. I took it over and Sergeant Denton and some doctor took it down to the laboratory and they came back and gave me this thing that's in the little bottle.

Q. Is this what they gave you from the (indicating)—

A. Yes, it is and they told me as long as I threw up and everything, that there was nothing in it that could hurt me; that I would not be poisoned from it and after that I went home and just couldn't eat any more. Everything I ate for the first two weeks, everything I ate reminded me of it. Everything I tried to eat was thrown up and I lost six pounds and that's when Lieutenant Veginol told me I should come into the hospital.

Q. What date did you go into the hospital?

Elaine Babb.

page 50 } A. On the 21st of October.

Q. And the records show they let you go home on the 25th, is that right?

A. Yes, that's right.

Q. And then did you stay under the care of that hospital or did you employ other doctors?

A. No, I went back to the hospital twice more and I talked to Captain Irvin and he told me he thought I should see this doctor in town. I told him I didn't know any doctor in town and he called someone up and got Doctor Ransone and he made an appointment for me and called my husband to take me over the next day.

Q. And, now, Mrs. Babb, Doctor Ransone has testified that you were under his care for I believe from the 10th of November through some time in December. Would you state, if you recall, how many visits over that period of time you made to his office?

A. It was either four or five.

Q. Prior to the 10th day of October, will you state to the court what your general health conditions or condition was?

A. From April of that year until this happened, I was in the best of health. There was absolutely nothing wrong with me. I felt wonderful and I was gaining weight.

Q. Had you, during that time, visited a doctor from April up until the 10th of October for any reason at all?

A. No, I don't think so.

page 51 } Q. Now, were you ever physically able to return to your employment with the Federal Government after the 10th day of October, 1947?

A. No.

Q. Have you been able to enter any employment for any length of time since this happened?

A. I did work for about four weeks in Chicago and I found I just couldn't do it. I couldn't go without eating and sleeping and still try to work at accounting.

Q. And that is your following, accounting work?

A. Yes, it is.

Q. Mrs. Babb, has there been any difference in the taste of your food since the 10th day of October up until now?

A. Yes, there has been very much so.

Q. Has there been any embarrassment to you at times when you were ready to eat since the 10th day of October?

A. Yes. When certain things are called at the table or something is said, I'll have to get up and excuse myself and leave the table and I just can't stay there.

Elaine Babb.

Q. Mrs. Babb, there is evidence here of—medical evidence here as to your monthly periods. Has there been a change since that time?

A. Definitely.

Q. What is that change?

A. Instead of four days, it's been going eight to page 52 } ten days every month and very erratic near certain—

Q. Was this condition present before the 10th of October?

A. No.

Q. Have any of the doctors that you have seen discharged you as being cured since the 10th of October?

A. None of them.

Q. Will you state what your pain and your feelings are now as to the present condition?

A. I have a backache all the time. I have headaches. I get periodic spells of vomiting, maybe last for 10 days of each month; not sleeping right.

Mr. Gordon: I object to him questioning on this evidence.
Court: He hasn't questioned her. He hasn't questioned her about a thing in the world.

Q. Mrs. Babb, will you state to the court what your salary was at the time you were employed at Fortress Monroe?

A. \$37.50 a week or \$1,954 per annum.

Q. And what was the type of appointment that you had?

A. It was a temporary appointment for six months.

Q. Did you plan to work the full period?

A. Yes, I did.

Q. And you haven't had any steady employment since then?

A. No, I only tried working just recently and I couldn't do it.

page 53 } Q. Now, you were examined again, I believe, by Doctor Ransone yesterday, or the day before yesterday, is that right?

A. Yes.

Q. Would you please state to the court that since October 10, what had been the least that you have weighed at any period since October 10?

A. 110 pounds.

Q. And what was your weight some time prior to that, the most that you have weighed?

A. Well, I weighed between 122 and 125.

Q. That was some time prior to this?

Elaine Babb.

Court: Some time prior to what?

A. Yes.

Mr. Gordon: October 10, 1947?

Q. There is evidence you weighed something like 116 on the 10th day of November, 1947.

A. That's about right.

Q. And you say since this time your weight has fluctuated back and forth?

A. Yes, that is—

Q. You have weighed as low as 110?

A. I never gone above 116.

Q. And prior to that, you did weigh as much as 125?

A. Yes.

Q. When you were on the Post yesterday, were page 54 } you embarrassed by anything that occurred down there in reference to this case?

A. Yes. I was quite embarrassed. Somebody came up and asked me—

Mr. Ford: I object, if your Honor please.

Court: Let's find out. Tell me who came up?

A. Mrs. Potter and Sergeant Potter.

Court: Who are they?

A. He's the Post Sergeant Major.

Court: All right. Go ahead. I overrule the objection.

Mr. Ford: It is hearsay, if your Honor please.

A. Mrs. Potter came up and asked me if I had been in jail. I asked her what she was talking about. "Somebody was investigating you" and just then Sergeant Potter told me—

Mr. Ford: I object to what Sergeant Potter said.

Court: I overrule the objection.

A. I mean it was just embarrassing to have people checking on my character, checking on my background as though I were a criminal or something.

Q. What was some of the other question, if there were any, that Sergeant Potter said were asked of him?

Elaine Babb.

A. He said he was asked what kind of people we were, if we were quiet, if we were noisy, if we caused trouble and where we came from and where I went to. I don't know all he told me. I was so upset about that.

Mr. Ford: Same objection and move to strike.
page 55 { Court: Overruled.

Q. Did Mrs. Kelly tell you anything about this case too?

Court: Don't answer the question. The question is leading.

Q. Did you have any conversation with Mrs. Kelly?

A. Yes, I had a telephone conversation with Mrs. Kelly and she told me that Mr. Brown—

Mr. Ford: Objected to as being hearsay.

Court: Overruled.

Mr. Ford: Exception.

A. Told me Mr. Brown had been to see her and that she told him what happened there and that he had asked everybody around there and that I should take any settlement Mr. Brown offered me.

Mr. Ford: Same objection, if your Honor please.

Q. All right. Now, Mrs. Babb—

Court: Gentlemen of the jury, with reference to these reports that came to this woman, I've admitted them in the evidence for one purpose alone; that is not as to the truth of the statements but the fact that some people made this statement to her, which she said upset her, in addition to what she already testified to that upset her.

Q. Now, Mrs. Babb, will you state what the doctors told you was the matter with you when you were under their care at Fortress Monroe?

page 56 { A. Captain Irvin told me—

Mr. Ford: I object to what this Captain Irvin told her.

Court: Objection sustained.

Elaine Babb.

Q. Do you know what your ailment and trouble was immediately after this accident or this unfortunate matter came up?

A. Was psychogenic gastral intestinal reaction.

Q. Do you know whether or not you have been cured of that condition?

A. No, I haven't.

Q. And who is your present physician in Chicago?

A. Doctor L. V. Barrete.

Q. When you were examined by Doctor Ransone recently, did you bring a report of the findings with you to Doctor Ransone?

A. Yes, I did.

Q. Did you give them to him?

A. Yes, I did.

Q. Now, you have testified that you took an examination and were in good physical condition prior to the 10th day of October, 1947. Now, name the doctor that you have had examine you from that time to the present time, as best as you can?

A. There was Captain Irvin.

Q. Where was he?

A. At the Post Hospital.

Q. And who else?

page 57 } A. And Doctor Ransone and Doctor Barrete and there were some at the Post that I just don't know their names. They come and go so often, it's quite hard to remember.

Q. You have been constantly under medical care since the 10th day of October, 1947, up till now?

Mr. Ford: I object to the leading question and the witness has not so stated. Let the witness testify what care she got, if your Honor please.

Court: I sustain the objection.

Q. Are you under the doctor's care now?

A. Yes, I am.

Q. Have any doctors pronounced you cured since the 10th of October?

A. No, and Doctor Barrete said—

Mr. Ford: I object.

Court: Don't tell what he said.

Elaine Babb.

Q. Do you think you are making some progress?

A. Very little.

Q. Have you ever fell back to normal like you were before the 10th of October, '47?

A. No, I haven't.

Q. Are you, at this time, spending money for doctors and medicine?

A. Yes, I am.

Q. While you were at the hospital at Fortress
page 58 } Monroe, did you have to pay any expenses down
there or did the government provide all of the facilities and medicine?

A. They took care of all the medical and the hospital but I paid for my meals, rations.

Q. And who has to pay Doctor Ransone?

A. I do.

Q. And your doctor in Chicago?

A. I have to pay him.

Q. I believe you just testified you are not working at this time?

A. No, I am not.

Q. And where did you say your husband is stationed?

A. In Panama, Corosal, Canal Zone.

Q. Are you planning on joining him there?

A. I can't plan on joining him. The doctor won't release me to go down there.

Q. Do you know why you can't go?

A. Because of my nerves, because of the climate down there. The climate and my nerves just won't mix.

Q. On the date of October 10, 1947, when you drank this Coca-Cola in which this decomposed worm was present, who else was present in the room that you recall?

A. Mrs. Kelly, Mrs. Lewis, and Miss Lewis, I'm not sure which; Mr. Catlett and there were three girls that I really don't know where they are and Mr. Toulson.

page 59 } Q. Who actually brought you the Coca-Cola?

A. Mr. Toulson.

Q. Did you pay Mr. Toulson for it?

A. Yes, I did.

Q. And did anyone have an opportunity to be close or have control of the drink that you know of, other than yourself until the time that you drank it, after Mr. Toulson gave it to you?

A. No, no one did.

Elaine Babb.

Q. How close was it sitting to you when Mr. Toulson gave it to you?

A. About so far away from me. (Indicating.)

Q. Did you leave your desk at any time after you originally got the drink?

A. No, I didn't.

Q. Can you state whether or not you swallowed any of this worm?

A. I can't state if I swallowed anything but there was something slimy at the roof of my mouth when—I mean that was in my mouth, little slimy object and that was—had touched my teeth.

Q. I believe you then spit into the waste basket?

A. I brought the bottle down like that (indicating) and spit, all at the same time.

Q. Will you please show to the court and to the page 60 } gentlemen of the jury about how much of the drink you drank?

A. I'll say about so much (indicating).

Court: For the purpose of the record, that would be about how much out of the bottle?

A. Well, from there to there.

Court: Between a half and a third you drank?

A. Yes.

Q. Did you have anything else in your mouth at the time? Were you smoking?

A. I was smoking a cigarette.

Q. Drinking a Coke and smoking?

A. Yes.

Q. Now, did you go directly to the hospital after this happened?

A. I waited until the representative came out. I was shaking and he came out and he said he would like to take the bottle with him and have it analyzed. I told him I would sooner take it to the hospital myself and after he left, he was there about five minutes, I think five or ten minutes, I took it over to the hospital.

Q. And it was in the bottle at that time?

A. Yes, it was.

Q. Did you give it to the officials of the hospital?

A. I gave it to this doctor and Sergeant Denton, they both.

Elaine Babb.

The doctor carried it and Sergeant Denton went with him.

Q. And this was what they returned to you
page 61 } (showing bottle)?

A. That is what they brought to me.

Mr. Ford: Let me interpose, if your Honor please. As
a question of identification of that, I want to save the point.

Court: Identification of what?

Mr. Ford: Rather than go back, I didn't hear who it was—

Court: I overrule the objection because I asked you when
it was submitted whether there was any objection and the
record ought to show, since there is no objection, it would
be admitted.

Mr. Ford: The record will show that I did not object to
it because that was similar to the object he saw. I didn't
object to that.

Court: All right.

Mr. Gordon: Then you object to the question I just asked?

Mr. Ford: Because I wasn't paying attention and I didn't
hear your question and answer. If it is what I thought it was,
then I interpose an objection.

Q. How long would you say it was after you called Mr.
Brown before he had his representative there?

A. Between 20 minutes and a half hour.

Q. And had you ever seen this man before?

A. No, I had never seen him before.

Q. Who did he say he was, do you recall?

page 62 } A. I don't recall what his name was.

Q. Did he say what he was—his position was?

A. He was the driver of the Coca-Cola. He had a uniform.
He talked like he was the driver.

Q. Did you show him the bottle with the worm in it?

A. Yes, I did. I brought it over.

Q. And did he observe it?

A. He held it up to the light and he looked and peered at
it and—

Q. And he said what?

A. He said to me he just hopes it's only a cigarette butt.

Q. I see and after that—was it before that that you called
Mr. Brown or after that?

A. I called Mr. Brown in order to tell him about this and
this driver asked me if I would let him know what the analysis
was and I told him I would as soon as I found out.

Q. From that day until today, have you seen or talked to
Mr. Brown?

Elaine Babb.

A. I talked to him the following morning and told him what the analysis was, of what the doctors told me about the Coca-Cola.

Q. And you recall any conversation with Mr. Brown?

A. Very distinctly. He told me that I should
page 63 } take two shots of Bourbon and a half glass of Coke
and get over it. It's only my imagination and he
also told me that people all over the country eat snails or
worms and I told him I didn't want to drink anything after
it had been soaked in Coke for a while.

Q. That's what Mr. Brown told you the next morning?

A. Told me over the phone.

Q. How did you feel then?

A. I just finished throwing up my breakfast, what I tried
to eat for breakfast.

Q. Now, Mrs. Babb, you had worked there until the 10th.
Was the reason that you did not continue on there—why
didn't you continue on in the employment there?

A. Because I wasn't eating. I was losing all my meals and
I was too nervous to sit down and try to work at figures.

Q. Did you resign or did they terminate you?

A. They terminated me and I took the week off and I had
to take the following week off and I got my notice of termina-
tion.

Q. Do you know why that was?

A. Because I wasn't coming into work.

Q. You say you couldn't go to work?

A. I couldn't go to work.

Q. And you have been under the care of doctors from the
10th of October through the present time?

page 64 } A. Yes, I have.

CROSS EXAMINATION.

By Mr. Ford:

Q. Mrs. Babb, did you say how old you are? Do you mind
telling us?

A. I'm 27.

Q. Do you know who brought you this Coca-Cola? Was it
Mr. Catlett or Mr. Toulson?

A. Mr. Toulson.

Q. You stated that Mr. Catlett went out. You know whether
he went out with Mr. Toulson?

A. I think that he did. I presume he did.

Q. But you don't know?

A. I'm not sure.

Elaine Babb.

Q. You actually don't know then who got the Coca-Cola out of the vending machine, Mr. Catlett or Mr. Toulson because you weren't there?

A. No.

Q. You don't know who brought it back over the courtyard or whatever it is out of doors, Mr. Toulson or Mr. Catlett or both, do you?

A. No, I don't.

Q. You weren't there, except what Mr. Toulson has testified to?

A. Just what he testified to today.

Q. Except that you do know, as you stated, he page 65 } put it on your desk?

A. He gave it to me.

Q. Were you working at the time under the immediate direction of Mr. Duncan?

A. I don't know Mr. Duncan.

Q. Wasn't he your verifier?

A. No, he wasn't my verifier.

Q. Were you a computer?

A. No, he wasn't. I had a woman doing my computing.

Q. Your computing or verifying?

A. I was doing the computing. She was doing the verifying.

Q. And it was not Mr. Duncan?

A. It was not Mr. Duncan. I don't know Mr. Duncan.

Q. When did you go to work at the Finance Office this time? You had been off and on at the Finance Office, had you not?

A. Yes, I had.

Q. For what period of time?

A. From July of '46 until the date, the 10th of October.

Q. From July, '46. Did you go back—did you leave the Finance Office and go to the hospital in July of '46?

A. No, I left the Signal Office at Fort Eustis and went to the Hospital in '46.

Q. You were in the hospital in July, '46, were you not?

A. Yes, I was.

page 66 } Q. Until some time in August?

A. Very beginning of August.

Q. Did you tell Doctor Ransone why you were at the hospital?

Mr. Gordon: I object to anything prior to the 10th day of October.

Elaine Babb.

Mr. Ford: I have a right to show this woman's condition that might exist from this other cause.

Court: Objection overruled.

Q. Did you tell Doctor Ransome why you were at the hospital just a little over one year prior to this?

A. Yes, I did.

Q. You were there because of a very serious woman condition, were you not?

A. Yes, I was.

Q. In which you lost a considerable amount of blood?

A. Yes.

Q. Over a period of days?

A. Yes.

Q. That would give you very serious emotional upset?

A. We—

Q. And it did?

A. No.

Q. It did not give you very serious emotional upset?

A. No, I had the best medical attention there page 67 } was and they took care of it.

Q. Your condition wasn't such at that time and carried over and still does, as a result of your experience in July and August of last year in the hospital at Fort Monroe, to cause you serious emotional upset?

A. You mean in 1946?

Q. Yes, 1946.

A. No, it isn't because the doctors got me, they considered me cured and my blood count was up to 100% in April of 1947. I was in the best of health that I had been since my second daughter was born and I had a blood count of 100% and I was in perfect physical condition.

Q. You were in perfect physical condition, I mean mentally as well as physically after you left the hospital in August of last year, '46?

A. Yes.

Q. At one time they despaired of your life, did they not?

A. I don't think so.

Q. Did you not?

A. No, I didn't.

Mr. Gordon: If your Honor please, I object. She's answered the question.

Court: She's answered the question.

Elaine Babb.

Q. Now, wasn't it the experience that you had
page 68 } in the hospital as late as July or August of '46 that
gave you the emotional upset rather than this occurrence?

A. No, it wasn't.

Q. You say it was not. You don't have to tell the jury what the cause was of your being in the hospital. I'm not asking you. You are at liberty to say what it was.

A. I don't mind saying. I was in the hospital for a miscarriage and they call it an abortion.

Q. They call it an abortion. Superinduced?

A. Not necessarily.

Q. After you drank the Coca-Cola to the extent that you said,—I withdraw that. After you first drank the Coca-Cola, I don't believe you did state about how much you drank at that time when you said that something was wrong with this Coke. Can you give us an estimate how much you drank?

A. Very small amount; about that much from the top of the bottle (indicating).

Q. A sip and you said something was wrong and Toulson or somebody remarked it was your imagination?

A. Toulson and this girl that sat next to me.

Q. What was her name?

A. I don't remember her name.

Q. And after that you then drank it down to where you indicated which his Honor has estimated as somewhere between a third or a half when you felt the object in your mouth?

page 69 } A. Yes.

Q. How many times did you drink it, a sip at a time?

A. I don't know how many times I drank it. I wasn't paying any attention. I was working at the time.

Q. And then when you felt this object in your mouth and on your teeth you say you spat it out into the wastepaper basket?

A. I had the bottle up to my mouth. It hit my teeth. I tipped the bottle down and spat into the wastepaper basket.

Q. I mean you spat into the wastepaper basket?

A. Yes.

Q. And you remarked that something was in that bottle?

A. Yes, sir. I said, "There's something in this bottle."

Q. You mean something had been in the bottle. You had spit it out?

A. No, I hadn't spit the snail out and it slipped back into

Elaine Babb.

the bottle and I spit out this small slimy object, whatever it was.

Q. Well, you spit it out into the wastepaper basket, did you not?

A. Yes, the small slimy object. The big thing went into the bottle again.

Q. You didn't spit that out?

A. No, that touched my teeth.

Q. Whatever touched your teeth, you spat out page 70 } whatever you had in your mouth.

A. It touched my teeth. I tipped the bottle down and was spitting at the same time and that slipped back into the bottle and the small object that got into my mouth, I spit into the wastepaper basket.

Q. That is no part of this what you spit into the basket?

A. I don't know what it was.

Q. That is what you show here remained in the bottle and did not go into the basket, is that correct?

A. That's correct.

Q. So this then did not go into your mouth?

A. It touched my teeth.

Q. That's what you said. Then you went to the washroom?

A. Yes.

Q. Where you were nauseated or sick?

A. Vomited very violently.

Q. Do you know where Captain Irvin is now, the doctor that treated you?

A. He is separated from the service.

Q. You know where he is?

A. No, I don't.

Q. Don't you know that he is in Winston-Salem, North Carolina?

A. No, I don't. All I know he is separated from the service.

page 71 } Q. Your counsel hasn't told you he was in Winston-Salem, North Carolina, if you wished him to testify?

A. My counsel hasn't told me.

Q. What was the name of your doctor in Chicago?

A. Doctor Barrete.

Q. How do you spell that, B-A-R-R-Y-T-E?

A. B-A-R-R-E-T-E.

Q. He's in Chicago?

A. Yes.

Elaine Babb.

Q. And his deposition could be taken, if desirable, could it not?

A. Yes, it can.

Q. It could be taken before this trial?

A. It could.

Q. He's in Chicago available to testify?

A. Yes, he is.

Q. And if Doctor Irwin is in Winston-Salem and—

Mr. Gordon: I object. You can bring in all the evidence you want to bring in. There isn't any reason for that.

Court: I think he's got a right to say that the depositions might be taken. Of course, this court cannot require him to come here and testify. Under proper notice, their depositions could be taken where they reside and introduced as evidence in this case.

Mr. Ford: That was the purpose of the question.

page 72 } Q. And you say your counsel did not tell you
Doctor Irwin was in Winston-Salem or some other
place in North Carolina?

A. I didn't talk to my counsel much since I'm down here,

RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. Let me ask you one question. Since counsel has evidently had some motive in asking you about your sickness 14 months prior to this matter, will you please state to the court what your religion is?

A. My religion is Catholic.

The court at 1:30 p. m. recessed until 2:30 p. m. at which time it reconvened.

AFTERNOON.

Mr. Gordon: If your Honor please, I ask if I might be permitted to get Mr. Cochran back on the stand for just a minute to verify the dates.

Court: All right, call him back.

Wallace H. Cochran—Marshall E. Andrews.

WALLACE H. COCHRAN,
recalled as a witness for the plaintiff testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Mr. Cochran, a few minutes ago you took the stand and testified that in your capacity as recorder there of the medical records of Fortress Monroe, the records indicated that Mrs. Babb had been the patient at the Fortress Monroe Hospital from October 21 through October 25 and that page 73 } she was a patient in the hospital?

A. Hospitalized patient.

Q. Now, will you state to the court the days in which Mrs. Babb was what you consider an "out-patient" after October 10, 1947?

A. From the official Out-Patient Register on Elaine M. Babb, Ptack was her maiden name, October, 1947, it showed she received treatment on the 13th of October and the 15th of October; then again on the 20th of October, 31st of October. The final date is 4 November.

Mr. Gordon: That's our case.

MARSHALL E. ANDREWS,
called as a witness by the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ford:

Q. Please state your full name, Mr. Andrews?

A. Marshall E. Andrews.

Q. Where do you live?

A. I live in Hampton.

Q. How long have you lived in Hampton?

A. About 15 months.

Q. If you can sort of listen to me ask you the questions and then talk to the jury, any way that you can, I would appreciate it. They're the ones who really want to hear you. How long have you been employed at the Newport News Coca-Cola Bottling Company?

page 74 } A. About 15 months.

Q. And in what capacity?

Marshall E. Andrews.

A. Plant superintendent; production superintendent.

Q. Plant superintendent or production superintendent?

A. That's right.

Q. Generally, what are your duties?

A. Well, to see that everything is going on in perfect order in the plant mostly.

Q. You have charge of the operation of the plant?

A. That's right.

Q. Charge of the bottling of Coca-Cola?

A. That's right.

Q. How long have you been in the bottling business?

A. Oh, about 25 years.

Q. Consecutively?

A. Only thing I ever done since I started.

Q. Where were you employed, in what capacity before you came to Newport News?

A. I was production superintendent in Silver Springs and La Plata, Washington.

Q. In La Plata, Washington?

A. That's right.

Q. And in Silver Springs?

A. Out of D. C.

Q. Main office in D. C.?

page 75 } A. General office was in Richmond. Main office was in Richmond.

Q. What company?

A. James E. Crass.

Q. Do they have companies as large as Newport News?

A. Yes, the Washington and Richmond plant is, either one as large as this one.

Q. And you have been employed in the bottling business for about 25 years?

A. That's right.

Q. You were employed as plant superintendent or production superintendent, whatever you call it, October of 1947?

A. Yes, sir.

Q. And you have been since that time?

A. That's right.

Q. Now, Mr. Andrews, I want you to explain to the jury the method of making Coca-Cola from Coca-Cola syrup and carbonic gas, telling the name of the machines that are used, the beginning of the preparation from the syrup barrel on through the process and using any illustrations that you have or any diagrams or blueprints that you may have that are proper to be used. Do you have that book, by the way?

Marshall E. Andrews.

A. Yes.

Q. You go ahead, generally, if you want to.

A. I just have the book of the washer but the page 76 } main procedure first is the washing machine.

Q. Just start with the syrup, if you will. Where do you buy the syrup?

A. The syrup is shipped from Baltimore.

Q. In what kind of containers?

A. In stainless steel drums.

Q. Purchased from whom?

A. Coca-Cola.

Q. You say they are sealed stainless steel drums?

A. Yes, sir.

Q. They are shipped in here and where are they delivered?

Q. By truck to our warehouse.

Q. How does the syrup get into the machines that fill the bottles with syrup?

A. We have a direct hookup from the drum to the machine; that is a fitting that fits on the drum and the drum is rolled over and it drains down to the machine.

Q. By gravity?

A. By gravity.

Q. You don't use a pump system?

A. No, with a float in the machine to keep the right amount for the measuring cups in the syrup at all times.

Q. Is there any straining of the syrup?

A. Two strainers; one where the barrel is put on, very fine mesh strainer.

Q. Can you give the size of it?
page 77 } A. I wouldn't know the mesh of the wire. It's a lot smaller than the ordinary screen wire. You just can see through it.

Q. It's smaller than ordinary screen wire?

A. Oh, yes and another, same type strainer. That's right before the syrup goes into the syruper.

Q. The syruper is on what floor and the barrel is on what floor?

A. The barrel is on the second floor, comes down to the first floor to the syrupering machine.

Q. And the syruper is on the first floor?

A. Yes, sir.

Q. Now then, with the bottles that come from the trade, or new bottles, how are they introduced to the line on which the bottles come on to the syruper? What's done? Just describe the bottles as they go through the soaker?

Marshall E. Andrews.

A. The bottles are pre-inspected as they go into the washer, as they go up into it bottom up condition. The first procedure is it is pre-rinsed twice. It is pre-rinsed twice before going into the caustic tanks.

Q. How?

A. By strong sprays of water into the bottles with the bottles in the upright position.

Q. After they enter into the machine?

page 78 } A. Yes, sir.

Q. All right.

A. Then they pass into the first tank, a four per cent solution of caustic solution.

Q. Four per cent caustic solution and what is its purpose?

A. That's to sterilize the bottle. We generally keep the first tank around 130 degrees fahrenheit and it stays—

Q. Let me ask you before you leave that. Will you state whether or not that is the solution that is used by the trade and by, commercially, by all bottlers that you know of?

A. Yes. We generally maintain a four per cent solution. I don't think the state requires you to have three and a half. We maintain four per cent at all times.

Q. That is the caustic soda solution?

A. That's right.

Q. All right. How long would it remain in the first tank.

A. About four minutes.

Q. What is its function in the first tank? What does the bottle do?

A. Well, the bottle just rides on this chain.

Q. On a chain?

A. Moves all the time; moves down into this solution.

Q. Is it stopped?

A. Don't never stop.

page 79 } Q. Is the neck of the bottle open?

A. Yes, sir, and it passes on out, drains back into the same tank and goes into the second tank which is four per cent alkali solution.

Q. What is the temperature?

A. 140 to 150 degrees temperature. We maintain 140 to 150.

Q. How do you determine the temperature?

A. We have thermometers on the outside of the machine.

Q. How do you test the solution?

A. We have a Tytrating acid, Acid Tytrating Kit that we test each morning to see what the loss is during the day and

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we add back or in the evening we add what we used out of that compartment each day to bring it back to four per cent.

Q. Test each day and maintain its efficacy each day?

A. That's right.

Q. Go to the second tank. Then does it have another tank?

A. In the third tank we keep that at three per cent solution, 150 degrees. Same procedure practically and remains in about four minutes. Then it goes to the fourth tank; practically the same thing only about a two per cent solution and after it leaves there, it goes into fresh water.

Q. Still on a chain?

A. Still on a chain all the time. It goes to a fresh water tank which washes off the solution that would be
page 80 } on the bottle when it comes out these caustic tanks.

That's about 110 degrees that we keep that at. Then the bottle is still on the chain and goes up outside and there is a brushing device which brushes the bottom and the sides of the bottles. It has a lifting spindle that takes this bottle off the chain. That's that particular place; pushes between those two revolving brushes. The bottom brush washes the outside of the bottle. Then it passes from there to the first inside rinsing tube which is a high spray of water and that is about 110 degrees fahrenheit. First rinsing tube. This bottle is rinsed thoroughly and then passed through a revolving brush about 550 revolutions per minute.

Q. What are the bristles of that brush made of?

A. Nylon.

Q. All right, sir.

A. And then after that, goes up in the bottle and spins, comes down in the bottle, passes through another rinsing tube which would rinse out anything that happens to be in the bottle at that particular time and then it goes over another brush in the same procedure and after that, it goes over two more rinsing tubes under high pressure, just regular temperature of water pressure; then each bottle is rinsed twice more then and then drained until it gets down to the front of the machine. Then this bottle passes on to this syruper.

Q. After the second rinsing, it comes out of
page 81 } the machine?

A. The man sits there all the time to watch for cracks in the bottles or just for anything that should happen to be wrong with the bottle at that particular place.

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Q. Has anybody touched this bottle from the time it was put into the machine into now?

A. Nobody touched it at all. Then it's passed on to our first inspector which is the girl that sits there just thirty minutes at a time. We change them every thirty minutes. She watches.

Q. Let me go back. How long has it taken the bottles from the time they entered the machine until the time you are speaking of when they come out?

A. 25 minutes.

Q. They have been in this washer about 25 minutes?

A. About 24 or 25 minutes.

Q. They come out.

A. They are bottom up, all up to this particular time. When they come out of the machine they are set up on this other conveyer.

Q. Conceyer belt? Where is the inspection with reference to the opening of the machine?

A. He sits right in front. Twelve bottles come out at a time. He sets right in front as they tip up with a bright light right at the end of the machine and he watches for those—

Q. How close to the operator—to the end of the
page 82 { machine where they come out. How many feet
would it be between the inspector and where the
bottle comes out?

A. About as close as this.

Q. Two feet, as close as two feet; about to the stenographer?

Mr. Gordon: Three feet.

A. Then they pass on, on the same conveyer to the girl which inspects the bottles. She sits there just thirty minutes at a time and watches for any cracked bottles or anything that could be wrong that they missed seeing at the first machine and then it passes on under the syruper.

Q. How far would it pass from this inspector who looks for cracked bottles or anything out of the way, how many feet on the conveyer would it run?

A. About three feet. Then it comes around this syruper.

Q. Now, how does it get the syrup in it?

A. Without anybody touching the bottle at all. Each syrupering tube has a one once measuring cup that's raised and drained in the bottle each time so it doesn't get more

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or less than one ounce of syrup in the bottle. It passes on from under the syruper—

Q. Is that on a sort of cylinder, goes around?

A. Yes, takes on carbonate water.

Q. What distance is the syruper from the filler?

A. Probably a foot.

Q. Right next to the syruper, goes then from
page 83 } the syruper with the syrup in the bottom of the
bottle to the filler—

Mr. Gordon: I don't mind him leading this man a little bit. You have *lead* the man throughout the whole testimony. I have no objection but this is continuous.

Court: If you don't have any objection—

Mr. Gordon: I am objecting to letting him testify.

Court: I think the last few questions were leading.

A. Then the bottle passes around the filler and takes on the carbonated water and the capping machine or crowner, we call it, is right within one foot of the filler where the bottle is capped at that point. It's never touched from the time it comes out of this washer sterilized, until after the cap is on and it goes on around the mixing machine then, on the same belt. The bottles are turned upside down to thoroughly mix the syrup and carbonated water together, follows the conveyer around. Then another girl inspects the finished product. She sets there with another light behind the bottles as they pass on by and watches them for the third inspection before they get to the place they case up the bottles.

Q. Getting back to the carbonating of the water, where does the water come from?

A. Water comes from the filter in the basement and it comes up to the carbonator.

Q. City water?

A. After it is treated.

page 84 } Q. Tell how it is treated?

A. Through sand and gravel filters and carbon filter which would take out any taste of the water. Then it goes from the carbon filter through a paper disc filter, double paper disc filter, before it passes to the carbonator.

Q. Where is the carbonator?

A. Where? Right side of the filler. I'd say four or five

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feet from the filler and it passes through block ten pipe from a line pipe from the carbonator over to the filler.

Q. And then after the last inspection, it's ready for the trade, is that right?

A. That's right.

Q. They put in cases?

A. Put on the platform and right up to the trade.

Q. Go back further to the capping of the bottles. Where do the caps come from?

A. We have those in a closed container on the first floor. They come sealed in packages. They are dumped in this closed container. They come down through a stainless steel pipe to the top of the capping machine. The whole procedure is closed in from the time the caps are put in the stainless steel tank.

Q. The caps are received in a sealed container?

A. They are dumped into this stainless steel container on the second floor and they are dumped, fed down by gravity.

Q. What is the name of the soaking machine?

page 85 } A. Meyer Dumore. Meyer Manufacturing.

Q. Is that a modern machine or not?

A. I think it's the latest improvement in the machine on the market. Latest I have seen.

Q. Is that your opinion?

A. Yes. I don't think there's anything on the market any later than this particular machine.

Q. Have you been in a number of plants, in your experience?

A. Yes.

Q. Do you know of any machine that's as modern or more modern than this?

A. No, sir.

Q. Now, will you turn (pointing to the book)—

Mr. Gordon: Let me see what you are going to do, Mr. Ford.

Mr. Ford: I was just about to hand it to you.

Q. Is this the cleaner (indicating to picture in the book)?

A. That's the washer. Here's the open procedure.

Q. Just a minute, so that Mr. Gordon is going to know what we are going to talk about.

A. Here's the first design of the washer (indicating).

Q. Now, Mr. Andrews, if you will, with your Honor's permission, I would like for Mr. Andrews to stand over here, if

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your Honor will permit, so that the jury can see page 86 } the process by way of the diagrams of the washing part. You don't have with you the diagram of the syruper.

A. We don't have it.

Mr. Gordon: Now, let me see, Mr. Ford. Are you going to show different pages?

Court: I thought you marked the one he intends to show. Any objection to those?

Mr. Gordon: No.

Court: This is where the bottles are right here where the first of the men will be standing.

Q. Let's get it as well as we can for the record. You are now testifying from a diagram of the diagram on Page 7 of the Meyer Dumore Bottle Cleaner book which appears to be a book published by the manufacturer showing the diagram and photographs of the machine that now is used in Newport News Coca-Cola Bottling Company, is that correct?

A. That's right. These bottles are loaded on chains right here first. This is a feed-in device right here (indicating). The bottles are inspected here (indicating) by two men and put on this feed-in. Then they pass right up over here which is a pre-rinsing device with two strong pressure jets and each bottle is rinsed twice before it goes down into what we call the first tank here. A chain comes around here, comes down under this drive in this four per cent solution which takes about four minutes. Then it goes over the

page 87 } top where it drains after it gets above the water line here and it goes back into the second tank. It feeds the same procedure all the way through, two to four per cent and two to three per cent solution and three and a half solution and it goes into this fresh water tank right behind this where running water is running in and out at all times. That is to get the caustic or cleaning compound out of the water or off the bottle before it goes into the machine.

Q. You are pointing now from page 10 of a diagram of the same book?

A. This bottle, this is the way the bottles travel after they come out of the fresh water tank right up here. They travel over here. This is the lifting spindle device, takes this bottle off the chain here which you see (indicating). It travels on and these brushes revolving. Then there's a brush on the

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bottom of this thing here. Then the bottle is pushed up. This lifter spindle is turning and these brushes are revolving the other way and that washes the bottle with two sprays of water coming in here and here and that washes the outside and the bottom of the bottle. Then it passes on up to here to this first rinsing jet which is heated with about 110. That's to keep the bottle from getting too chilled when it hits the cold water and this device lifts up, goes up to the bottle, top of the bottle with a strong spray of water in there. Then it comes down and the next one is the brush spindle
 page 88 } that goes up into the first bottle here with water on the brush at all times sprayed in here.

Mr. Fraley (Juryman): You got one brush on that spindle.

A. One brush on each spindle.

Mr. East (Juryman): Goes into the bottle?

A. Yes, same as a hand-bottle brush and then it passes into this center rinsing tube which is just normal temperature water that rinses the bottle again before it passes to this second brush and it goes through the same procedure here this second brush.

Q. The brush revolves?

A. The brush revolves around 550 R. P. M. and then there's two more rinsing jets over here and they come over this, and this chain is constantly moving. You see, this thing goes up and the chain drops back and picks up the next bottle and each bottle is rinsed there with those two front and then they drain and then they get down to—let's see if I have a sketch here. In other words, that's the type machinery right there (indicating).

Mr. Gordon: Let him identify that page.

A. Number 17, and it comes off through these. You see each one of those rollers here and they come—this thing sets them up. It is a conveyer going right by, sets the bottle bottom up until this chain turns until this particular place and then the bottle is out and they slide out and this thing sets them up and they go over on a conveyer and the first
 page 89 } inspector sits right here in front of a row of lights made on to the equipment, right under a shield right in front of the machine here.

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Q. From this photograph, where does the conveyer go?

A. It goes right straight about four feet down here where the syruper would be.

Q. You are pointing over to the right, off the edge of the page?

A. That's right and another inspector sits right here between this washer and the syruper and just as an extra precaution in case anything should be wrong with the bottle and they pass around the filler.

Q. This diagram and photograph that you are referring to now does not show beyond the washing machine, is that correct?

A. Right.

Q. You do not have a photograph of diagram showing the process after it leaves the washer when it goes on the conveyer and goes to the syruper?

A. I do not have that.

Q. You do not have such a diagram of that, as you have of the soaper?

A. No, sir.

Q. Do you know what model machine this is?

A. '39. That's about the latest model been made unless they made one since the war. Latest type machine
page 90 } I have seen.

Q. Now, all of this washing and sterilizing and the precaution that you have spoken of in the filtering of the water and syruper and inspection is for what purpose?

A. To put out a sanitary, clean, sanitary package.

Q. What is the effect of the caustic soda on any contents of a bottle, of foreign substance, if it should get into the soaker?

A. Well, it will deteriorate most anything, piece of meat or anything, the caustic will eat that up or anything that should be caked on a bottle other than probably tar or asphalt. I have seen some of that would come through on a bottle once in a while. Other than that, it would take anything else off a bottle with this temperature and high percentage of caustic that would be on the bottle or in it.

Q. How about a piece of cement or something like that?

A. Probably wouldn't take off cement. In fact, I know it wouldn't take off cement or probably tar or asphalt. Other than that, it would remove anything else that should happen to be on or in the bottle.

Q. What is the purpose of the inspection as it immediately comes out of the soaker and the inspector who sits immediately

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to the right and the one down near the end. What's the purpose of that inspection?

A. That's just an extra precaution, in case of cracked bottles or sometimes it has been known that the machine would get too hot and then coming into a cooling tank, page 91 } it might crack a bottle or two.

Q. Have you seen cracked bottles?

A. If it should, I mean if anything should happen to this device and it got too hot and the bottle went into a cooler tank, it might crack a bottle.

Q. What do you do with the cracked bottles?

A. They wouldn't fill if a bottle is cracked or the least little nick on it. The bottle wouldn't fill.

Q. What does the inspector do if it's detected?

A. He takes it off and it's broken up. If the bottle has been in use a great while, sometimes it gets scarred or scuffed. It doesn't look presentable. You couldn't tell very well until after the bottle was cleaned and sterilized whether this bottle should be taken off or not. That's the main thing that we do at this particular point.

Q. Suppose, if the bottle contained say a open safety pin or a clothespin that had gotten into a bottle. Would the washer take that out?

A. In case, say a clothespin or anything like that getting in the bottle, on this brushing device, there is an automatic stop. If anything—I have seen marbles once or twice in a bottle. Somebody put a small marble in the bottle and you couldn't get it out and the brush gets into the bottle. It wedges itself and that automatically stops; cuts page 92 } the machine off and you have to go back and get the bottle off and probably replace the brush before you could run any more. Same way with a clothespin. Of course, if we didn't have this pre-inspection in front, probably one might get in the machine. At that particular place when this brush goes into the bottle it would hang the brush in the bottle and the brush couldn't get out and naturally it would stop the machine at that point.

Q. Now let me ask you this. If, when the bottle is put into the washer it contained organic matter, would the same result obtain or would it be thrown out or what would happen?

A. I never have seen anything in the way of soft, anything soft, mushy or paper or anything would be in a bottle, that would be in it when the bottle came through. Brushes would

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take out anything that would come through the neck of the bottle or either those revolving brushes. Any soft matter, it would tear it to pieces so it would wash out.

Q. After the two brushes that you pointed out on Page—I don't know whether it was seven or ten, how many rinses under pressure are there after the brushes come out?

A. Two.

Q. Two rinsings under pressure?

A. That's right.

Q. How much pressure is it?

A. About 50 pounds pressure.

Q. And what's the purpose of that?

A. Well, in case anything should be stuck in page 93 } there that the brush loosened, naturally it would give it a thorough rinsing after it leaves the brushes; in fact two more rinsings. Each bottle has about 12 procedures of washing before it passes this last rinsing tube.

Mr. Ford: We want to introduce, if your Honor please, those pages he testified from. If we can get them out, we will do so with the understanding that they will be definitely marked.

Court: I'm admitting in the evidence the diagram and pictures. In regards to the description or wording on there, you'll disregard that.

The diagrams and pictures were received in evidence and marked Defendant's Exhibit 1(1), 1(2), and 1(3).

Q. Do you know anything personally about this matter we are discussing in this case?

A. No, I ain't heard anything about it.

Q. You don't know anything personally about the bottle or anything in it?

A. No.

Q. May I say one thing further. You have testified, generally, about the operations. May I ask you, sir, if the testimony that you gave would pertain to the operations of the plant in and around October 10, 1947?

A. What is your question?

page 94 } Q. You have testified generally as to the operation of the plant. Is that same operation the same as existed in October 10, particularly, in 1947?

A. That's right.

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CROSS EXAMINATION.

By Mr. Gordon:

Q. Mr. Andrews, Mr. Ford just asked you if this was the first time you knew that a suit was pending against the Coca-Cola Company.

A. Just a few days ago Mr. Brown told me about it and said—

Mr. Ford: I didn't ask him that but that's all right.

Mr. Gordon: Let me get the question in. What was the question?

Court: You asked him if he knew anything about this particular case.

A. I think I saw something about someone getting something in the bottle. Until a day or two ago, as far as knowing anything about it, I think Mr. Brown said something about it. He probably wanted me to come down to court.

Q. Mr. Andrews, you have been engaged in this work, you say for 25 years; is that true?

A. That's right.

Q. And has your position always been the same?

A. A good many years.

Q. As manager of this concern and all?

page 95 } A. Good many years.

Q. And during that time, have you ever had any work along the lines of complaints?

A. Well, I don't remember. I haven't had any complaints; haven't heard of any complaints since I have been in Newport News and it's been, I don't remember; probably been 10 or 15 years back. Probably might have bought a bottle back then or something. I haven't had a complaint of any kind.

Q. Now, do you know definitely when this particular machine was installed?

A. No, sir.

Q. You don't know?

A. I know what model machine it is.

Q. You don't know when it was installed?

A. Couldn't have been installed before 1939.

Q. They haven't any since '39?

A. I think they made a '40 model; a few '40 models if I am not mistaken.

Q. How old would you say this machine was that you have just spoken about?

A. Well, I think it's running about five or six years probably.

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Q. If they haven't made any since 1939 and this machine has been there all the time, how do you account for five or six years?

page 96 } A. Well, I don't know about that but it seems like to me I heard someone around the plant say the machine was put up in a garage for a year or two after it was bought before it was installed.

Q. You know there have been any type of machine made since '39 or '40?

A. Not to my knowledge unless they started making it again this year or the last year.

Q. Now, to start off with, you say the syrup is purchased from Baltimore?

A. Yes, sir.

Q. And you say it comes down from Baltimore to this company here in Newport News and it's placed, you said, on the second floor and comes down on the first floor?

A. That's right.

Q. How much do you put in there at a time?

A. What do you mean?

Q. I mean how much syrup do you put in there at one time?

A. We have a device upstairs. We can hook on five barrels at one time.

Q. How much would five barrels weigh?

A. Between five and six hundred pounds.

Q. That means that the force from five barrels of syrup are on top at all times?

A. We don't turn them down at all times.

page 97 } Q. At one time there is a force of five barrels?

A. I said we put on five barrels. We turn down two barrels at one time.

Q. In other words, two barrels are forced down through the strainer at one time?

A. There's a float in this device that is at the bottom of the tank that raises and lowers. As the syrup is running, fed and used in the syruper, this float gradually goes down and more syrup goes down, not under a whole lot of pressure.

Q. Not under a whole lot of pressure?

A. This float valve control at the bottom of the line—

Q. How does that work if you put in two barrels like you just testified to and there's a float in this. Wouldn't there be any more pressure than if you just had a half barrel on there?

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A. I don't hardly—wouldn't be none to amount to anything, I don't think. That's because the float generally cracks down a little bit at a time and lets the syrup in a little at a time and it runs through very slow.

Q. There are two barrels of syrup and the force, other than the check-valve, is forcing the syrup down?

A. Yes, sir.

Q. It forces it down into the bottle?

A. No, not into the bottle.

Q. Where does it go?

A. Goes into this tank and—

page 98 } Q. How much is in the tank at one time?

A. About three gallons.

Q. Now, how does it get out of the tank into the bottle?

A. That's what I was explaining. There's a one ounce cup on the end of these rinsing tubes and this bottle comes out under here and the ounce cup, it raises out of the syrup and drains into the bottle while the bottle goes around.

Q. How long is it on there from the time it hits it until the time it comes off?

A. About a fourth of a minute; not hardly that long.

Q. You have been 25 years in the business?

A. The machine runs about 128 or 130 bottles a minute and there's twenty of those syrupers on this syrupe so you can figure about how long each bottle would stay on there in order to get—

Q. This is purely a mechanical device is that true?

A. That's right.

Q. No human hand touches it. It's operated purely by mechanics?

A. That's right.

Q. Mr. Andrews, in your 25 years or in your whole life have you ever found a perfect machine?

A. Well, I don't know. I have seen right many very near perfect; about as near as a human being, or more so I think.

Q. Can you tell whether or not you have ever
page 99 } seen a perfect machine?

A. There's nothing perfect. I have seen them as near perfect as they can possibly be made to make them and I think the bottling equipment is about one of them.

Q. You have testified that the syrup comes in from Baltimore and the water is the regular water that we use in our own household, is that right?

A. After it's treated. We treat the water.

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Q. And how much water do you bring in at one time to be held in the reservior there for use with your drinks?

A. I'd say around ten or 12 gallons.

Q. Now, you are making these drinks at the rate of 130 a minute and you are only going to have 12 gallons on hand, is that right?

A. That's right.

Q. All right, sir. Now, you have testified that the bottles are brought in your plant and placed in a conveyer, on a conveyer? Now they are placed on this conveyer, you say and they come around and come into a tank, is that right?

A. That's right.

Q. Are they inspected before they go into the tank?

A. Yes.

Q. Now, they go into a tank; that's right?

A. Yes.

Q. And that is tank number one, is that right?
page 100 } A. That's right.

Q. Would you tell me if I am correct on this?
In the morning when you start, it's four per cent caustic solution in the tank?

A. Yes.

Q. When does your normal operations commence in your plant?

A. Around eight o'clock.

Q. And what time do you normally stop?

A. Five.

Q. Eight to five. Is your plant ever in operation after five in the daytime?

A. Well, it has been at times.

Q. Do you know whether or not it was?

A. We always shut down. If we going to run after five, we go through the same procedure and check our caustic solution say if we're going to run in the evening. We check our caustic solutions again and build it back up to four per cent before we start on the next eight hour shift.

Q. Do you know whether or not it was operating last night after five?

A. Yes, sir.

Q. How late did you operate last night?

A. Until around nine o'clock.

Q. You know the names of those employees
page 101 } working last night?

A. I know all by the first name. I know some of them by the full name.

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Q. How many did you have working there last night?

A. Seven.

Q. And how many of them were women and how many were men?

A. Two women and five men.

Q. Now, Mr. Andrews, you say that the bottles are placed in this tank with four per cent solution in the morning at eight o'clock?

A. That's right.

Q. From your experience in testing and all, how much is your usual percentage at the end of the day?

A. Generally takes about 20 pounds, or 18 pounds to bring it back up if you have a good running day.

Q. Do you do that at the end of the day or do you do that at the commencing of your day?

A. End of the day.

Q. What would 20 pounds represent in the percentage?

A. It would run back between three and three and a half per cent, I'd say at the lowest ebb. It would never get below three. It would probably be around three and a half per cent.

Q. And who is charged with the duty of verifying that fact?

A. I do the checking on it myself.

page 102 } Q. You do that all the time?

A. Yes, sir.

Q. Wonder who's doing it today?

A. I did. I did it last evening and I'll be back in the evening in time to do it this evening.

Q. If they do work tonight?

A. I have an assistant to do it if I wasn't there.

Q. What's his name?

A. Mr. Sears.

Q. When you leave tank number one, the bottle goes into tank number two?

A. Yes, sir.

Q. And what is the percentage of caustic solution in there?

A. Four per cent.

Q. And why do you go from tank number one with four per cent of caustic solution which you have testified here is very strong, into tank number two still with four per cent solution?

A. Well, they said we could cut it back to three but in order to have an extra precaution we always keep the first two tanks at four per cent.

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Q. All right. Now, you are admitting to yourself that you can't clean it in tank number one so you are going to put it in tank number two.

page 103 } A. I think if we didn't have but one of those tanks, the bottle would be entirely sterilized.

Q. All right, you put it in tank number two, is that right?

A. Yes, sir.

Q. Then you go to tank number three?

A. Yes.

Q. Why do you go to number three?

A. Well, this chain, that's the way the factory made this thing and they recommended, they made this device so you can't cut out any of the tanks. I don't know whether you looked at the diagram or not. It's a continuous moving chain. It goes up and down in one tank and in the other. You can't cut out any of them.

Q. So you have admitted you don't think it's—doesn't clean in tank number one?

A. I haven't admitted that. I seen one compartment soakers in old styles that I thought did a very sanitary job in cleaning the bottle and this should be four or five times better than the old times.

Q. Your operation is you put it in tank number one—

A. That's right.

Q. Then the manufacturer must not think it's cleaned in tank number one. He puts two tank in there so you follow the operation and then you put the bottle in tank number two?

page 104 } A. Yes, sir.

Q. And then you go to tank number three? Why do you go to number three?

A. Now, we dilute the solution down as we go until it gets down to the fresh water compartment.

Q. You are in tank number three. You washed the bottles three times?

A. That's right.

Q. Is the management convinced that it's cleaned in three washings or does he have another tank?

A. I guess the reason the tanks were added were for the extra precaution in case anything should happen and it didn't clean in it.

Q. If the first three times—

A. In the first tank, no, sir. I don't think it is necessary. In fact, the milk bottling plant—

Q. I'm not talking—

Marshall E. Andrews.

Mr. Ford: If your Honor please, let him answer.

Mr. Gordon: I'm not talking about milk. I'm talking about Coca-Cola.

Mr. Ford: Can the witness complete his answer, if your Honor please?

Court: Yes, sir.

A. If you go to the Peninsula Dairy, you won't see but one tank that a milk bottle goes through and we have page 105 } all these extra precautions.

Q. You have washed it three times?

A. Yes, sir.

Q. Then what do you do with it?

A. Goes into the fourth tank.

Q. Why do you go into four tanks? You have been into three? Could it be because it is not clean in three tanks, Mr. Andrews?

A. I didn't make the machine.

Q. I know you didn't make the machine.

A. We are using it according to specifications.

Q. Then you washed the bottle four times, is that true?

A. Yes, sir.

Q. Why *ten*, Mr. Andrews, if you washed it four times why do you stop at four? Why don't you go to ten? You say it's not clean in three; it's not clean in one. Why do you stop at four?

A. I said at first I don't think it's necessary to have all those tanks myself but they are on the machine and it cuts the solution down. I don't know; this carry over on these chains. When the bottle goes through, it carries a certain amount of caustic solution in the second and third tank. By having all the tanks, by the time you get over to the fresh water tank, you've practically done away with all the caustic.

I think the idea was more or less for that purpose page 106 } other than to sterilize the bottle any further than the first tank in order to keep the caustic in the machine without having a great deal of caustic all the time.

Q. You and the management are convinced it's not cleaned in one so it's finally cleaned in two or three or four?

A. I said one compartment washers, I've used them and they did about as thorough a job as this four compartment does.

Q. In 25 years experience, you are satisfied that after going through four, instead of five or ten, that it is ready for human consumption?

Marshall E. Andrews.

A. Yes.

Q. Then why are thousands and thousands of dollars spent over there to have those inspectors? Are they out there to find decomposed snails or worms? What are they doing out there if they are clean?

A. Like I said, for extra precaution in case the bottle should be scuffed or cracked. If he lets a cracked bottle go around the filler, we try to watch out for anything that might happen. Sometimes a piece of glass gets chipped off the bottle. Sometimes the inspector takes that off that the others might not have seen. If there should be piece on the bottle, it would probably damage the tube or valve. It's just an extra precaution. There is more inspection here at this plant than I have ever seen in any plant before but I think it's wonderful to have it just the same.

Q. Would you be willing, Mr. Andrews, to sell
page 107 } that for human consumption after it had been
washed one time?

A. Well, I have sold them.

Q. All right, that's all. You have testified that these men are there, these inspectors, after it's been washed four times. I don't know why you stop at four to see if there's anything in the bottles.

A. Anything wrong, ruffled or scuffed or cracked; just an extra precaution to see that the bottle is in good condition before it is filled.

Q. Q. It's been testified to that a marble would get in there and that would go through. That would stop the machine? How about wood? Would that caustic—

A. If it was a wooden clothespin, it wouldn't come out of the bottle. These brushes would hang it and cut the machine off.

Q. How about rubber?

A. The same thing with rubber.

Q. Wouldn't eat rubber, would it?

A. No.

Q. Wouldn't eat rubber. That's right. You have testified that this inspector, the first inspector looks at 12 bottles at one time?

A. They go by in front of a bright light.

Q. And he looks at 12 at one time. That was
page 108 } your testimony, was it?

A. I don't say, anybody could look at the 12 bottles before they get out of sight that wasn't blind.

Q. The girl inspects anything in the bottle, is that right?

Marshall E. Andrews.

A. I said what?

Q. The girls inspect anything that's in the bottle. That's your testimony is it?

A. I said looked at the bottles, inspected the empty bottles to see they were in perfect condition.

Q. Anything that was in the empty bottles.

A. I didn't say that. I said see if the bottle was in perfect condition before it is filled.

Q. I wrote it down.

A. You must have misunderstood me.

Q. After the bottles come out of the tanks, they move along. Isn't that in the open space?

A. No, that's closed in behind.

Q. Closed in?

A. That's right.

Q. All right then. After they come through and come out, where the inspectors are, that's in the open?

A. Yes, sir.

Q. Isn't that open from the top?

A. Yes, sir.

page 109 { Q. Open from the side?

A. Would have to be for you to see the glass.

Q. Would it be possible for a bottle to be placed on that conveyer as it goes around? It's open, isn't it?

A. Sure it's open.

Q. That's after it comes out of the cleaner?

A. That's right.

Q. Now, open from the top, open from the side because the woman is standing there, isn't that true?

A. Woman sits there, and looks at it.

Q. That's right. The woman sits there. Now, you say the caps are dumped into a bin, is that right?

A. Stainless steel container from the shipping cartons. They are dumped into this stainless steel container and they come down through a pipe around six inches.

Q. Does it work along like this when it's capping? Doesn't it work in like this (indicating) as it goes down? Isn't that the way it works, the capping of the bottles?

A. The capping goes down on the bottle.

Q. From where the bottle is capped, after it's inspected, that's open too, isn't it?

A. That's right.

Q. Then isn't it possible for anything to get in there as it comes down? It open?

Marshall E. Andrews.

A. I don't think it would hardly be possible.
page 110 } It could be probably, if anyone was to try to put something in there. Somebody could set a bottle on there probably.

Q. Somebody could set a bottle on there?

A. It wouldn't hardly be possible that anybody would do it, I don't think.

Q. They could do it?

A. These bottles are inspected again after they are sealed.

Q. You had seven people working there last night until nine o'clock. One of those seven persons could inadvertently placed a bottle on there?

A. Yes, it could have been done, I guess.

Q. Do you know how many employees there are in that plant?

A. About 25 on my payroll, I think, at this time.

Q. And what percentage, if you know, of those working in the plant are women, what percentage are male?

A. About one third.

Q. One third?

A. Women.

Q. You say that women who are inspectors sit there for half an hour, is that true?

A. That's right.

Q. What do they do the other half of an hour?

A. They do anything that should happen; see anything dirty around the machine.

Q. Any dirt around the machine?

page 111 } A. Anything that needs cleaning or probably the windows cleaning up a little. They do anything that should happen to come at hand.

Q. Any dirt around the machine where they would be cleaning the dirt around the machine?

A. We clean the plant before we start and clean after we stop. However, as to that, there's always some little tidying up.

Q. Some little dirt around the machine, something like that?

A. I don't think you'd see—

Q. They don't clean that up? That gets in the bottle, is that right?

A. I don't think that either. You could put that—

Q. You said some of the dirt around the machine and this lady found it in there. I want to know if it wasn't something they didn't clean up.

Marshall E. Andrews.

A. You could put that up there and turn the bottle up and it would come out. You wouldn't have to do any washing for that.

Q. You have been there 15 months?

A. Yes, sir.

Q. During that time, have you had any mechanical disruption during the 15 months?

A. No, sir. We run five days a week and I page 112 } checked the machines on Saturdays.

Q. Never breaks down?

A. I haven't had a serious breakdown since I have been there.

Q. And you concede the machine is nine years old at least. You said they built none since 1939?

A. Yes, sir.

Q. They never break down?

A. I think it was overhauled in the meantime. That was before I came to Newport News but I think it's been generally overhauled at one time.

Q. You said here that the machine gets hot and breaks down. What did you mean by that?

A. I didn't say that.

Q. What did you say? I must be very poor in understanding you.

A. I don't know what you're getting at. I didn't say anything about getting hot and breaking down.

Q. You didn't testify that the machine gets hot?

A. We keep those tanks at a certain degree of temperature. I don't know whether that is what you are speaking about; 130 to 150 degrees temperature and caustic solution tanks but I didn't say anything about the equipment getting hot and not running or breaking down.

Q. Now Mr. Andrews, you have testified here page 113 } that you have brushes—

A. That's right.

Q. How often are you required to change those brushes?

A. Well, we check over them during the day and numbers of times during the day and we inspect them thoroughly to see if any are worn or any needs replacing. They are supposed to last about 100 hours.

Q. That would be two weeks?

A. In case anything should happen to one, it throws this overloader out and then you have to replace the brush before you can operate.

Q. That's a nylon brush you say?

Marshall E. Andrews.

A. That's right.

Q. And you have to have them there in order to wash the bottle, is that true?

A. We have one spindle for—one brush for each bottle.

Q. And you say that in about two weeks time or 100 hours, which we will say is about two weeks time, you have to change those, is that true?

A. We change them if they show any wear at any time. I give them a thorough inspection every morning and we look after them. I have a flashlight and look through them all during the day, I'd say a half dozen times a day but in case the brush comes off, it puts the spindle too low and the spindle wouldn't go into the hole where the brush is supposed to run and this cut-off cuts off the machine and you have to put the brush on before you can operate it.

Q. You say "100 hours." You mean the nylon brush wears out in 100 hours?

A. I never used them long enough to use them out. We replace them when they get worn out.

Q. When you do wear them out, you take them off?

A. When they look like it's wearing, we take them out.

Q. It wears?

A. Nylon lasts a long time though and you could see the ones I take off, you couldn't hardly tell which is a good one and which is an old one.

Q. That substance, the solution that you spoke of, wouldn't decompose or eat up those brushes?

A. No, sir.

Q. The only place, when it wears out, is to go into the bottle, isn't it?

A. I don't know what you mean.

Q. You have been 25 years in the business and you testified here that these brushes wear out every 100 hours.

A. They naturally get a little shorter; not quite as long. I don't say the bristles fall out.

Q. You have to change them and they are not as good as new?

A. Yes, sir.

page 115 } Q. They have been worn?

A. Yes.

Q. And that means some of the substance has left them?

A. There's two strong sprays of water that rinses those bottles again after they leave these last brushes though.

Q. That's right. I agree with you there but I'm still say-

Marshall E. Andrews.

ing that brush wears out and those bristles and the by-products of what is on that brush are there and that's after it leaves the caustic solution. Isn't that true?

A. That's right.

Q. If this worm were in those brushes and with the force and water that came out, wouldn't it be possible for this to get in the bottle there?

A. No.

Q. From the brush?

A. No way it could get in the brush in the first place.

Q. Well, I don't know. You take them out and put them in every 100 hours. You just said you put them in every 100 hours?

A. We wouldn't leave a brush in unless it was all right. I don't have a rinsing tube but I could show it to you readily enough. You have to take the tube and draw on the end. If anything is wrong with it, naturally we wouldn't put it in.

Q. Not if you knew it?

A. We could at least see it.

page 116 } Q. You wouldn't do it, if you knew it. We don't contend that you maliciously did it.

A. It couldn't have happened.

Q. You put one in every two weeks but it couldn't have happened?

A. No.

Q. You say that you have never seen a mechanically perfect machine. You still say that, don't you?

A. I said that I don't think anything is entirely perfect but machinery, this particular type of machinery, is more perfect than human people are.

Q. There has been evidence that Mr. Brown said that "not to have any fear" if Mrs.—

Mr. Ford: I suggest you not tell what another witness said.

Court: Let's hear the question.

Q. I said that there has been testimony that Mrs. Babb was told it wouldn't hurt her to eat anything that was in the bottle.

Mr. Ford: I suggest that isn't proper.

Court: What is the question?

Mr. Gordon: The question is, I said that Mrs. Babb testified that Mr. Brown said anything he sold from that plant in there, you could eat.

Marshall E. Andrews.

Court: That's not a question.

page 117 } Mr. Gordon: That's a statement. I'm going to ask him if he would eat this (indicating).

Mr. Ford: I object.

Court: I sustain the objection.

Q. You say that after the bottles are washed four times in four different tanks, they come out and there is an inspector sitting there. Why did you say there was an inspector there?

A. Just an extra precaution in order if anything should happen to be wrong. They sit there for hours and don't even move, different one. They change them every 30 minutes but they don't have anything to do but sit there. They never see anything wrong with a bottle unless it should happen to be a nicked bottle. Some times a bottle would probably break off over there and cause the bottle to lean a little bit. If they see it like that—

Q. Are you going to sit there and tell us that you have been there for 15 months and you never *head* of anything in a bottle for 15 months?

A. I never seen a different bottle.

Q. Would you know anything that is going on there today?

A. This is the first day I have been away from there since I have been employed.

Q. You know everything that has happened there?

A. Most of it.

page 118 } Q. And a matter as important as this, you never heard about it until today?

A. I never.

Q. Mr. Brown never discussed it with you?

A. No, sir.

Q. Did you talk it over with anybody before you came over today?

A. I never discussed anything. I really didn't think it amounted to anything after I saw it in the paper.

Q. Did you then ever talk to Mr. Ford, Charles Ford, the attorney, right here?

A. I talked to him yesterday.

Q. I thought you just testified you never talked to anybody about this case?

Mr. Ford: I object.

Court: The question is all right. He's got a right to test the man's credibility.

Marshall E. Andrews.

A. I said up until a few days ago that I hadn't heard the case discussed. I didn't say who I hadn't talked to since then.

Q. I asked you if Mr. Brown or anyone had talked to you about this case before.

A. I said until recently. That's what I said.

Q. When was the first that Mr. Brown and you discussed this case?

page 119 } A. I think he said a few days ago "it seemed like we were going to have a lawsuit or something." "I probably want you to go down to court" or something like that. Probably two or three days ago.

Q. When did you talk to Mr. Ford?

A. Yesterday afternoon he came by the plant and I went over the machine and explained to him the operation. As for talking to him, I didn't do any more talking than just to explain how the bottles went through the machine.

Q. You say it is possible that a bottle could be placed on the conveyer as it is going through?

A. I don't think it is possible without someone knowing, that's employed there, and I don't think anybody is employed there would do anything like that.

Q. You don't think?

A. I am positive.

Q. Not intentionally.

A. They couldn't do it otherwise. They have to do it intentionally.

Q. Could they do it unconsciously?

A. No, nobody would do that. They wouldn't have the bottle in there unless they should have to have one there intentionally to do that. That would be the only way they could be done.

RE-DIRECT EXAMINATION.

page 120 } By Mr. Ford:

Q. Just one or two questions, Mr. Andrews please sir. You were asked about whether the caustic soda would dissolve or eat rubber or wood. You said it would not. Would the brushes pull it out if it were not stopped up, like a cotterpin or marble?

A. I said the brushes would hang or pull out and the automatic cut-off would stop the machine and we have to take that bottle off and take the brush out before we could proceed to operate any further.

Ralph Hutson.

Q. I believe you said it wouldn't dissolve a marble. What would happen if a marble was jammed in there?

A. I have seen the marble. If the brush goes up, the brush would wedge itself and cut the machine off and you would have to stop and take the bottle and brush out before you could operate.

Q. Mr. Gordon asked you about the machine breaking down, about it being too hot. Did you say anything about the bottles cracking?

A. I said if one compartment would get a higher temperature than it should and it might crack a bottle or two and these inspectors would see it before it went to the filler. It wouldn't fill and it would waste the syrup.

Q. That was the subject of your testimony about the machine being too hot; not that it was breaking down?

A. No.

page 121 } Q. Break the bottle if the solution was too hot?

A. That's right.

RALPH HUTSON,

called as a witness by the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ford:

Q. Please state your name, Mr. Hutson?

A. Ralph Hutson.

Q. When was the first time you ever saw me?

A. This morning.

Q. Where?

A. In the hallway.

Q. What is your position with the Post Exchange?

A. Civilian manager of the Post Exchange.

Q. Did you give your full name?

A. Ralph Hutson.

Q. How long have you been civilian manager of the Post Exchange?

A. 25 years.

Q. And were you acting as such in October of last year?

A. I was.

Q. In 1947. Do you buy your commodities for sale, including Coca-Cola?

A. Yes, sir.

Q. Whom do you buy your Coca-Cola from?

Ralph Hutson.

A. Coca-Cola Bottling Company in Newport
page 122 } News.

Q. How do you dispense it?

A. We have different methods of dispensing. Some of it is sold through vending machines; some of it over the counter.

Q. But you do sell it through vending machines?

A. That's correct.

Q. How many vending machines do you have?

A. Between about 12.

Q. Under whose supervision are they?

A. Mine indirectly.

Q. I mean you are in charge?

A. I am in charge.

Q. Do you have or did you have the vending machine in the Finance Office in October of last year?

A. There was one in the building adjacent to the Finance Office.

Q. Will you describe the position of that building in reference to the Finance Office proper?

A. It was a small building, small temporary building diagonally across the street from the Finance Office.

Q. About how far would you say?

A. I would guess 30 or 40 yards.

Q. The vending machine was in that building?

A. Yes, sir.

Q. What else was in the building?

A. I don't recall anything else in the building
page 123 } except some records.

Q. Did you keep any Coca-Colas there beside what was in the vending machine?

A. I don't think there was any Coca-Colas stored in there.

Q. Who serviced the vending machine?

A. A man named Lane.

Q. Under your supervision?

A. Yes, sir.

Q. Is he an employee of Coca-Cola?

A. No, sir.

Q. He is an employee of the Exchange?

A. Yes, sir.

Q. How often would he service the machine, including the one in the Finance Office?

A. Once a day usually.

Q. Where would he get the Coca-Colas?

A. From the Exchange Main House.

Ralph Hutson.

Q. Where is that located? In the rear of the Main Exchange Building? That's inside the Fort?

A. That's inside the Fort, yes, sir.

Q. How often would you buy Coca-Colas and how was it delivered?

A. Delivered by the Coca-Cola truck; usually about twice a week.

Q. How many cases would you get approximately?

A. Twice a week we would get 30 or 40 cases.

page 124 } Q. Where would the cases be stored?

A. In the Exchange Warehouse.

Q. Under whose supervision?

A. The warehouseman.

Q. Who would that be?

A. Mr. Afque.

Q. Is he directly under you?

A. Yes, sir.

Q. Does he have any employees?

A. No, sir.

Q. How many cases of Coca-Colas would be stored in that warehouse at a time?

A. I imagine the maximum of 60 at one time.

Q. And you would add to that twice a week, as you have stated?

A. We replenished our stock twice a week as needed.

Q. Who had access to the warehouse beside Mr. Afque?

A. Mr. Afque and two truck drivers.

Q. Including Lane?

A. Including Lane.

Q. You spell that L-A-Y-N-E?

A. L-A-N-E.

Q. What's the name of the other one?

page 125 } A. The other truck driver is named Chester Trapp.

Q. So under your supervision Mr. Afque was the warehouseman and he had two employees and Trapp who had access to the warehouse?

A. Yes, sir.

Q. How did they get the Coca-Colas to the several vending machines in the area?

A. With an Exchange truck.

Q. Your truck?

A. Yes, sir.

Q. Who serviced this particular machine, Lane or Trapp?

Elijah Lane.

A. Lane.

Q. Did he have a helper or not?

A. No, sir.

Q. So he serviced a machine, would leave the truck outside unattended?

A. That's right.

Mr. Gordon: No question.

ELIJAH LANE,

called as a witness by the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ford:

Q. Your name is Elijah Lane?

A. Yes, sir.

Mr. Ford: Try to talk to the jury, if you will, Lane.

Q. How old are you?

A. 42.

page 126 } Q. Last October, where were you employed?

A. P-X on Fort Monroe.

Q. Where?

A. Post Exchange, Fort Monroe.

Q. What were your duties?

A. I was serving the Coca-Cola machines and delivering groceries. I serviced the Coca-Cola in the morning and delivered groceries in the evening.

Q. How many Coca-Cola machines—you mean vending machines?

A. Yes, sir.

Q. Coca-Cola vending machines did you serve?

A. 12 of them.

Q. How often did you serve them?

A. Once a day, every morning.

Q. Where did you get the Coca-Cola from, the cases with which to serve the vending machine?

A. From the warehouse.

Q. Did anybody let you in the warehouse or did you have access to it?

A. They always open the warehouse in the morning and I

Elijah Lane.

load up and go out and serve them and bring the empties back.

Q. Someone would open the warehouse in the morning?

A. Yes, sir.

Q. And you would go out and service the machine page 127 } chines?

A. Yes, sir.

Q. Did you have a helper?

A. No, sir.

Q. You got the Coca-Colas in the morning?

A. Yes, sir.

Q. When did it close?

A. 5:30 in the evening.

Q. Anybody in there all day?

A. Yes.

Q. Who was there?

A. Atkiss.

Q. Who else?

A. That's all.

Q. How about Trapp?

A. No, sir, he wasn't there at that time.

Q. Did he serve machines like you did?

A. No, sir.

Q. Did you have a helper or not?

A. No, sir, I didn't have no helper.

Q. When you loaded up the truck and served the machine, how did you serve them? Did you go around the different places—

A. Yes, sir.

Q. Who took care of the truck while you served the machine?

A. I just parked the truck and take the Cokes page 128 } off and bring the empties back.

Q. How long did it take you, as a rule?

A. I start at nine in the morning and be through about 11.

Q. How many Coca-Cola bottles would be in the average machine say in the Finance machine?

A. It holds 108.

Q. How long did it take you to service them?

A. Five or ten minutes.

Q. Depending on the number of bottles, I presume?

A. I had to go around to the different buildings and I—

Q. After you served, after you filled it up—

A. Yes.

R. M. Brown.

Q. You would go around to the different buildings and pick up your empties?

A. Yes.

Q. How long did it take?

A. Ten or 15 minutes. There are about three buildings there I go to.

Q. The vending machine was located where, with reference to the Finance Office?

A. In the Finance Office, in the little building behind the—

Q. Were there any Coca-Cola bottles kept there for servicing? Did you take them all off the truck?
page 129 { A. All off the truck. Never left any.

Q. Never left any there?

A. Not outside. Always put them there.

Q. And you were serving this machine last October?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Gordon:

Q. How long have you been working there?

A. I started to serve the Coke machines—

Q. How long with the Government there?

A. In '47, I believe it was.

R. M. BROWN,

called as a witness by the defendant, in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ford:

Q. Mr. Brown, you have testified before as an adverse witness and you are President of the Newport News Bottling Company?

A. Yes, sir.

Q. And how long have you been president of that company, or predecessor of the company?

A. Since 1914.

Q. And you are—

A. I was Secretary and Treasurer for three or four years and then I have been president ever since. Maybe 30 years, I have been president of the company.

R. M. Brown.

Q. You are the beneficial owner of the company page 130 } pany?

A. Yes, sir.

Q. And you have been in that business for more than 30 years?

A. It isn't a part of the Coca-Cola. We are not a part or branch of the Coca-Cola Company. We are an independent concern doing business in this territory under a contract franchise with the Coca-Cola Company.

Q. That's really the beneficial owner, R. M. Brown, owns the Coca-Cola?

A. Yes.

Q. For a great many years?

A. Yes.

Q. Your plant is located where?

A. 32nd Street and Huntington Avenue.

Q. When was it built?

A. It was built in—it was completed in 1941.

Q. When was the machinery that is in there now installed?

A. 1941.

Q. Does that include the Meyer Washer?

A. Yes.

Q. What model is that?

A. Well, it's known as a five compartment, 12 bottle wide.

Q. Did you invent that or did you buy it?

A. We bought that.

page 131 } Q. From this manufacturer?

A. George G. Meyer Company.

Q. Will you state whether or not that is a standard, accepted model washer in use in the bottling business?

A. Yes, they are the largest manufacturers of bottle washers in the world.

Q. Is there any, so far as you know, any bottle washer manufactured today that is an improvement on this one?

A. No, there is none.

Q. Approximately what did that washer cost?

A. I think at the time we bought it, which was 1939, we kept the bottle washer in the building in the back.

Q. What did it cost?

A. About \$18,000.00 at the time. It would cost almost twice as much now.

Q. I imagine. The other equipment, the syruper, the gravity system that serves the syruper I'm trying to say, is that a modern invention or modern installed machine?

R. M. Brown.

A. Yes, that is the best equipment available for handling of syrup for the simple reason that the syrup is not exposed. After it's put in these stainless steel drums from the Coca-Cola factory in Baltimore, it's not exposed any more until a person drinks it.

Q. Previously they had used a pump?

A. Yes, we have a system in our syrup room page 132 } which is on the second floor that provides for the attaching of hose equipment to the barrels.

Q. I don't want to repeat what Mr.—your manager said unless he left out something. We don't want to go over that any more unless there is something you want to supplement.

A. And that is the only equipment that I know of that does function in just that way. In other words, it keeps the syrup from going into a jar and being exposed to the room.

Q. Now, your syruper, is there a name for that?

A. That's—

Q. Model patent?

A. Forty spout—what's known as a forty spout, low pressure unit. The syruper has, I think 30 or 24 spouts and the water side, that puts the carbonated water in, has forty spouts. See, the syrup runs a little faster than the water side because—

Q. I want you to state to the jury, with reference to the general usage, what standing does that syruper and your filter, and your waterer, have in the trade? What type of machinery is it?

A. It's the best machinery that's available.

Q. Have you inspected any other plants throughout the country?

A. Yes.

Q. In the last year or so?

page 133 } A. Yes.

Q. Will you state whether or not yours, in your opinion, compares favorably with any you know of?

A. Compares favorably with the very best one. There is nothing better than the equipment we have.

Q. Now, your help that you have. Are they not trained in your plant or gotten trained from other plants?

A. Well, some of them probably worked in other plants. Our plant superintendent, Mr. Andrews, came from the Crass organization.

Q. What kind of organization is that?

A. It's a very large organization. They own 30 plants

R. M. Brown.

throughout Virginia, Maryland, Pennsylvania and Ohio.

Q. And he came to you as an experienced plant superintendent?

A. Yes.

Q. In your opinion, is he?

A. Yes, sir, he is very, very good.

Q. Do you know anything, of your own knowledge, of the occurrence here, which is the subject matter of this suit, prior to the time you had a telephone call?

A. I didn't understand that.

Q. Do you know anything about this particular bottle which is the subject matter of this suit prior to the time that you had a telephone call, according to the testimony?

page 134 } A. No, I did not.

Q. Did you receive a telephone call from Mrs. Babb?

A. Yes.

Q. Will you please state the substance of the—

A. On the afternoon of October 10, I received a telephone call from Mrs. Babb.

Q. Had you known her before?

A. Never heard of her. She said she had drunk a Coca-Cola, gotten a Coca-Cola with some foreign substance in it and she was—had been made nauseated. I said, "I'll send somebody down to see what the trouble is". I sent one of our men down. I sent the salesman who worked this territory down here. He's not a truck driver. He does drive the truck but he's a college graduate and his job is salesman, truck salesman.

Q. Little more than a truck driver?

A. Oh, yes.

Q. You sent him down as your representative?

A. I did.

Q. Did he report back to you?

A. Yes.

Q. Did you, after that time, talk with Mrs. Babb at any time?

A. Yes, she called me up the following morning, Saturday morning, I think.

page 135 } Q. Yes.

A. And said that she had to see a doctor and that she was terribly upset and so forth; and that she had employed a lawyer. She went into detail about how upset she was and how nervous she was and her stomach was terribly upset

R. M. Brown.

and I told her that if my stomach was upset to that extent, I would try some bourbon in a Coca-Cola to settle it.

Q. Did you tell her to do that?

A. No, I said I would do it if my stomach was upset. If I was in that condition, I'd take some bourbon in a Coca-Cola.

Q. Did you tell her to go take a couple of shots of bourbon and forget it?

A. No, I didn't use that language.

Q. Have you seen her since?

A. No.

Q. You have seen Mrs. Kelly?

A. Yes.

Q. As somebody has testified, I forget who is was; and have you talked with Mr.—

A. Holt.

Q. Yes, the head of the Finance Office.

A. Holbrook.

Mr. Gordon: I object to this.

Mr. Ford: You brought it all out.

Mr. Gordon: You did. I didn't.

page 136 { Court: The question is all right.

Q. How did you find out the names of the people who might give you some information as to what actually occurred?

A. When we were notified we were going to be sued—

Q. You listen to my question. Who told you the names of the people?

A. Mr. Holbrook.

Q. Did you talk to him?

A. Yes.

Q. For what purpose?

A. To find out what happened at the time she drank the Coca-Cola.

Q. Whom did you talk to, if you recall by name?

A. I talked to Mrs. Kelly.

Q. She was one of the employees?

A. She was supervisor in the office. I talked to all that Mr. Holbrook gave me their names, people who were there at the time.

Q. Talk to Mr. Toulson?

A. Yes, talked to Mr. Toulson.

Q. And your purpose was what?

R. M. Brown.

A. To find out what it was all about.

Q. Did you ever make any statement to Mrs. Kelly or anybody else that would lead Mrs. Babb or anybody else to understand that you had made any offer to Mrs. Babb to settle this case?

A. Absolutely not.

Q. Have you made her any offer?

A. No.

Q. Or anybody else?

A. No.

Q. For her? To her counsel?

A. No.

Q. Or anybody else?

A. No.

CROSS EXAMINATION.

By Mr. Gordon:

Q. Since you have introduced the fact that he has talked to me, I think I'll be permitted to question him about our conversation.

Court: All right, sir.

Q. Mr. Brown, you have testified here about an offer of settlement. Do you recall that on the day—in the first week after this happened, after I wrote to you, that you asked me to come to your office?

A. May—

Mr. Ford: You answer the question.

A. What was the question.

Q. The question is, after I wrote to you, I don't recall whether I called you or you called me but I know it was at your invitation that I came to your office and talked to you. Do you recall that time?

A. Yes, but it wasn't—I didn't invite you to come to my office, that is give you a direct invitation.

Q. I didn't have an appointment with you?

A. I said I would suggest that you come to our plant and see how we bottle Coca-Cola, how we operate.

Q. Mr. Brown, you told me to come to see how you bottle Coca-Cola?

A. That's right, to show you how we operate.

R. M. Brown.

Q. Well, I misunderstood you.

A. Badly.

Q. I came to your office anyway?

A. You did. No doubt about that.

Q. You and I talked this case over?

A. You did most of the talking.

Q. Didn't you tell me that no other attorney would bring suit against you?

Mr. Ford: You let Mrs. Kelly testify that she ought to take whatever offer was made. That's the only reason I made the statement.

Court: He suggested but one of the witnesses made that statement.

Ford: That's the only reason I made that in rebuttal.

Court: This is an action brought by this plaintiff against the Newport News Bottling Company for damages that this lady alleges she received. Anything that's pertinent to that case is proper evidence but any conversation between you gentlemen, I don't think that has any connection unless it is to contradict something that he said. You got a right to do that.

Q. Now, do you recall, Mr. Brown when it was that I talked to you?

A. I don't know what date it was.

Q. And then your invitation to me to come to see you then was to view your plant?

A. I said that I didn't invite you to come to see me.

Q. I must have been the uninvited guest.

A. You went out in quite a storm.

Q. Now, I intend to put on evidence to contradict you and you are telling this jury that in the conversation with Mrs. Babb on Saturday morning that she told you she had already employed counsel?

A. That's right, she said that she had already seen the lawyer.

Q. On Saturday?

A. Saturday morning.

Q. You are sure of that?

A. I know it.

Q. Now, you have testified here as to the syruper, as you call it, and then you testified, I believe, as to the filter or as

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to the machine that you use to filter the water,
page 140 } is that right? What do you call the machine
that the water goes through?

A. At what stage?

Q. When you get the water, you filter it don't you?

A. Yes, it comes in, city water comes in through four inch pipes and it's filtered through sand and gravel filter and treated through hydrocarbon filter which is activated carbon and then it goes through this paper disc filter.

Q. When was that process purchased or installed in your plant?

A. At the same time we started operating in the new building which is in 1941.

Q. Is that a 1939 model too?

A. Well, there is no particular model. It's not designated by any particular model. There's nothing unusual about a sand and gravel filter. It's the same system that the city uses but the hydrocarbon filter has activated carbon in it. That purifies the water; takes out any odor that might be in the water and that was new equipment put in at the same time that the bottle washer and the filters, crowner and the rest of the equipment was. The reason for the delay from 1939 to 1941 was it took two years and a half to complete the building and we had to hold the machinery until the new plant was ready for occupancy.

Q. Have you visited many other plants re-
page 141 } recently, Mr. Brown?

A. Well, I have been—I was in the plant in Atlantic City on the 8th or 9th of March.

Q. What type of machine do they have in there?

A. Same type we do.

Q. Do you know when that was installed?

A. No, I don't.

Q. When I first asked you today what your position was, you said manager and now you have testified you are president?

A. Both.

Q. You are both manager and president?

A. And majority stockholder.

Q. Is the salesman and truck driver you spoke of, what did you say his name was?

A. Rouse.

Q. Is Mr. Rouse here today?

A. He is.

E. P. Rouse.

Q. And you expect to put him on as a witness?

A. You might ask my lawyer about that.

E. P. ROUSE,

called as a witness by the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ford:

Q. What is your name?

A. Rouse.

Q. What are your initials?

A. E. P.

Q. Where do you work?

page 142 } A. Coca-Cola Bottling Company.

Q. How long have you been working for them?

A. Almost 16 years.

Q. You live in Newport News?

A. Yes, sir.

Q. Where did you come from?

A. North Carolina.

Q. And you have been here 16 years working for Mr. Brown of Coca-Cola Bottling Company?

A. Yes.

Q. What was your duties?

A. I was with Coca-Cola Bottling Company.

Q. What were your duties?

A. I was salesman.

Q. In what territory?

A. In the part of Hampton, Phoebus, and Fort Monroe.

Q. Did you sell Fort Monroe Post Exchange?

A. Yes, sir.

Q. About how often a week did you sell them?

A. Twice a week.

Q. How many Coca-Colas, cases, would you sell them a week?

A. At the warehouse they get about 30 to 50 cases per weeks.

page 143 } Q. Where else would you sell them?

A. There were several. There was a Post Exchange, Grocery and several branches.

Q. But at the warehouse, do you know what they did with the Coca-Cola of your own knowledge?

E. P. Rouse.

A. Yes, sir, they distributed them to these vending machines.

Q. You delivered 50 or 60 cases twice a week at the warehouse?

A. Yes.

Q. After that time, did you have any control over the Coca-Cola at all?

A. No, sir.

Q. You sold and delivered to the Post Exchange?

A. That was the end, as far as I was concerned.

Q. Anybody else in the Coca-Cola Company have any control of it?

A. Not that I know.

Q. Have anything to do with the vending machine?

A. No, sir.

Q. Anything with the servicing of it?

A. No, sir.

Q. Elijah Lane in your employ?

A. No, sir.

Q. Mr. Lane in your employ? Is he employed by you?

A. No, sir.

page 144 } Q. Did you come down to see Mrs. Babb last October as a result of any conversation with Mr.

Brown?

A. Yes, sir.

Q. Did you have a conversation with her?

A. Yes, sir.

Q. Did she tell you what happened?

A. Yes, sir.

Q. What did she say?

A. She told me had gotten the bottle and in drinking the contents, she became very ill.

Q. Did you make any suggestion or she make any suggestion about hospitalization?

A. I asked her if she had to have any medical attention. She had not had. I asked her how she was feeling. She said she was feeling better at that time.

Q. Did she say anything about the contents?

A. Inasmuch as she would like to have it examined, she said she would like to keep it and have it analyzed.

Q. Have you gotten any part of the analysis, as far as you know?

A. No, sir.

E. P. Rouse.

CROSS EXAMINATION.

By Mr. Gordon:

Q. Mr. Rouse, as best as you can tell, does this look like the partially decomposed—
page 145 } A. I have no idea. I couldn't say.

Q. You looked at it when you were there?

A. I looked at the bottle, yes, sir.

Q. And you saw a substance in the bottle?

A. I couldn't tell what was in there. On the afternoon I went down there, it was late in the afternoon in the midst of a terrific rainstorm and it was not any too light where I looked at it and I could not tell what was in the bottle.

Q. Could you tell whether there was some foreign substance in there?

A. It looked like something a little bit thick but it did not look like that, sir.

Q. Your position is salesman and you are a college graduate and he let you handle some of the outside work in reference to this?

A. I am a salesman of the Coca-Cola Bottling Company.

Q. And he trusted you in a matter like that?

A. Yes, sir.

Q. Do you generally get these calls or did he give you one like this before?

A. Never had one before.

Q. Exactly like that?

A. None whatsoever like this.

Mr. Ford: We rest.

Mr. Gordon: No rebuttal.

page 146 } Mr. Ford: I want to move to strike the evidence of the plaintiff in this case on the grounds that it does not measure, it does not prove negligence against the defendant company which is required under the law. This case was tried under the theory of, I presume whether I presume right or not, of inferred negligence or *res ipsa loquitur*. The degree of proof of due care, we think has been proved not only by a preponderance of the evidence but almost beyond a reasonable doubt, such that this court ought not to submit it to a jury; that the presumption of negligence or the inference of negligence has been rebutted by the testimony of the witnesses as to the high degree of care and the practical improbability and practical impossibility of the foreign sub-

stance that is alleged to have been in the plaintiff's drink, to have been bottled by the defendant or any of its employees and for that reason there's nothing to go to the jury to consider as to the negligence of the defendant.

Counsel then proceeded to argue the motion.

Court: Motion overruled.

Mr. Ford: Exception. I would like for your Honor to direct a view of the plant. Although Mr. Andrews has indicated the processes, I think the importance of this case warrants an inspection of that plant, a view of the plant by this jury. I know it would take some time, probably an hour or more but we have delays in this court and other courts that are less important than that. The importance of page 147 } this case to the plaintiff and this defendant is such, that, I think your Honor ought to direct a view of the plant of this defendant.

Court: The purpose of the view would be to understand the process. The purpose of the view would be a demonstration of this and I don't think you can do that. That would be taking evidence and you can't *taken* any evidence unless it taken in this court.

Mr. Ford: I don't think—

Court: I have permitted the plant engineer to testify and produce sketches and pictures and I think that's all that is necessary. I overrule the motion.

Mr. Ford: Exception.

At this time, the jury was excused until tomorrow, Saturday, May 1, 1948, at 10:00 a. m.

page 148 } INSTRUCTIONS.

Plaintiff's Instruction No. 1 (granted).

The Court instructs the jury that if they find from the evidence that the defendant, Coca-Cola Bottling Works of Newport News, Virginia, Incorporated, manufactured or bottled and placed upon the market the bottle of beverage called Coca-Cola in question in this case, for human consumption, and that the plaintiff, Elaine M. Babb, purchased said bottle of beverage in due course of trade, and that as a result of the negligence of the Coca-Cola Bottling Works of Newport News, Incorporated, the said bottle of Coca-Cola so purchased contained foreign substance, and plaintiff was thereby

damaged, it is your duty to return a verdict for the plaintiff, unless you further believe that the plaintiff was guilty of contributory negligence.

Mr. Ford: I object to any instructions being given on the part of the plaintiff that would permit a finding, on the grounds that I principally stated in my motion to strike the evidence, if your Honor please. Without waiving that, I specifically object to Number 1 offered by the plaintiff for the reason that the evidence does not show that the bottle of Coca-Cola was in the possession of the defendant company after it left the plant or rather after it was delivered to the Post Exchange and that there was reasonable opportunity for tampering with the bottle after it left the Coca-Cola plant or after it was delivered to the Post Exchange. Therefore, there can be no inference upon which to base an instruction which this instruction does; and further that the evidence shows that the defendant has fulfilled its duty of a high degree of care and that there isn't any issue to go to the jury and no finding could be based as set out in Instruction No. 1.

Court: All right, sir. I overrule the objection and note your exception for the reasons stated.

Plaintiff's Instruction No. 2 (granted).

"The Court instructs the jury that they may infer negligence from the fact that foreign substance was found in the bottle, and the law does not require the plaintiff to show the particular dereliction."

Mr. Ford: We object to this instruction for the reasons assigned to Instruction No. 1 where it is applicable; that is that the continuity of possession was broken. Apprehending that the instruction will be given in this case, I suggest that an amendment be made as follows, following the end of the sentence after the word "dereliction."

"The court instructs the jury that such inference of negligence may be overcome by evidence, if any, on the part of the defendant, showing that it had exercised a high degree of care, which is the measure of its duty toward the plaintiff." I think if this instruction is going to be given, that that additional amendment ought to be made.

Court: I'll grant the instruction as presented and note your exception. I imagine you have that feature of the case covered in your instructions.

Defendant's Instruction No. "A" (granted).

"The Court instructs the jury that this is a case against the defendant, Coca-Cola Bottling Company, based upon the alleged negligence of that company in permitting its employees negligently to allow a foreign substance to enter a bottle of Coca-Cola, a part of which was drunk by the plaintiff.

"The Court further instructs you that the burden rests upon the plaintiff to prove the alleged negligence of the company and its employees by a preponderance of the evidence. You cannot find a verdict based upon surmise, conjecture or guess or upon anything except the preponderance of the evidence. If you find, therefore, that the plaintiff has failed to carry the burden of proving such negligence by a preponderance of the evidence, it will be your duty to find your verdict for the defendant."

Defendant's Instruction No. "B" (granted).

"The Court instructs the jury that while the defendant owed the duty to exercise a high degree of care in the bottling and preparation of its product, nevertheless, the Court further instructs you that the defendant company is not an insurer or guarantor of the purity of its product. This action is based upon the alleged negligence of the defendant. Therefore, before the plaintiff can recover anything in this action, she must prove by a preponderance of the evidence that the foreign substance entered into the bottle in question before it left the custody of the defendant and further that the defendant failed to exercise that degree of care in bottling, and preparing an inspection of its product, and that such failure, if any, was the proximate cause of the injury complained of, and that actual damages resulted to the plaintiff.

Defendant's Instruction No. "C" (granted).

"The Court instructs the jury that before the plaintiff can recover in this case, she must show by a preponderance of the evidence:

"First, that the foreign substance mentioned was in fact bottled in the Coca-Cola at the defendant's plant.

"Second, that even if it was so bottled, the defendant company was guilty of negligence in permitting it to be done.

“Third, that such negligence, if shown, was the sole approximate cause of the plaintiff’s injury, if any.

“Fourth, that the plaintiff was in fact injured as a result thereof.

“Five, that even then, the plaintiff is not entitled to recover, under the law, if she, herself, was negligent in failing to discover the presence of the foreign substance.”

Mr. Gordon: I object to “C”. There’s no duty upon her, your Honor, to, no duty upon her.

Defendant’s Instruction No. “G” (granted).

page 152 } “The Court instructs the jury that the burden is upon the plaintiff to prove by a preponderance of the evidence that the foreign substance was in the bottle of the Coca-Cola when it left the custody of the defendant bottling company. You have a right to consider that the bottle in question was stored and handled by the Post Exchange people, was handled by the delivery boy of the Finance Office, and was handled opened by the person who carried the bottle in from the vending machine to the plaintiff and to consider all the other facts and circumstances and evidence in determining whether or not the defendant was negligent.

“Therefore, if, after hearing all the evidence, you are not satisfied from a preponderance of the evidence, or you are in doubt as to whether the foreign substance was in the bottle when the same left the custody of the defendant company; or if it appears to the jury that it was equally as probable that the foreign substance was not in the bottle when the defendant gave up control of the same to the Post Exchange and its employees, as that it was in the said bottle, then it is your duty to find your verdict for the defendant bottling company.”

Defendant’s Instruction No. “H” (granted).

“The Court instructs the jury that even though you may believe from the evidence that a foreign substance was bottled in the defendant’s plant, and even if you further believe that the defendant was negligent in doing so, under the
page 153 } other instructions of the Court, yet, if the jury shall further believe from the evidence that the plaintiff, on her own part, by the exercise of reasonable care, should have discovered the foreign substance in the bottle, and thereby avoided injury to herself, and that she did not exer-

cise such care, then she is not entitled to recover any damages in this case, and you shall find your verdict for the defendant."

Defendant's Instruction No. "I" (granted).

"The Court instructs the jury that even if you find *find* the foreign substance complained of was bottled at the defendant's plant, and later consumed in whole or in part by the plaintiff, and even if you should further find that she was injured thereby, without negligence or fault on her part; yet, if upon the whole case, the evidence does not satisfy the jury by a preponderance of the evidence that the defendant did not exercise a high degree of care in the bottling and preparation and inspection of its products, but if the jury shall find, on the other hand, that the defendant did exercise such high degree of care, then it has discharged its full duty, under the law, and the plaintiff cannot recover damages from the defendant."

Defendant's Instruction No. "F" (refused).

"The Court instructs the jury that while you may reasonably infer negligence from the fact that the foreign substance was found in the bottle, as set forth in instruction number 2, nevertheless, you are further instructed that the
page 154 } mere presence of the foreign substance in the
bottle will not of itself alone sustain a recovery
by the plaintiff, if you further find, after hearing all the evidence, that the bottling company did exercise that high degree of care required of it in the bottling, preparation and inspection of its product, in which event your verdict should be for the defendant bottling company.

Mr. Ford: We except.

page 155 } JUDGE'S CERTIFICATE.

I, Frank A. Kearney, Judge of the Circuit Court of Elizabeth City County, Virginia, who presided over the foregoing trial in the case of Elaine Babb v. Coca-Cola Bottling Works of Newport News, tried in said Court at Hampton, Virginia, on the 30th of April and 1st of May, 1948, do certify that the foregoing is a true and correct copy and report of the evidence, together with the motions, objections and exceptions on the part of the respective parties, and the action of the

Court in respect thereto, and all other incidents of the First and Second Day of said trial on April 30 and May 1, 1948, as therein set forth.

I do further certify that the attorney for the Plaintiff had reasonable notice, in writing, given by counsel for the defendant, of the time and place when the foregoing record of the testimony, exceptions, and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication, and that the said report was presented to me on the 28th day of January, 1949, within less than 60 days after the entry of final judgment in the said cause.

Given under my hand this 5th day of February, 1949.

FRANK A. KEARNEY,
Judge of the Circuit Court of Elizabeth
City County, Virginia.

page 156 { Virginia :

In the Circuit Court of Elizabeth City County.

Elaine Babb, Plaintiff,

v.

The Newport News Coca-Cola Bottling Company, Incorporated, Defendant.

NOTICE OF APPEAL.

To: Charles H. Gordon
Counsel for Plaintiff

Please take notice that on the 27 day of January, 1949, at ten o'clock A. M., or as soon thereafter as I may be heard at the Court House, Hampton, Virginia, the undersigned will present to the Honorable Frank Kearney, Judge of the Circuit Court of Elizabeth City County, Virginia, who presided at the trial of the above mentioned case, in said Court, a stenographic report of the testimony, instructions given and refused, exceptions, original exhibits for initialing and identification, and other incidents in the trial of the above styled case, to be authenticated and verified by the said Judge.

Also, that the undersigned will, at the same time and place, request the Clerk of the said Court to deliver to counsel for the defendant a transcript of the record in the said case, all for the purpose of presenting the same to the Supreme Court

of Appeals of Virginia, together with a petition for writ of error and *supersedeas* therein.

Given under my hand this 25th day of January, 1949.

CHARLES E. FORD
Counsel for Defendant.

Service of the within notice is hereby accepted this 25 day of January, 1949.

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CHARLES H. GORDON
Counsel for Plaintiff

page 158 } I, R. E. Wilson, Clerk of the Circuit Court of Elizabeth City County, Virginia, do hereby certify that the foregoing is a perfect transcript of the record of the notice of motion for judgment heretofore pending in the Court between Elaine Babb, plaintiff, and Coca-Cola Bottling Works of Newport News, Va., Incorporated, defendants, as the same now appears from the original papers and records on file in my office.

I further certify that the notice required by law to be given by the appellant to appellee, upon application made to me for a transcript of the record has been duly given; is filed among the original papers in this office and is copied in this record.

I further certify that a suspending and *supersedeas* bond in the penalty of Thirty-five hundred dollars (\$3,500.00), with approved security, conditioned according to law, was entered into as required by order of Court.

Given under my hand this 24th day of January, 1949.

R. E. WILSON,
Clerk of Circuit Court of Elizabeth City
County, Virginia
By S. M. GIBSON
Deputy Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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