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# Recent Decisions

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It is submitted that elevation of the defendants in this case to the status of "bona fide" employees renders nugatory the intent of Congress as embodied in the Act.[35] The decision, as a whole, is unsatisfactory. As a legal proposition, the reasoning is highly argumentative. Recognizing the result as a *fait accompli,* however, the issue is therefore thrust squarely back upon the Congress for prompt remedial legislation.[36]

# RECENT DECISIONS

BAILMENTS—INNKEEPERS—LIMITED LIABILITY UNDER GENERAL BUSINESS LAW.—Plaintiff entered a hotel for the purpose of attending a dog show in the ballroom, and checked her coat with attendants provided for that purpose. The coat disappeared prior to the time that plaintiff presented her check and demanded the coat. In an action to recover the value of the coat, defendant hotel sought to limit its liability in accordance with the New York General Business Law § 201. The plaintiff denied the defendant's right to rely on this statute as it had not posted a notice in accordance with § 206 of the General Business Law, requiring hotels and inns to post printed copies of the sections of the statute limiting their liability for property loss. The trial court sustained the plaintiff's position and directed a verdict for the plaintiff. On appeal from a judgment of the Appellate Term, which reversed the trial court, *held,* defendant is liable for the full value of the coat in the absence of evidence that it had complied with this subsequent section of the statute. Judgment Reversed. *Gardner v. Roosevelt Hotel, Inc.,* 263 App. Div. 268, 32 N. Y. S. (2d) 208 (1st Dep't 1942).[1]

The first question in this case is one of procedure. It is concerned with the action of the trial court in directing a verdict for the plaintiff after the plaintiff had proved the defendant's failure to return her coat on demand and the defendant had failed

35. See note 2, *supra.* The Court said that "the proviso in § 6 [18 U. S. C. A. § 420 d] safeguarding 'the rights of bonafide labor organizations in *lawfully* carrying out the *legitimate* objects thereof,' although obscure indeed, strengthens us somewhat" in the conclusion that Congress intended to leave unaffected the *ordinary* activities of labor unions.. Local 807, at 648. (Italics added.)

36. The defendants were further convicted of conspiracy to violate Sec. 1 of the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. A. § (1937), which, among other things, renders unlawful any conspiracy in restraint of interstate commerce or trade. This conviction was also reversed by the Circuit Court of Appeals, but review of this part of the judgment was not sought by the Government. In reversing, the Circuit Court of Appeals wrote in part as follows: ". . . There was no evidence of any concerted agreement to fix the price of trucking or of the commodities carried; nor was there any evidence that the action of the accused had in fact affected those prices." Note 5, *supra,* at page 686.

For comment upon recent decisions involving prosecutions of labor unions under the Sherman Anti-Trust Act and the judicial trends in respect thereto, see Comment (1941) 10 FORDHAM L. REV. 268.

1. *Rev'g* 176 Misc. 546, 28 N. Y. S. (2d) 78 (App. Term, 1941) *aff'g* 175 Misc. 610, 24 N. Y. S. (2d) 261 (City Ct. of N. Y. 1940).

to offer evidence to show that its failure to return the coat was not due to its negligence. It is said, in the law of bailments, that an "imputation of negligence" arises from the bailee's failure to return the subject of the bailment on demand.[2] Proof of the non-return by the plaintiff shifts the burden of going forward with the evidence to the defendant. Though only a few bailment cases[3] apply the terminology, *res ipsa loquitur,* to this doctrine, it is apparent that it is only another application of this familiar rule, where the defendant bailee's liability is predicated on negligence.[4] Recently the New York Court of Appeals has clarified the effect to be given to a *res ipsa loquitur* case. It is now settled that the proof of such a case by the plaintiff merely entitles him to have the issue submitted to the jury. A *res ipsa loquitur* case is a *"prima facie"* case. It is rarely sufficient to entitle the plaintiff to a directed verdict.[5]

The second question is one of substance. At common law, the innkeeper was responsible for the safekeeping of property committed to his custody by a guest. He was an insurer against loss, unless such loss was caused by the negligence or fraud of the guest, or by an act of God or the public enemy.[6] However, the liability of the innkeeper for the goods of his guest applied only to those who came to the hotel as travelers and whom courts designated "guests."[7] In the principal case, the plaintiff cannot be considered a "guest" of the hotel.[8] Therefore the hotel cannot be liable

2. Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595 (1891); Claflin v. Meyer, 75 N. Y. 260 (1878); Miles v. International Hotel Co., 289 Ill. 320, 124 N. E. 599 (1919); Employers' Fire Ins. Co. v. Consolidated Garage, 85 Ind. App. 674, 155 N. E. 533 (1927); Stone v. Case, 340 Okla. 5, 124 Pac. 960 (1912); Noel & Co. v. Schuur, 140 Tenn. 245, 204 S. W. 632 (1918).

3. Kaiser v. Latimer, 40 App. Div. 149, 57 N. Y. Supp. 833 (2d Dep't 1899); Beck v. Wilkins-Ricks Co., 179 N. C. 231, 102 S. E. 313 (1920); Hanes v. Shapiro, 168 N. C. 24, 84 S. E. 33 (1915).

4. The defendant bailee's duty to use reasonable care in guarding the bailed chattel may be based on contract, under some theories of bailment. Krumsky v. Loeser, 37 Misc. 504, 75 N. Y. Supp. 1012 (1902). However, the complaining bailor's obligation to show a breach of such a contract, by showing negligence on the part of the bailee will be the same under the contractual theory as under a relational theory. Proof of such negligence by *circumstantial* rather than by *direct* evidence is the type of proof offered in a *res ipsa loquitur* case. For a discussion of the incidence of the burden of going forward with evidence after plaintiff proves a *res ipsa loquitur* case see Rosenthal, *The Procedural Effects of Res Ipsa Loquitur in New York* (1936) 22 CORN. L. Q. 39.

5. Foltis v. City of New York, 287 N. Y. 108, 38 N. E. (2d) 455 (1941). The court said "the doctrine is not confined to any particular class of Cases."

6. Hulett v. Swift, 33 N. Y. 571 (1865); Milhiser v. Beau Site Co., 251 N. Y. 290, 167 N. E. 447 (1929). For an excellent discussion of the historical reasons for this rule, see Crapo v. Rockwell, 48 Misc. 1, 94 N. Y. Supp. 1122 (1905).

7. BROWN, ON PERSONAL PROPERTY (1936) § 104. See also, Ticehurst v. Beinbrink, 72 Misc. 365, 129 N. Y. Supp. 838 (1911), in which case the defendant innkeeper was not held liable as an insurer because the plaintiff was not technically a guest at the inn.

8. Fitch v. Casler, 17 Hun 126 (N. Y. 1879), in which the court expressed itself as follows: "One who goes to a hotel on invitation of the proprietor to attend a party or dance, at which music, supper or stabling room are furnished at a definite price, is not a guest." See also Carter v. Hobbs, 12 Mich. 52 (1863); Amey v. Winchester, 68 N. H. 447, 39 Atl. 487 (1895).

as an insurer under the common law, but of course this would not mean that it could not be liable for negligence under common law rules. The common law liability of the innkeeper continues today, insofar as it has not been abrogated by statute.[9] In New York the legislature has seen fit to limit the liability of innkeepers. By section 200,[10] the innkeeper may provide a place of safekeeping for "money, jewels or ornaments" belonging to guests, and by so doing, and giving the notice as directed, he is not liable for the loss of such "money, jewels or ornaments" by theft or otherwise. By section 201,[11] the liability of the innkeeper to his guests is limited to a definite sum for property loss in certain specified situations. But these statutes, insofar as they apply to guests, seem to have no application to the present case since the plaintiff is not a guest.[12] However, the concluding clause of the first sentence of General Business Law section 201 applies to patrons, other than guests, like the plaintiff and on this, defendant hotel in the principal case, relied to limit its liability. This single clause applies with equal force to restaurants and hotels. The General Business Law, section 206 applies only to hotels and inns. The burden of posting printed copies of section 200 and 201 is not placed on restaurants.[13] Yet restaurants are entitled to invoke section 201.[14] If the restaurants can have the advantage of section 201 without posting why should the defendant hotel be required to post such a notice in the situation presented by the principal case? The statute relied on by the court, section 206 does not *in its terms* make posting a condition to limiting liability under section 201.

The intent of the legislature in enacting the clause of section 201 involved in the principal case was to prevent frauds on the bailee of property deposited in the check rooms of restaurants and hotels. In case of loss of the article checked, the bailee is at the mercy of his bailor, and has no way of disputing any value which the latter may place upon the article lost. To frustrate this purpose, as the principal case does, without clear warrant in the statute seems to be unsound. It might be well for the legislature to consider a clarifying amendment.

CRIMES—FELONY MURDER—EFFECT OF SEC. 1045-A OF N. Y. PENAL LAW.—During a robbery, defendant killed a storekeeper. On appeal from conviction of murder in the first degree, *held,* three judges dissenting, it was reversible error for the trial court to charge that a jury, finding a defendant guilty of felony murder, must return a verdict of guilty even though it disagreed on the question whether a sentence of

9. Milhiser v. Beau Site Co., 251 N. Y. 290, 167 N. E. 447 (1929).

10. N. Y. GEN. BUS. LAW § 200.

11. N. Y. GEN. BUS. LAW § 201.

12. Bean v. Ford, 65 Misc. 481, 119 N. Y. Supp. 1074 (1909) (action to recover value of goods checked in hotel by non-guest) The following statement was made by the court: "As the plaintiff was not a guest of the hotel at the time when he left the valise there, the ordinary rules of liability between innkeepers and their guests have no application, *and the various notices to guests posted in the hotel and introduced in evidence seem also to be quite irrelevant.*"

13. A restaurant is not an inn. Davidson v. Chinese Restaurant, 201 Mich. 389, 167 N. W. 967 (1918); Carpenter v. Taylor, 1 Hilt. 193 (N. Y. 1856).

14. Honig v. Riley, 244 N. Y. 105, 155 N. E. 65 (1926); Young v. Kit Kat Restaurant, N. Y. L. J., Jan. 13, 1939 at p. 192, col. 1.

life imprisonment as authorized by section 1045-a of the Penal Law should be recommended. *People v. Hicks*, 287 N. Y. 165, 38 N. E. (2d) 482 (1941).

The question dividing the Court of Appeals here was the proper construction of section 1045-a of the Penal Law. This section provides that: "A jury finding a person guilty of murder in the first degree, as defined by subdivision 2 of section 1044, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."[1] Both majority and minority stressed the intent of the Legislature in enacting section 1045-a. Both agreed that the purpose of the Legislature and the intent of the Governor was to make it easier for the jury to bring in verdicts of guilty in felony murder cases. Each of the two opinions considered that the construction given the statute by the other would defeat this plain purpose.[2]

Prior to the enactment of section 1045-a, courts were having difficulty in administering section 1044 (2) because of the fact that the actual killer in such cases was usually entitled to a charge on the lower degrees of homicide, while the accomplice would in most cases be deprived of such charge.[3] As an accomplice, he would usually be guilty of felony murder or entirely innocent of murder. Hence no charge on the lower degrees of homicide was necessary. The New York Court of Appeals in *People v. Seiler*[4] criticised this situation. The Law Revision Commission pointed out that, under the *Seiler* decision, it would be possible for the jury to convict the slayer of a lower degree of homicide, than the accomplice, although, technically, if the accomplice was guilty of first degree murder the actual killer must also be guilty of that offence. It suggested that these faults would be corrected by giving greater elasticity to the *penalty* for first degree murder.[5]

Both from the circumstances surrounding its enactment and judicial decisions interpreting and construing it, there is little doubt that section 1045-a as enacted was intended to reach the punishment and not the guilt of a defendant.[6] It allowed a

1. N. Y. Laws 1937, c. 67, amending § 1045 and adding N. Y. PENAL LAW § 1045-a. Enacted March 17, 1937.

2. Majority and minority opinions, in almost the same words, hold that the construction adopted by the other will make convictions more difficult. Chief Justice Lehman held that, under the minority construction, a jury would still have to choose between death and acquittal unless all twelve agree on a recommendation. Finch, J., fears that under the majority interpretation a defendant whose guilt has been established beyond a doubt may still go free if all twelve jurors cannot agree as to the degree of punishment to be meted out. People v. Hicks, 287 N. Y. 165, 174, 177, 38 N. E. (2d) 482, 486-488.

3. Asip, *Recent Penal Law Provisions in Relation to Punishment for Felony Murder* (1938) 12 ST. JOHNS L. REV. 373; Corcoran, *Felony Murder in New York* (1937) 6 FORDHAM L. REV. 43.

4. People v. Seiler, 246 N. Y. 262, 268, 158 N. E. 615, 617 (1927).

5. Law Revision Commission, REPORTS, RECOMMENDATIONS AND STUDIES, LEGIS. DOC. No. 65 (P) 1937, pt. IV (C) p. 169 *et seq.* advising the Legislature that the law concerning the guilt of accessories under the felony murder statute was *defective, not in its substantive provisions, but in its penalty.* This resulted in the anomaly of making compromise verdicts more frequent for the slayer than for the accomplice. See Asip, *supra,* note 3, to the same effect.

6. "The public policy of the State, as enacted by the Legislature into chapter 67, is

jury to mitigate the punishment of a defendant found guilty under section 1044 (2) in the discretion of the jury by its recommendation, and the judge by his sentence. From the decisions which have followed the enactment, we learn that it was intended to benefit the accomplice primarily, but was not limited to him in terms.[7] We also learn that the statute is permissive and confers an absolute discretion on the jury;[8] that the exercise of such discretion must be free and uninfluenced except by the facts and circumstances;[9] that without the jury's recommendation the court has no discretion;[10] that the recommendation is not binding on the court and may be disregarded by the court if improper;[11] that the judge should charge the jury in the words of the statute on the principle that the force of a plain and simple statute should not be weakened by qualifying words.[12]

The point herein involved, where the alleged error concerned the right of a jury to render a verdict of guilty when not unanimous on the question of a recommendation, was raised in *People v. Gati*,[13] and is commented upon in the majority opinion in the case at bar. Judge Lehman says that this point did not have to be decided there, as the error in the original charge, if any, was cured by the subsequent instructions.[14] This explanation, however, is not altogether satisfactory, as it appears

one of avoiding the death sentence in cases that appeal to the conscience of the jury and the court." People v. Smith, 163 Misc. 469, 472, 297 N. Y. Supp. 489 (Sup. Ct. 1937). This was the first case to be decided after the enactment of N. Y. PENAL LAW § 1045-a.

7. People v. Smith, 163 Misc. 469, 297 N. Y. Supp. 489, 493 (Sup. Ct. 1937).

8. The Court of Appeals in affirming the conviction in People v. Ertel, 283 N. Y. 519, 523, 29 N. E. (2d) 70, 71 (1940) said: "The crime committed is still murder in the first degree, but [because it is under the felony murder statute] the jury has power, if it seems proper to it to exercise such power, to recommend life imprisonment." See also People v. Ray, 172 Misc. 1004, 16 N. Y. S. (2d) 224 (Sup. Ct. 1939), *aff'd* 259 App. Div. 1065, 22 N. Y. S. (2d) 119 (4th Dep't 1940), *appeal dismissed*, 282 N. Y. 680, 26 N. E. (2d) 811 (1940); 2 MICHIE, HOMICIDE (1914) 1737; State v. Ellis, 98 Ohio St. 21, 120 N. E. 218, 220 (1918).

9. People v. Ray, 172 Misc. 1004, 16 N. Y. S. (2d) 224 (Sup. Ct. 1939); State v. Caldwell, 135 Ohio St. 424, 21 N. E. (2d) 343, 344 (1939); State v. Romeo, 42 Utah 46, 67, 128 Pac. 530, 538 (1912).

10. People v. DeRenna, 166 Misc. 582, 2 N. Y. S. (2d) 694 (1938), holding that the Court is powerless to act without a recommendation of the jury.

11. People v. Cole, 285 N. Y. 838, 35 N. E. (2d) 503 (1941). "Even had the jury made a recommendation, it would not have been binding on the court." People v. Ertel, 283 N. Y. 519, 523, 29 N. E. (2d) 70, 72 (1940); Harvey v. State, 29 Ga. App. 300, 115 S. E. 31 (1922); State v. Farnsworth, 51 Ida. 786, 10 P. (2d) 295 (1932); State v. Lindberg, 125 Wash. 51, 215 Pac. 41 (1923). *Contra*: People v. DeRenna, 166 Misc. 582, 2 N. Y. S. (2d) 694 (1938), cited *supra*, note 10, basing its decision on a rule of construction that where the statute invests a public body with a power of authority which concerns the public interests or the rights of individuals, its permissive power will be construed as mandatory, citing BLACK, INTERPRETATION OF LAWS (2d ed. 1896) § 151. For a discussion of this view, see Asip, *supra*, note 3.

12. People v. Ertel, 283 N. Y. 519, 29 N. E. (2d) 70 (1940); People v. Fitzgerald, 156 N. Y. 253, 266, 50 N. E. 846, 850 (1898).

13. 279 N. Y. 631, 18 N. E. (2d) 35, three of the Judges voting to affirm under Section 542 of the Code of Criminal Procedure.

14. People v. Hicks, 287 N. Y. 165, 172, 38 N. E. (2d) 482, 485—These subsequent

from the *Gati* record that the trial court, there, not only gave conflicting instructions when pressed for a ruling, but admitted that it did not know the law, as this point had never been decided. The word "cured" does not seem to apply to such a charge.

Since the point was not there passed upon, the *Gati* case affords merely a preliminary flourish to the present interpretation of the statute. The decision in the case at bar now instructs us that the law is that there can be no verdict unless the jury is unanimous, first on the question of guilt, and second on the question of a recommendation. It is submitted that section 1045-a is positive and was enacted for a positive purpose. The words of the statute are clear and unambiguous, and express perfectly that purpose. In such case it is not allowable to go beyond a literal reading of the words used.[15] Section 1045-a gives an election to the jury and lays down the rule as to how such election is to be exercised—"a jury finding a person guilty . . . may, as a part of its verdict, recommend." Only a jury which has found a defendant guilty can come under section 1045-a, soundly too, for if the guilt has not been established, the question of punishment is superfluous. If a jury cannot agree on guilt, it matters not whether they could agree on the punishment—they may not even consider it. A jury agreeing on guilt *may*, as *part of its verdict*, recommend.[16] If a jury wishes to recommend, it *must* make such recommendation *a part of its verdict*. In other words, it must elect unanimously to bring itself within the provisions of the statute. If the jury wishes to fit punishment to the varying degrees of moral guilt, it may express its wish as part of its verdict. The statute does not

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instructions are printed in full in the majority opinion, the Court apparently feeling that the *Gati* decision afforded a stumbling block to the decision in the case at bar, since the precise question was there presented to the Court of Appeals and was the only point urged in the brief of defendant-appellant Gati.

15. In construing a statute, the aim is to ascertain the intention of the Legislature. If a literal reading of the words expresses such intent, the statute should be construed literally. Only where the words do not express the intent perfectly, is it allowable to go beyond the literal meaning. However, it has been said that "It is also a rule sometimes laid down by text writers that whenever . . . the sense of the law, how clear soever it may appear in the words, would lead to false consequences and unjust decisions, the palpable injustice which would follow from its literal sense compels an effort to discover some kind of interpretation, not what the law literally says, but what it means". People v. Comm'rs of Taxes of N. Y., 95 N. Y. 554, 559 (1884). However, with reference to § 1045-a, it seems that any other interpretation than a literal interpretation would tend directly toward unjust decisions, and therefore § 1045-a must be construed according to the literal meaning of the words used. See also, LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3d ed. 1880) 11 for the distinction between interpretation and construction.

16. In this connection, the cases show the general rule to be that a recommendation to mercy is merely an addition to the verdict, in no wise qualifying its legal effect. A verdict is, by the weight of authority, defined as the unanimous decision made by the jury and reported to the Court on the matters lawfully submitted to them in the course of the trial of a cause. French v. Merrill, 27 App. Div. 612, 614, 50 N. Y. Supp. 776, 777 (4th Dep't 1898); Hawley v. Barker, 5 Colo. 118, 120 (1879); Smith v. Paul, 133 N. C. 66, 45 S. E. 348, 349 (1903); Simmons v. Hamilton, 56 Cal. 493, 495 (1880). See also Otis v. Spencer, 8 How. Prac. 171, 173 (N. Y. 1853), where the court said, "as used in the Code and in a legal sense generally, it [the verdict] is understood to be the determination of a jury, upon the matters of fact in issue in a cause, upon the evidence."

provide either expressly or by implication as to what a non-unanimous jury shall do. Such a jury has not qualified itself to act under section 1045-a and may not procure the lesser punishment. Section 1045 is still the law which provides the penalty for first degree murder.[17] The Legislature did not intend to modify section 1045 except in case of a jury electing, as part of its verdict, to recommend lesser punishment. If the majority interpretation is correct, the verdict should be "guilty with a recommendation" or "guilty without a recommendation", and an examination of the cases shows that the latter verdict has not even been thought of by judge or jury.[18]

It is respectfully submitted that the majority interpretation of section 1045-a will defeat its plain and well understood purpose—to make felony murder convictions more certain. Under this decision, regardless of guilt, no conviction may be had if even *one* of the twelve will not consent to recommend *or* insists upon a recommendation against the others. District Attorneys henceforth will probably be loath to indict under section 1044 subdivision 2, as the decision in the case at bar appears to give an advantage to a criminal who can bring himself under the felony murder statute. Professional criminals may use the rule as thus laid down advantageously. By merely perpetrating a robbery on his victim, before killing him, a murderer may give his crime the appearance of felony murder and thus place himself in a better situation than if he had confined himself to the single crime of murder. The decision appears to be an unfortunate one, as is shown by the action of The Association of the Bar of the City of New York; The Committee on Criminal Courts Law and Procedure, in approving a bill to amend section 1045-a of the Penal Law. The object of this bill is stated to be to obviate the effect of the *Hicks* case.[19]

DIVORCE—RIGHT OF INSANE PARTY TO SUE THROUGH NEXT FRIEND.—Plaintiff, an incompetent, through his next friend, brought suit for divorce on the ground of his wife's adultery since the marriage, and in the alternative, for dissolution of the marriage on ground that he was insane at the time it was solemnized. On appeal from a judgment sustaining the demurrer to the divorce action, *held,* two judges dissenting, an insane person may maintain a suit filed by a next friend against wife on grounds of adultery. Judgment reversed. *Campbell v. Campbell,* — Ala. —, 5 S. (2d) 401 (1942).

17. N. Y. PENAL LAW, § 1045. "Murder in the first degree is punishable by death unless the jury recommends life imprisonment as provided by Sec. 1045-a."

18. This was made very evident in People v. Lunze, 278 N. Y. 303, 16 N. E. (2d) 345 (1938) (record on appeal, Fol. 1959). The Trial Court there charged: "In form your verdict will be either guilty of murder in the first degree or not guilty. That is your verdict. If your verdict is guilty of murder in the first degree, you may accompany it, if you see fit, by the recommendation that the defendant be imprisoned for the term of his natural life, or, if your verdict is simply guilty and no such recommendation accompanies it, then your verdict stands as given."

19. This bill provides that a jury may, "upon the unanimous vote of its members" recommend life imprisonment and such a recommendation "shall not be deemed a part of the verdict of the jury", and provides further that a jury's "failure to make such recommendation shall not be a ground for appeal or reviewable on appeal." THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE COMMITTEE ON CRIMINAL COURTS LAW AND PROCEDURE, Bulletin 3, March 5, 1942, Memo. No. 33, p. 105.

The court in this case ruled that in its own state such an action has statutory authority. To come to this conclusion it argued from two separate statutes. The statute providing that persons of unsound mind may sue by a next friend[1] was construed[2] in connection with the statute[3] allowing the court to divorce persons from the bonds of matrimony. It feels that in so doing it has not violated the rule of the majority of jurisdictions,[4] that in the absence of a permissive statute such an action for divorce cannot be maintained on behalf of the incompetent.[5]

The dissenting opinion adopts the view of many jurisdictions, that statutes of the type relied on by the majority should not be considered a sufficient foundation upon which to base the right of an insane party to sue for divorce through another person. These jurisdictions recognize the right of the insane person to sue or be sued generally through a committee, guardian, or a next friend, but make a clear distinction between an ordinary contract and the contract of marriage which creates a unique status. They point out that this status which endures for the joint lives of the parties can never be created except with the voluntary consent of the parties. They emphasize the fact that marriage can only be dissolved where a grievous *wrong* has been committed, and then only at the instance and with the consent of the innocent party.[6] If a person can neither judge nor reason, all his actions, in so far as the law is concerned, are non-volitional. How then can a third party be said to give effect to the volition of the insane person, when the latter lacks freedom of choice?

New York denies a divorce even though adultery is proved when the offence charged has been forgiven by the plaintiff.[7] The prevailing opinion in the instant case does not consider the fact that if the husband were sane he might condone the action of his adulterous wife, although condonation is a defense to a divorce action in Alabama.[8] The mere fact of adultery does not dissolve the status. The party, knowing he has been injured, must take affirmative steps to exercise the privilege of seeking a divorce. If this privilege is given to a third person, it may result in the perpetration of a fraud on the unknowing and perhaps unwilling insane spouse. The guilty party might pre-

1. ALA. CODE (1923) § 6519.

2. Under the *pari materia* rule all consistent statutes which can stand together and relate to the same subject, although enacted at different dates, are treated and construed together as though they constituted one act. Lucchesi v. State Board of Equalization, 137 Cal. 478, 31 P. (2d) 800 (1934).

3. ALA. CODE (1923) § 7407.

4. Worthy v. Worthy, 36 Ga. 45 (1867); Mohler v. Shank, 93 Iowa 273, 61 N. W. 981 (1895); Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885). Although the Court of Appeals has not passed upon this question, the trend of the New York law is with the majority view Mainzer v. Avril, 108 Misc. 230, 177 N. Y. Supp. 596 (1919); Gould v. Gould, 141 Misc. 766, 252 N. Y. Supp. 617 (1931). See also the *dicta* of the Court of Appeals in Kaplan v. Kaplan, 256 N. Y. 366, 369, 370, 371, 176 N. E. 426 (1931).

5. Cases coming to a conclusion similar to that of the majority opinion in the instant case are: Garnett v. Garnett, 114 Mass. 379 (1874) and Cowan v. Cowan, 139 Mass. 377, 1 N. E. 152 (1885) in which the court applies a statute specifically permitting such an action; and Baker v. Baker, L. R. 5 P. D. 142 (1880), *aff'd* 6 P. D. 12 (1880) decided by statutory construction.

6. Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885).

7. N. Y. CIV. PRAC. ACT § 1153.

8. ALA. CODE (1928) c. 283, § 7413.

vail upon the "next friend" of the insane spouse to bring suit.[9] This would rid the guilty party of an insane spouse, and thus afford the former a remedy to which he is not entitled at law. The fact, mentioned by the dissenting judge, that the wife had a cause of action for divorce against her husband on the ground of insanity,[10] does not seem to eliminate this possibility. Her wrongdoing might have prevented her success in such a divorce action, if the statute of limitations on that wrong had not run. Insanity is not always incurable, although a presumption of continued insanity arises, once there has been an adjudication. Thus a spouse might regain sanity and find that he is no longer married and that he has been deprived of the right of condonation.[11]

The right to an action for divorce is a personal right. In actions dealing with such subjects as election to take dower,[12] the right to change the beneficiary of a trust fund[13] and the right to withdraw the principal of a trust fund,[14] courts have held that these are purely personal transactions involving the will of the insane person, and, the committee of an insane person cannot act for its ward with regard to them. How much more personal is an action for divorce!

The argument upon which the holding of the Alabama court might be supported, is that such an action would come within the scope of the committee's duty to protect the pecuniary interest of the incompetent. However, although one regrettably acknowledges the increasing number of divorces,[15] one should continue to frown on divorce as detrimental to moral and material welfare.[16] It seems that the pecuniary interest of the insane party is a secondary consideration.

Arguing against the result in the instant case does not mean that an action for a separation is impossible.[17] By allowing a decree of separation the obligation to

9. The court found such a situation in Kemmelick v. Kemmelick, 114 Misc. 198, 199, 186 N. Y. Supp. 3 (1921) and went further in Bradford v. Abend, 89 Ill. 78 (1878), where the court held that fraud would be presumed in a situation where the wife was confined in an institution at the instance of the husband, and in his charge, in another state from that in which the action was brought by her "next friend."

10. ALA. CODE (1928) c. 283, § 7407, subd. 7.

11. See the comment of the judge in Mainzer v. Avril, 108 Misc. 230, 232, 177 N. Y. Supp. 596, 597 (1931), cited in note 6 *supra.*

12. Camardella v. Schwartz, 126 App. Div. 334, 110 N. Y. Supp. 611 (2d Dep't 1908); Flynn v. M'Dermott, 183 N. Y. 62, 75 N. E. 931 (1905).

13. In Matter of Estate of Grant, 122 Misc. 491, 204 N. Y. Supp. 238 (1924).

14. This right of the committee is said to apply only to a ministerial act. Matter of Wainman, 121 Misc. 318, 200 N. Y. Supp. 893 (1923).

15. For articles showing procedural developments tending to break down former obstructions to free divorce see Comment (1940) 10 FORDHAM L. REV. 242; Comment (1940) 10 FORDHAM L. REV. 376; Vreeland, *Obligatory Interstate Recognition of Divorce Decrees—A New Trend?* (1939) 8 FORDHAM L. REV. 80.

16. "Marriage . . . being the all in all without which the state could not exist—it is of highest public interest. *Prima facie,* therefore, each particular marriage is beneficial to the public—each divorce prejudicial . . . suffered only in cases decreed by public authority." 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) §§ 38, 39, p. 16.

17. The Alabama court cites Mims v. Mims, 33 Ala. 98 (1858); and Wray v. Wray, 33 Ala. 187 (1858), as direct authority for allowing suit to be brought, although the proceeding involved was for a separation, as in Woodgate v. Taylor, 2 Sw. & Tr. Rep. 512

support the guilty wife may be extinguished by the court, and the innocent party may be protected against the assertion of marital rights by the guilty party. In New York, the law further protects the insane person's property, by depriving the spouse against whom a separation decree has been obtained of the right of election,[18] although the law cannot reach the will of an insane party if made before he became incompetent. The marital status is preserved in this manner,[19] and if sanity is regained, the person is free to elect whether he will condone or bring an action for absolute divorce.

Divorce is not a right which may be asserted by anyone, but a privilege limited to parties in interest who fulfill the conditions laid down by law, and since in the majority of jurisdictions the law does not provide a means for the insane person to sue for divorce, it seems the better view, and in keeping with public policy and good morals, that such suits should be disallowed.

LABOR LAW—BUILDING SERVICE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT.—The defendant, a realty corporation, owned and operated a loft building in the city of New York. It leased space to various manufacturers who sold ladies garments in interstate commerce. The defendant's employees ran the elevators, maintained the building in good order, and watched the tenant's premises. The elevator operators' only contact with the goods occurred when the goods were transported by them to and from the various floors. Plaintiff, as Administrator of the Wage and Hour Division of the Department of Labor, sought an injunction to restrain the defendant from violating the Fair Labor Standards Act of 1938, known as the Wage and Hour Law, and to compel payment of time and a half for overtime. On appeal from a judgment dismissing the complaint after trial, *held,* the maintenance workers of a building, whose tenants are engaged in interstate commerce, are engaged in a work necessary to the production of goods in interstate commerce, and the F.L.S.A. applies to them. Judgment Reversed. *Fleming v. Arsenal Building Corp.,* 125 F. (2d) 278 (C. C. A. 2d, 1941).

The court in this case included under the provisions of the Act[1] employees of a realty corporation, engaged in an intrastate activity, who did not contribute in any manner to the finished product manufactured on the premises, on the ground that they were "necessary to the production"[2] of goods in interstate commerce. The Act is held to apply to maintenance workers, who are thus entitled to time and a half for overtime. This decision falls in a field of law marked by great confusion. The exact coverage of the Wage and Hour Law is quite uncertain. The purpose of the F.L.S.A. was to limit the number of hours of work per week, and to provide a min-

(1861) and as in Parnell v. Parnell, 2 Phillim. Eccl. Rep. 158 (1814) and Kaplan v. Kaplan, 256 N. Y. 366, 176 N. E. 426 (1931), cited in note 6 *supra,* where the court distinguished between the protection of the interests of the party and a dissolution of the marriage.

18. N. Y. DECEDENT'S ESTATE LAW § 18, subdiv. 3, 4, 5.

19. However, since adulfery is not a ground for separation in New York, Collins v. Collins, 245 App. Div. 612, 283 N. Y. Supp. 795 (1st Dep't 1935), some other ground would have to be found before a suit could be brought for separation by a next friend.

1. FAIR LABOR STANDARDS ACT, 52 STAT. 1060, 29 U. S. C. A. § 201 *et seq.* (Supp. 1938).

2. The court here construed § 3 (j) of the Act, which defines production of goods in interstate commerce. 52 STAT. 1060, 29 U. S. C. A. § 203 (j) (Supp. 1938).

imum standard of pay for employees engaged in interstate commerce. Congress used its power to regulate interstate commerce to achieve this end[3] and the constitutionality of the F.L.S.A. has been upheld[4]. But the question remains: Who are engaged in interstate commerce within the meaning of the Act?

It is apparent from the legislative history of the Act,[5] the changes made in Committee,[6] and the statements in Congress,[7] that the *nature of the employee's work* was to determine whether he came within the provisions of the act.[8] It appears, especially in *Fleming v. Kirschbaum*,[9] and *Eddings v. Southern Dairies*,[10] that Congress changed the test from that employed in the Wagner Act,[11] namely, the relation of the employer's business to interstate commerce.[12] If employees are engaged in, or their work is necessary to, the production of goods for interstate commerce, they are deemed to be within the purview of the F.L.S.A. Thus employees of an independent contractor, who is engaged in intrastate commerce, are included under the Act when they contribute an element necessary to the production of goods for interstate commerce, e.g. independent button-hole makers who are engaged in working on the goods within the state.

The test, while seeming to be relatively simple in theory, has been a difficult one

3. Congressional statement of policy, 52 STAT. 1060, 29 U. S. C. A. § 202 (Supp. 1938).

4. Opp Cotton Mills v. Administrator of Wage and Hour Div., Dep't of Labor, 312 U. S. 126 (1941); U. S. v. Darby, 312 U. S. 100 (1941). See also (1939) 16 N. Y. U. L. Q. REV. 454 (1939); Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making* (1941) 27 WASH. U. L. Q. 1.

5. For an interesting article tracing the development of the Act, see Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW AND CONTEMPORARY PROBLEMS (1939) 464.

6. H. R. REP. 2738, 75th Cong., 3rd Session (1938).

7. See the remarks of Senator Pepper, Senate manager in Conference. 83 CONG. REC. 9168 (1938).

8. 29 U. S. C. A. § 203 (j) (1938), which provides that all workers, who are engaged in the production of goods for interstate commerce or in any work necessary to the production of goods for interstate commerce, shall be included under the act.

9. 38 F. Supp. 204, 206 (E. D. Pa. 1941), *aff'd* 124 F. (2d) 567 (C. C. A. 3d, 1941).

10. 42 F. Supp. 664 (E. D. S. C. 1942).

11. 49 STAT. 449, 29 U. S. C. A. § 151 *et seq.* (Supp. 1935). In N.L.R.B. v. Fainblatt, 306 U. S. 601 (1939), the court included under the Wagner Act, an independent contractor because his business affected the flow of commerce. In N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 41 (1937), the court held that a steel mill, a manufacturing enterprise, bore such a relation to interstate commerce that any stoppage due to labor disputes would affect the free flow of interstate commerce and that the mill was subject to the Wagner Act. In Consolidated Edison Co. v. N.L.R.B., 305 U. S. 197 (1938), the court held that although the great part of a public utility service was in intrastate commerce, the company affected foreign and interstate commerce to such a degree as to be subject to federal control. These cases adopted a very liberal viewpoint expanding the concept of interstate commerce and defined the test of the Wagner Act to be the relation of the employer's business to interstate commerce.

12. Congressional declaration of policy, 49 STAT. 449, 29 U. S. C. A. § 151 (Supp. 1935). The purpose of the Wagner Act was to prevent employers from engaging in unfair labor practices which would lead to labor disputes that would hinder the flow of interstate commerce.

for administrators and courts to grasp. Courts,[13] and the Wage and Hour Division,[14] have at times recognized that the relation of the employee's work to interstate commerce is the basis for including him under the Act. But the Wage and Hour Division would include workers under the Act on the ground that they must be necessary to the production of the goods or they would not be on the payroll, although being employed in a firm within 90 days of removal of goods in interstate commerce is merely *prima facie* evidence that he was engaged in producing the goods.[15] Thus in *Killingbeck v. Garment Center Capitol Inc.*,[16] the court held that maintenance employees are not included under the act when hired by one who is himself not engaged in interstate commerce, but went on to say, in a *dictum*, that if the maintenance workers were employed by one engaged in interstate commerce, they would be included under the act.[17] However a New York court restricted the coverage of the statute in *Pedersen v. Fitzgerald*.[18] It held, employees of an independent contractor, who were making repairs on a railroad bridge, were not engaged in production of goods in interstate commerce, and not under the Act.

In the principal case, the court relied on a theory similar to that of the *dictum* of the *Killingbeck* case. It held that, since the maintenance workers would be included under the act if they were hired by the manufacturers, there was no reason to exclude them when hired by the landlord. No reason is given why the workers would be included when hired by the manufacturers. Thus the employer's relation to interstate commerce, suggested as the basis in the *Killingbeck* case, seems to be adopted in the principal case according to this argument of the court.

Both the instant case and the *Kirschbaum* case are also based on the theory that employees are covered by the act because they are necessary to the production of goods in interstate commerce. The maintenance workers involved do keep the premises clean and in good repair, but when their work is done, they have not contributed any material part to the finished product. Their efforts may be necessary to the total enterprise, but are they "necessary" to the production of the goods?[19] Only in the *Kirschbaum* case has the court attempted any definition of "necessary", quoting Chief Justice Marshall: "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable."[20] This test does not seem very helpful. It is probably due to the confusion as to the

13. Allen v. Moe, 39 F. Supp. 5 (D. C. Idaho, 1941); Rogers v. Glazer, 32 F. Supp. 990 (D. C. Mo. 1940). Lefevers v. General Export Iron & Metal Co., 36 F. Supp. 838 (D. C. Texas, 1940).

14. Wage and Hour Division, Interpretive Bulletin No. 1, issued Sept. 22, 1938, Wage and Hour Manual, 1941, p. 27.

15. *Supra* note 14, p. 28.

16. 259 App. Div. 691, 20 N. Y. S. (2d) 521 (1st Dep't 1940). Accord: Robinson v. Mass. Mut. Life Ins., 158 S. W. (2d) 441 (Tenn. 1941).

17. In Doyle v. Johnson, 176 Misc. 656, 28 N. Y. S. (2d) 452 (City Ct., Kings County, 1941), on a motion to dismiss for failure to state a cause of action, it was held that the Act was broad enough to include any employee who contributes in any manner to the finished product.

18. 262 App. Div. 665, 30 N. Y. S. (2d) 989 (3rd Dep't. 1941).

19. For a discussion of this point, see 6 LAW AND CONTEMPORARY PROBLEMS 338 (1939).

20. McCulloch v. Maryland, 4 Wheat. 315, 413 (U. S. 1819).

meaning of the term "necessary to production" that the employer's relation to interstate commerce has been used so frequently. It is regrettable that in the principal case no effort was made to distinguish among the bases of the decisions in the various cases. Congress has continually enlarged the scope of its power to regulate commerce, and the Supreme Court has followed Congress. But it is to be doubted whether the employees of a landlord are to be included where the tenants are engaged in interstate commerce. Their work does not contribute to the finished product. The goods are only indirectly affected by them, and the workers thus have only an indirect effect on interstate commerce.[21] The practical effect of the court's attempt to reach into the landlord and tenant relationship is to place property owners, whose tenants are engaged in interstate commerce, at a disadvantage in relation to other property owners whose tenants are not so occupied. The resulting dislocation in real estate values might be quite serious.

NEGLIGENCE—LIABILITY FOR SUBSEQUENT AGGRAVATION OF ORIGINAL INJURY.—Plaintiff, an infant six years old, fell, while descending with his mother on an escalator in a department store. The fingers of each hand were caught between the moving steps of the escalator and the metal plate at the bottom where it disappeared into the floor. The escalator continued to operate for some three to seven minutes after the child was caught. Defendant was charged with negligence in operating an escalator so constructed as to leave sufficient space to permit children's fingers to be caught therein and also charged with negligence in failing to stop the machinery sooner. On appeal from a judgment for the plaintiff, based on the jury's award of damages on the second count, *held,* one judge dissenting, defendant owed a duty to the passengers, carried on the escalators, to have someone nearby who could stop the machinery quickly in time of peril. Judgment affirmed. *L. S. Ayres & Co. v. Hicks,* 34 N. E. (2d) 177 (Ind. 1941).

Under an early rule, governing the recovery of damage for negligence, the mere fact that a defendant had been negligent was sufficient to hold him liable for any consequential damage.[1] However, shortly after the beginning of the nineteenth century, the doctrine of contributory negligence appeared as a complete bar to a plaintiff's recovery.[2] The doctrine of contributory negligence is qualified by our modern rule of "last clear chance".[3] The doctrine upon which the instant case rests, called the

21. Jewel Tea Co. v. Williams, 118 F. (2d) 202, 206 (C. C. A. 10th, 1941) held, the F.L.S.A. is limited to employees engaged in interstate commerce, and not those who merely indirectly affect interstate commerce. *Accord,* Chapman v. Home Ice Co., 43 F. Supp. 424 (D. C. Tenn., 1942).

1. MacIntyre, *Rationale of Last Clear Chance* (1940) 53 HARV. L. REV. 1225.

2. Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. R. 926 (1809). A few years later two cases were decided on the theory that damages should be apportioned according to fault and amount of fault. Raisin v. Mitchell, 9 Car. & P. 613, 173 Eng. Rep. R. 979 (1839); Smith v. Dobson, 3 Man. & G. 59, 133 Eng. Rep. R. 1057 (1841); see also Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233.

3. The first case invoking the modern rule seems to have been Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. R. 588 (1842). In that case the plaintiff negligently left his donkey fettered at the side of a public highway. Defendant, if he had exercised proper care,

doctrine of "subsequent negligence", seems to be an outgrowth of "last clear chance". It makes one liable for aggravation of an injury to a person where the aggravation was due to defendant's carelessness subsequent to the original injury. Thus a recovery was allowed in the case of a man who was injured by a train, solely because of his own negligence, when evidence showed that defendant railroad's delay in getting the injured man to a hospital lessened his chance of survival.[4] Cases involving the principle displayed in that case are rather common.[5] It is true that these cases often involve carriers and that carriers must exercise the highest degree of care.[6] However, that factor would not seem to distinguish this line of cases from the case at hand since elevators[7] and escalators[8] have also been adjudged to be common carriers. However, the rule is not limited to carriers but extends to any type of business and even to individuals. Indeed, in one case the court held that the action of defendant in forbidding a sick man to remain in his house overnight might be negligent conduct sufficient to impose liability on him.[9]

In the cases to date, liability has usually been imposed on the defendant for negligence in carrying out some affirmative course of action, upon which he had embarked, or for failure to act to prevent harm when the defendant had present and immediate control of the apparatus causing the injury. Few cases have been found where liability was imposed for failure to act, even if an injured person was in serious need of aid, where the defendant was not at the time guiding and controlling the apparatus causing the injury.[10] The instant case provides an instance where failure to act when the apparatus is not under the immediate actual control of the defendant is

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could have, at the last moment, avoided the donkey but defendant was negligent and ran down and killed the donkey. He was held liable. James, *Last Clear Chance: A Transitional Doctrine* (1938) 47 YALE L. J. 704; Comment, *Last Clear Chance Doctrine* (1922) 22 COL. L. REV. 745.

4. Dyche v. Vicksburg, S. & P. R. Co., 79 Miss. 361, 30 So. 711 (1901).

5. Northern Central Ry. Co. v. Price, 29 Md. 420 (1868); Whitesides v. Southern Ry. Co., 128 N. C. 229, 38 S. E. 878 (1901). Yazoo & M. V. R. Co. v. Byrd *et al.*, 89 Miss. 308, 42 So. 286 (1906); Tippecanoe Loan & Trust Co. v. Cleveland C. C. & St. Louis Ry. Co., 57 Ind. App. 644, 104 N. E. 866 (1914); *contra*: Griswold v. Boston & Maine R.R., 183 Mass. 434, 67 N. E. 354 (1903).

6. Fowler v. Randle, 284 Ky. 164, 143 S. W. (2d) 1049 (1941); Greer v. Public Service Coordinated Transport, 124 N. J. L. 512, 12 A. (2d) 844 (1941); Bullis v. Northland Grayhound Lines of Ill., 236 Wis. 87, 294 N. W. 535 (1941). See also, Warner, *Duty of Railway Company to Care for a Person It Has Without Fault Rendered Helpless* (1919) 7 CALIF. L. REV. 312.

7. Hensler v. Stix, 113 Mo. App. 162, 88 S. W. 108 (1905); Perrault v. Emporium Dep't. Store Co., 71 Wash. 523, 128 P. 1049 (1913).

8. Petrie v. Kaufmann & Baer Co., 291 Pa. 211, 139 Atl. 878 (1927); Weiner v. May Dep't. Stores Co., 35 F. Supp. 895 (D. C. Cal. 1941).

9. Depue v. Flateau *et al.*, 100 Minn. 299, 111 N. W. 1 (1907). *Contra*: Ficken v. Southern Cotton Oil Co., 40 Ga. App. 841, 151 S. E. 688 (1930).

10. However, innkeepers have a duty to care for guests who are ill, Scholl v. Belcher, 63 Ore. 310, 127 Pac. 968 (1912), and carriers have a similar duty as to passengers. Newark R. Co. v. McCann, 58 N. J. L. 642, 34 Atl. 1052 (1896); Middleton v. Whitridge, 213 N. Y. 499, 108 N. E. 192 (1915).

sufficient to impose liability.[11] Remembering that, in this case, the defendant was exculpated from fault in the construction and operation of the escalator, the case seems to stand for the proposition that a duty is owed to invitees on one's premises to go rapidly to their assistance although they are injured without the occupier's fault. The Restatement seems to support the rule.[12] It appears that the law is recognizing some duties that were hitherto thought to be called for by the moral law only.

TAXATION—APPORTIONMENT OF ESTATE TAXES—CONSTITUTIONALITY OF STATE STATUTE AFFECTING THE BURDEN OF FEDERAL TAX.—The testatrix provided general legacies for both her husband and stepson and bequeathed her residuary estate to her husband. Her executor ascertained her net estate and paid the federal and state estate taxes thereon. He then sought to apportion these taxes *pro rata* among the shares passing to the husband and stepson as general legatees and to the husband as the residuary legatee. On appeal from an order of the Surrogate pro-rating the burden of the taxes in accordance with section 124 of the Decedent Estate Law, *held,* three judges dissenting, that the state statute was invalid insofar as it directed an apportionment of the tax imposed by the federal statute. The federal tax must be paid in its entirety out of the residuary estate. *Matter of del Drago,* 287 N. Y. 61, 38 N. E. (2d) 131 (1941), *rev'g* 175 Misc. 489, 23 N. Y. S. (2d) 943 (1940).

Upon taking over the assets of a deceased person, the executor or administrator must first ascertain the amount of the estate left by the decedent and then dispose of this estate according to the statutes of descent and distribution or according to the terms of the will. In performing his duties, he must, of course, comply with various taxing laws. The amount of the tax is calculated on the bases of the net estate[1] which is determined by making certain deductions from the gross estate.[2] Congress intended that the federal tax be paid out of the net estate prior to the distribution thereof to the beneficiaries. This was clearly pointed out by Congressman Hull during the debate upon the original measure in the House of Representatives,[3] and the statute specifically so provides.[4] It is therefore clear that in its nature the tax is an excise upon the right to transfer property at death and not a levy upon the right

11. For discussion of this point, see Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. of PA. L. REV. 217, 230.

12. RESTATEMENT, TORTS, § 302, comment a, expresses the rule of the case as follows: "One who has started in motion a force over which he has a present and immediate control is regarded as if he were acting during the entire period in which the force is in operation. He becomes negligent if he permits the force to continue its operation after he should realize that its continuance involves an unreasonable risk of harm to others, although at the time that the force was started and became automatically operative he had no reason to expect that it would do any harm to them." See also *id.* §§ 314 (c) and 344.

1. 53 STAT. 120, 26 U. S. C. A. § 810 (1939) derived from 44 STAT. 69 (1926).

2. 53 STAT. 23, 26 U. S. C. A. § 812 (1939).

3. 53 CONG. REC. 10657 (July 8, 1916).

4. 53 STAT. 123, 26 U. S. C. A. § 826 (b) (1939). The statute also provides that the executor is personally liable for the tax and may require reimbursement, should he make premature payments from those whose interest would have been reduced if the tax had been paid prior to the disbursement of the net estate.

to inherit property,[5] which is an inheritance tax. While New York now imposes only a transfer tax similar to the federal excise,[6] many states require payment of an inheritance tax which is directed against the amount of property received by a beneficiary upon the distribution of the decedent's estate.[7]

Since an estate tax falls upon the net estate before distribution, the interest of the federal taxing authorities ceases at the point where, under the law of the state, the process of distribution commences. Therefore, the matter of determining upon whom the burden of the estate tax shall fall when the assets are distributed should be determined by state law.[8]

In intestacy, the proposition is academic because those who are benefitted take a share of the assets which remain after the payment of taxes and other expenses. Thus, in effect, the tax is *pro-rated* among all and the burden is equal. But where a will provides for general legacies, as in the case here considered, the problem arises whether the testator intended the taxes on these amounts to be paid out of the general legacies or to be deducted from the residuary estate. In order to ascertain the true intention of the testator, the courts have resorted to rules of construction, or, more properly, presumptions,[9] and have presumed that the testator intended that, if pos-

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5. The early case of Knowlton v. Moore, 178 U. S. 41 (1900) clearly pointed out this distinction. See also Y. M. C. A. v. Davis, 264 U. S. 47 (1924); Farmers' Loan and Trust Co. v. Winthrop, 238 N. Y. 488, 144 N. E. 769 (1924); Nichols v. Coolidge, 274 U. S. 531 (1927). In Edwards v. Slocum, 264 U. S. 61, 62 (1924), Justice Holmes said: "But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, . . . It (the net estate) comes into existence before and is independent of the receipt of the property by the legatee." Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4 (1919) held that the tax was paid out of the residue, but was decided before the statutory enactment here involved, yet it was relied upon in the prevailing opinion in the instant case.

6. In 1930, the prior taxable transfer statutes were superceded by N. Y. TAX LAW, § 249-m to 249-mm inclusive, N. Y. Laws, 1930, c. 710, § 1, which imposes a tax "upon the transfer of the net estate of every person dying" ofter Sept. 1, 1930. (N. Y. TAX LAW, § 249-n).

7. For the nature of the inheritance tax see Matter of Gihon, 169 N. Y. 443, 62 N. E. 561 (1902); 4 HEATON SURROGATES' COURTS (5th ed., 1929) 3; (1935) 83 U. OF PA. L. REV. 533.

8. ". . . if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter." Edwards v. Slocum, 287 Fed. 651, 653 (C. C. A. 2d, 1923), *aff'd* 264 U. S. 61 (1924). See also Hepburn v. Winthrop, 83 F. (2d) 566 (App. D. C. 1936); Matter of Oakes, 248 N. Y. 280, 162 N. E. 79 (1928); Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N. E. 265 (1919); Brown's Estate v. Hoge, 198 Iowa 373, 199 N. W. 320 (1924); (1937) 85 U. OF PA. L. REV. 328. Central Trust Co. v. Burrow, 144 Kan. 79, 58 P. (2d) 469 (1936); Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N. H. 471, 200 Atl. 786 (1938).

9. The primary rule of construction is that the duty of the court is "to ascertain the intention of the testator . . . and give effect to the legal consequences of that intention when ascertained." *In re* Williams, [1897] L. R. 2 Ch. D. 12, 22. See also Chrystie v. Phyfe, 19 N. Y. 344, 348 (1859); 1 JARMAN, WILLS (6th ed. 1893) 473, n. 1; REMSEN, THE PREPARATION OF WILLS AND TRUSTS (2d ed. 1930) 399; DAVIDS, N. Y. LAW OF WILLS (1923) §§ 449, 456.

sible, the general legacies mentioned in his will should be paid in full.[10] Thus the burden of the estate taxes falls upon the residue of the estate.[11] It was to this rule of construction that Judge Cardozo referred when he said: ". . . *primarily at least,* (the federal estate tax) is a charge upon the residue."[12]

But where a statute, such as that here involved,[13] intervenes, it abrogates the former rule and establishes a new one which the courts must follow. The New York statute was enacted only after careful and prolonged study by a legislative commission,[14] and was designed so as to apportion the burden of the estate taxes among those who received the benefits of the distribution.[15] The testatrix, in the instant case, is presumed to have known the law and must have intended her estate to be distributed according to the law in effect at the time of her death (as well as at the time her will was made).[16] The court has here not only vitiated this intent, but has

10. Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N. H. 471, 200 Atl. 786, 788 (1938).

11. Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4 (1919). See also cases cited at note 8, *supra.*

Some courts have held, without the aid of a statute or a testamentary instruction, that the tax should be apportioned among the legatees. Fuller v. Gale, 78 N. H. 544, 103 Atl. 308 (1918); Williams v. State, 81 N. H. 341, 125 Atl. 661 (1924); Foster v. Farrand, 81 N. H. 448, 128 Atl. 683 (1925). But this line of authorities in New Hampshire was expressly overruled in the well-reasoned case of Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N. H. 471, 200 Atl. 786 (1938), where the same court said at 788: ". . . Considering the will as a whole it seems rather more probable than not that the testator wished his specific legatees to receive the actual amounts which he gave them, . . . and that he wished his residuary legatee to receive whatever might remain thereafter. . ." This reasoning is in accord with the early case of Kingsbury v. Bazeley, 75 N. H. 13, 70 Atl. 916 (1908). See Obiter Dicta, *Pragmatism in Practice* (1939) 8 FORDHAM L. REV. 136. The case of Hampton's Admr's. v. Hampton, 188 Ky. 199, 221 S. W. 496 (1920) is distinguishable. It was concerned with the right of a widow to elect to take a share of the testator's estate, and it was then held that when the widow took a share as in intestacy, that share was subject to its *pro-rata* burden of the federal estate tax. Lakes v. Lakes' Ex'rs, 267 Ky. 684, 103 S. W. (2d) 86 (1937) is in accord with the majority view.

12. Matter of Oakes, 248 N. Y. 280, 282, 162 N. E. 79, 80 (1928) (Italics added).

13. N. Y. DECEDENT ESTATE LAW, § 124, N. Y. Laws 1930, c. 709; N. Y. TAX LAW, § 249-t, N. Y. Laws 1930, c. 710.

14. See Combined Reports of the Decedent Estate Commission, (Reprinted, 1930) 338.

15. The salutory effect of these statutes has been the subject of comment in the following articles: Note, *Influence of State Law on the Interpretation of Federal Tax Statutes* (1934) 34 COL. L. REV. 526; Karch, *Apportionment of Death Taxes* (1940) 54 HARV. L. REV. 690; Comment, *Apportionment of Federal Estate Taxes* (1940) 40 COL. L. REV. 690. Pennsylvania has also enacted a statute apportioning state and federal taxes (Laws of 1937, P. L. 2762, No. 565) and the recent decision of *In re* Crooks, Orphans Court of Lycoming Co., May 20, 1939, has given it judicial approval.

16. The prevailing opinion in the instant case states that the deceased "had a right to rely on the federal law as the only law fixing the burden of the federal estate taxes." Matter of Del Drago, 287 N. Y. 61, 79, 38 N. E. (2d) 131, (1941). But the decisions of the federal courts as well as the courts of New York point directly to the contrary. And respectable authority in this state has upheld and applied the statutes here involved. Matter

thrown into confusion already settled principles of inheritance and estate taxation.[17]

TORTS—PLEADING AND PRACTICE—RES IPSA LOQUITUR—MOTION FOR DIRECTED VERDICT.—Plaintiff's restaurant was damaged by a break in a water main maintained by the City of New York. The city was sued for negligence. The trial judge, after reserving decision on plaintiff's motion for a directed verdict, set aside two special findings of the jury denying negligence and directed a verdict for the plaintiff on the ground of *res ipsa loquitur*.[1] On appeal to the Court of Appeals, *held*, one Judge dissenting, no verdict can be directed in this case. Even where the doctrine of *res ipsa loquitur* applies and the defendant has offered no evidence tending to exculpate himself from negligence, a verdict may be directed in plaintiff's favor only in rare cases. Judgment reversed. *Foltis, Inc. v. City of New York*, 287 N. Y. 108, 38 N. E. (2d) 455 (1942).

The holding of the case is sound. It would seem that the jury properly concluded that the defendant had disproved any negligence on his part although the doctrine of *res ipsa loquitur* applies to cases of breaks in water mains.[2] The case invites comment, however. The court attempts to give an "authoritative formulation of the procedural rule, confused in this state as in other jurisdictions by earlier failure to appreciate fully the implications latent in the rule of *res ipsa loquitur*."[3]

With this task outlined the Court formulated the following rules: [1] "Where a plaintiff establishes *prima facie* by direct evidence that injury was caused by negligence of the defendant the court may seldom direct a verdict, though the plaintiff's evidence is not contradicted or rebutted by the defendant. In such cases the question of whether the defendant was in fault in what he did or failed to do is ordinarily one of fact to be determined by the jury unless the jury is waived. [2] The practice should be the same where under the rule of *res ipsa loquitur* the plaintiff establishes *prima facie* by circumstantial evidence a right to recover."[4]

The first rule, if it is stated merely as indicating a trend, reflects the situation in New York. Cases of conceded facts, where different inferences as to negligence may be drawn from these facts, are for the jury.[5] However, this rule is modified by the

of Parsons, 258 N. Y. 547, 180 N. E. 326 (1931), *aff'd mem.* 234 App. Div. 625, 251 N. Y. Sup. 872 (2d Dep't 1931); Matter of Kaufman, 170 Misc. 436, 10 N. Y. S. (2d) 616 (1939); Matter of Stanfield, 170 Misc. 447, 10 N. Y. S. (2d) 613, *aff'd* 257 App. Div. 932, 12 N. Y. S. (2d) 1022 (1939); Matter of Mayer, 174 Misc. 917, 22 N. Y. S. (2d) 468 (1940).

17. This decision has been criticized in (1942) 27 CORN. L. Q. 280 and (1942) 90 U. OF PA. L. REV. 623.

1. Foltis, Inc. v. City of New York, 174 Misc. 967, 21 N. Y. S. (2d) 800 (1940), relying on Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 (1896) *aff'd mem.*, 261 App. Div. 1059, 26 N. Y. S. (2d) 609 (1st Dep't 1941).

2. Higginson v. City of New York, 181 App. Div. 367, 168 N. Y. Supp. 866 (2d Dep't 1918); Ettlinger v. City of New York, 58 Misc. 229, 109 N. Y. Supp. 44 (1908); Silverberg v. City of New York, 59 Misc. 492, 110 N. Y. Supp. 992 (1908).

3. 287 N. Y. 108, 121, 38 N. E. (2d) 455, 463 (1941).

4. 287 N. Y. 108, 122, 38 N. E. (2d) 455, 463 (1941).

5. Palmer v. D. & H. C. Co., 120 N. Y. 170, 24 N. E. 302 (1890); Erickson v. Twenty-Third St. R. Co., 71 Hun. 108, 24 N. Y. Supp. 603 (1893).

general axiom—reduced to statutory form by Civil Practice Act, section 457a—that the jury has no right to deliberate on the case where the facts are clearly settled and only one inference can be drawn. In such cases a verdict should be directed.[6]

The second rule now proposed by the Court of Appeals calls for scrutiny. Earlier New York decisions seem to indicate a trend in favor of holding that in *res ipsa loquitur* cases, where the defendant does not submit any evidence, the plaintiff is entitled to a directed verdict,[7] provided he makes the necessary motion.[8] In effect, this meant that the rule once it was found to apply to a given set of facts had the strength of a presumption, thus shifting, if not the burden of proof, at least the burden of going forward with the evidence. Failure of the defendant to introduce any evidence led to his defeat. It was thought that this view represented the New York rule. This rule was inapplicable, however, in cases where the credibility of the plaintiff's witnesses was challenged or subject to doubt.[9]

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6. Dailey v. N. Y., N. H. & H. R. R. Co., 167 Fed. 592 (1909); Babcock v. Fitchburg R. Co., 140 N. Y. 308, 35 N. E. 596 (1893); Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 (1896); Lofsten v. Brooklyn Heights RR. Co., 184 N. Y. 148, 76 N. E. 1035 (1906).

7. The following cases hold that the plaintiff is entitled to a directed verdict as a matter of law: Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 (1896); Levine v. Brooklyn RR. Co., 134 App. Div. 607, 119 N. Y. Supp. 315 (2d Dep't 1909); Adams v. Union Ry Co., 80 App. Div. 136, 80 N. Y. Supp. 264 (1st Dep't 1903). The following articles support this view: Rosenthal, *The Procedural Effects of Res Ipsa Loquitor in New York* (1937) 22 CORN. L. Q. 39, 41 n. 6; Heckle and Harper, *Effect of the Doctrine of Res Ipsa Loquitor* (1928) 22 ILL. L. REV. 724, 730; Carpenter, *The Doctrine of Res Ipsa Loquitor* (1934) 1 U. CHI. L. REV. 519, 524. The author of the last mentioned article asks that the doctrine be given the standing of a presumption, and thus shift the burden of proof.

A second group of cases held that the issue must go to the jury to determine the question of negligence: Breen v. N. Y. C. & H. R.R. R. Co., 109 N. Y. 297, 16 N. E. 60 (1888); Stallman v. New York Steam Co., 17 App. Div. 397, 45 N. Y. Supp. 161 (1st Dep't 1897); Maher v. Manhattan R. R. Co., 53 Hun. 506, 6 N. Y. Supp. 309 (1889).

8. Failure of the party to move for a directed verdict is considered an admission that there is a question of fact to be determined by the jury. Hirsch v. Schwartz & Cohn, Inc., 256 N. Y. 7, 175 N. E. 353 (1931); Mieuli v. New York & Q. C. R. R. Co., 136 App. Div. 373, 120 N. Y. Supp. 1078 (2d Dep't 1910).

9. Rosenthal, *supra,* note 7; Sunderland, *Directing a Verdict for the Party Having the Burden of Proof* (1913) 11 MICH. L. REV. 198, 204-205; Smith, *The Power of the Judge to Direct a Verdict: Section 457a of the New York Civil Practice Act* (1924) 24 COL. L. REV. 111, 122. The question of credibility of a witness is largely determined by his interest in the law suit. However, even though the witness may appear to be interested, the credibility of his testimony does not necessarily go to the jury. If it is uncontroverted or not doubtful in any reasonable sense, the jury ought not to be allowed to deliberate on the matter. Some New York cases adhered to the rule that the testimony of an interested, uncontradicted witness always involved a question of fact to be determined by the jury. Saranac & L. P. R. R. Co. v. Arnold, 167 N. Y. 368, 60 N. E. 647 (1901); Gordon v. Ashley, 191 N. Y. 186, 83 N. E. 686 (1908). This strict rule was modified by the decision of Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102 (1900), where it was held that the uncontradicted testimony of an interested witness is not necessarily for the trier of the facts.

The Court of Appeals in rejecting the old rule of procedure which was formulated after the decision of *Hogan v. Manhattan Ry. Co.*[10] models its new doctrine after a line of decisions in other states[11] and the United States Supreme Court,[12] which hold that a *res ipsa loquitur* case leaves the plaintiff in no better position than in any other negligence case and that the defendant is entitled to have the jury decide upon the question of negligence. A New York decision, *Salomone v. Yellow Taxi Corp.*,[13] is cited in the principal case to indicate the functions of the jury. There are portions of this decision which seem to support the contention of the court. However, they would seem to lose some weight when it is noticed that the case expressly held that the rule of *res ipsa loquitur* did not apply. At any rate, the rule now seems to be that lower courts in the ordinary *res ipsa loquitur* case should not direct verdicts.

The statement of the court clearly indicates that there are now at least two groups of cases covered by the *res ipsa loquitur* rule—"ordinary" and "rare" ones—each of which has a distinct legal fate when the defendant fails to educe evidence. The first must go to the jury, the second may permit the direction of a verdict.

From the result reached in the *Foltis* case, it seems to be an "ordinary" *res ipsa loquitur* case. The group of "ordinary" cases, therefore, includes those wherein a jury might reasonably disagree with the theory of the plaintiff that the defendant's negligence caused the harm. This implies that a case can be a *res ipsa loquitur* case even where it is not clear that the defendant's negligence is a more probable explanation than some other explanation. Such an interpretation of the doctrine of *res ipsa loquitur* is contrary to some writers who seemed to believe that a *res ipsa loquitur* case is one where no reasonable person can disagree with the conclusion that the defendant was negligent.[14] With the *Foltis* case, the *res ipsa loquitur* doctrine seems now to have been extended in New York to cover cases where the plaintiff's case is only a *prima facie* case, and a jury disagreeing with the plaintiff's theory would not be considered biased or unreasonable.

The class of "rare" cases where a verdict may be directed seem to be that group of *res ipsa loquitur* cases where the credibility of the plaintiff's witnesses is not in doubt and a denial of negligence on the part of the defendant would be clearly unreasonable. Bearing in mind section 457a of the Civil Practice Act, it seems that in such cases if the defendant fails to introduce evidence to exculpate himself, the plaintiff should be entitled to a verdict.[15]

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This decision seems to represent the present status of the question, since it was cited with approval as late as 1931 in New York Bankers v. Duncan, 257 N. Y. 160, 165, 177 N. E. 407 (1931); and Bratt v. Magidow, 28 N. Y. S. (2d) 1011 (1941).

10. 149 N. Y. 23, 43 N. E. 403 (1896).

11. Hughes v. Atlantic City & Shore R. Co., 85 N. J. L. 212, 89 Atl. 769 (1914); Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 52 S. E. 121 (1905); White v. Hines, 182 N. C. 275, 109 S. E. 31 (1921); Glowacki v. Northwestern Ohio Ry. & Power Co., 116 Ohio St. 451, 157 N. E. 21 (1927).

12. Sweeney v. Erving, 228 U. S. 233, 240 (1913).

13. 242 N. Y. 251, 259, 151 N. E. 442, 445 (1926).

14. Robinson v. Consolidated Gas, 194 N. Y. 37, 86 N. E. 805 (1909); (1937) 6 FORDHAM L. REV. 483; 9 WIGMORE, EVIDENCE (3d ed. 1940) 380.

15. The decision is discussed in an article by Houghtaling, comment (1942) 27 CORN. L. Q. 285, 291. This article summarizes, as the effect of the decision, that it "gives to the rule of *res ipsa loquitur* the probative effect of a permissible inference in favor of the plaintiff which the jury in its discretion may reject or accept."