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# Recent Statutes

# RECENT STATUTES

HOTEL KEEPER'S LIABILITY—PROPERTY IN TRANSPORT.—Chapter 741 of the Laws of 1937, amending Section 203 of the General Business Law, gives hotel keepers a method of limiting their common law liability for the loss of or injury to property of guests which had been delivered to them for conveyance to or from their hotels.[1] This new statute was enacted to terminate the injustice of a guest receiving huge sums[2] for baggage lost in transport, where the innkeeper, who undertook the carriage was given no notice of such extraordinary value. There had been a fertile field for fraud by dishonest guests. Now, the legislature has supplied a needed remedy by pronouncing that no hotel keeper is liable for more than $250. for damage to such goods, unless at the time of their delivery to the keeper their value in excess of $250. is declared and a written receipt for that amount is issued by the innkeeper. Not only are the opportunities for fraud lessened, but the innkeeper, having notice of the value of goods received, is in a better position to give more adequate care to expensive property. Even after issuance of such an acknowledgement of value received, the hotel keeper is not liable beyond $500, unless the damage was caused through his fault or negligence.[3]

The common law was hardly munificent when it granted an innkeeper a lien[4] on the goods of his guest, for it simultaneously exacted from him the extraordinary liability of an insurer[5] for the safety of these goods.[6] This liability extended only

1. N. Y. GEN. BUS. LAW, § 203-a. *Hotel keeper's liability for property in transport.* No hotel keeper shall be liable in any sum exceeding the sum of two hundred and fifty dollars for the loss of or damage to property of a guest delivered to such keeper, his agent or employee, for transport to or from the hotel, unless at the time of delivering the same such value in excess of two hundred and fifty dollars shall be stated by such guest and a written receipt stating such value shall be issued by such keeper; provided, however, that where such written receipt is issued the keeper shall not be liable beyond five hundred dollars unless it shall appear that such loss or damage occurred through his fault or negligence.

§ 203-b. *Posting of statute.* Every keeper of a hotel or inn shall post in a public and conspicuous place and manner in the registration office and in the public rooms of such hotel or inn a printed copy of this section and section two hundred three-a.

§ 2. This act shall take effect immediately.

2. In the recent case of Davidson v. Madison Corp., 257 N. Y. 120, 177 N. E. 393 (1931), plaintiff recovered the sum of $10,000 where the hotel had been given no previous knowledge of the value of the baggage.

3. This statute continues the close parallel between the liability of the innkeeper and the common carrier. A provision similar to that contained in this new law is found in the N. Y. Public Service Commission Law § 38 relating to common carriers, baggage companies, and transfer companies.

4. Waters & Co. v. Gerard, 106 App. Div. 431, 94 N. Y. Supp. 702 (1st Dep't 1905); Thompson v. Lacy, 3 B. & Ald. 283, 106 Eng. Reprints 667 (1820). The lien extended to goods not owned by the guest but lawfully in his possession, even where the innkeeper had notice of this lack of ownership by the guest. Robins & Co. v. Gray, 2 Q. B. 501 (1895). It did not extend to goods which the host knew to be in the unlawful possession of the guest. Johnson v. Hill, 3 Stark 172, 171 Eng. Reprints 812 (1822); BEALE, INNKEEPERS AND HOTELS (1906) § 262. It seems that the lien attached itself even to goods stolen by a guest provided the fact of illegal possession was unknown to the host. See Robinson v. Walter, 3 Bulst. 269, 271, 81 Eng. Reprints 227, 228 (1895).

5. Unless injury arose from the negligence or misconduct of the guest, an act of God, or the public enemies, no degree of diligence could absolve the innkeeper. Hulett v. Swift,

to property *infra hospitium*,[7] but the confines of the *hospitium* were not the physical bounds of the hotel. Thus, even though goods were outside the limits of the hostelry, if they had been entrusted to the personal custody of the keeper, they were regarded as *infra hospitium* and fully covered by the liability.[8]

In early days when the law concerning innkeepers was taking its initial form, travelers carried few effects and experienced no difficulty in personally conveying them directly to the hotel. The development of transportation facilities, with their increased spatial capacities, permitted the carriage of more cumbersome baggage, and it became difficult for the traveler personally to carry this to the inn. As hotels undertook this service, which involved the acquisition of custody of goods before their owner had become a guest, courts were confronted with the question whether the innkeeper's special liability extended to them during the course of their transport and before the establishment of the host-guest relationship. With little hesitancy, however, many courts declared that where a person, intending to become a guest at a hotel, turns over his baggage to the proprietor or his servant at a railroad depot, and within a reasonable time does become a guest, the innkeeper's extraordinary liability attaches the moment he assumes custody of the goods.[9] Even the delivery of a mere baggage check to the innkeeper has been held to be a sufficient constructive delivery of the baggage, and to make the host answerable for the safe return of the check itself or of the baggage it represents.[10] These

33 N. Y. 571, 88 Am. Dec. 405 (1865). Accidental fire was not an act of God unless produced by lightning or other irresistible human cause. Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099 (1891); Miller v. Steam Navigation Company, 10 N. Y. 431 (1853). A minority holds the innkeeper immune from liability in the absence of negligence. Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369 (1855); Hill v. Owen, 5 Blackf. 323, 35 Am. Dec. 124 (Ind. 1840).

6. The general rule is that the innkeeper's liability is not confined to goods of any particular kind. Berkshire Woollen Co. v. Proctor, 7 Cush. 417 (Mass. 1851); Van Wyck v. Howard, 12 How. Pr. 147 (N. Y. 1856); Cayle's Case, 8 Coke 32-a, 77 Eng. Reprints 520 (1584); SCHOULER, BAILMENTS AND CARRIERS (3rd ed. 1897) § 283. However, in at least one American jurisdiction, Maryland, the innkeeper is liable only for articles ordinarily used on a journey. Pettigrew v. Barnum, 11 Md. 434, 69 Am. Dec. 212 (1857) (host not liable for silver, knives, forks, and spoons); Giles v. Fauntleroy, 13 Md. 126 (1859) (surgical instruments not baggage for which the innkeeper is liable, unless guest is connected with the medical profession).

7. Piper v. Manny, 21 Wend. 282 (N. Y. 1839); ". . . . for the thing with which the hostler shall be charged ought to be *infra hospitium*." Cayle's Case, 8 Coke 32-a, 77 Eng. Reprints 520 (1584). JONES, BAILMENTS (4th ed. 1833) 92.

8. Cohen v. Manuel, 91 Me. 274, 39 Atl. 1030 (1898); Piper v. Manny, 21 Wend. 282 (N. Y. 1839); Jones v. Tyler, 1 Ad. & El. 522, 110 Eng. Reprints 1307 (1834).

9. Sassen v. Clark, 37 Ga. 242 (1867). This case seems to be a logical and progressive development of certain earlier holdings. It was an early common law rule that the mere acceptance of animate property by an innkeeper constituted the owner of that property a guest, even though he had no intent to avail himself of the accommodations of the hotel. Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471 (Mass. 1830); York v. Grenaugh, 2 Ld. Raym. 866, 92 Eng. Reprints 79 (1703). Also, where at the time of delivery there was an intent to become a guest, it seems that the innkeeper would be immediately liable as such for the property whether animate or inanimate. See Grinnell v. Cook, 3 Hill 485, 490, 38 Am. Dec. 663, 664 (N. Y. 1842).

10. Keith v. Atkinson, 48 Colo. 480, 111 Pac. 55. (1910); Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491 (1889).

cases, in holding the innkeeper on common law grounds really extend his liability to goods *extra hospitium* but within his personal custody, contingent only on the consummation of the host-guest relationship.[11]

While New York has invoked the innkeeper's special common law liability to hold him for goods lost in the course of removal *from* the hotel to a depot,[12] the Court of Appeals, in a recent case, deliberately refrained from extending this liability to the situation where a guest at a hotel entrusted to the porter her baggage check, and the baggage was negligently lost while being carried *to* the inn.[13] But, though the innkeeper *as such* was not held liable, he was not permitted to escape responsibility entirely. Rather, inasmuch as a charge was made by the hotel for this service, the court found that such loss of the goods was the negligent breach of an implied in fact contract to convey safely, and upon this ground predicated liability.[14]

The paramount objection of the court to bringing this property within the pale of the innkeeper's special liability was that, after the baggage was released by the railroad, the independent transfer company to whom the porter had in turn given the check, and not the porter had been in custody of it. The hotel, through its porter, had been in custody of the baggage check, but the court is not "greatly impressed" with the reasoning of those cases which hold the delivery of a check as a symbolical delivery of the baggage.[15]

Exactly what constitutes a "delivery" of such goods is of particular importance in view of the requirement of this new statute that it shall operate only upon cases where goods are "delivered" to the innkeeper for transport "to or from the hotel."[16] Delivery fixes the liability, and fixing a liability must be anterior to the application

11. Where man entrusted baggage to porter, but never became a guest, held, the hotel is not liable either as innkeeper or bailee, though porter is personally liable as bailee. Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113 (1904).

12. Maxwell v. Gerard, 84 Hun. 537, 32 N. Y. Supp. 849 (1895), holding that where an innkeeper undertakes to deliver the goods of a departing guest to a depot he is liable *as innkeeper* until so delivered.

13. Davidson v. Madison Corp., 257 N. Y. 120, 177 N. E. 393 (1931).

14. Although the trunk was lost through the negligence of an independent contractor to whom the transfer had been assigned by the porter, the court finds no difficulty in holding the hotel on the ground that when a contract duty is assigned, the original obligor cannot escape liability for negligent non-performance by its assignee.

*Quaere:* Would the innkeeper be liable in the absence of negligence? The case of Davidson v. Madison Corporation does not settle this point.

15. Inferentially, the Court of Appeals would seem disposed to hold the innkeeper *as such* where the baggage was actually delivered. Davidson v. Madison Corp., 257 N. Y. 120, 123, 177 N. E. 393, 394 (1931). In this very case, the Appellate Division had allowed recovery on the theory that the hotel was liable *as innkeeper,* and that the delivery of the baggage check was sufficient constructive delivery of the baggage. Davidson v. Madison Corp., 231 App. Div. 421, 247 N. Y. Supp. 789 (1st Dep't 1931). The Court of Appeals, while preferring to affirm the judgment on the ground of non-performance of contract was careful to state: "We do not determine that the defendant was or was not liable for the breach of a duty owed by an innkeeper to his guest," Davidson v. Madison Corp., 257 N. Y. 120, 125, 177 N. E. 393, 394 (1931) allowing therefore for a possible acceptance in the future of the more general view that the innkeeper is liable *as such* and not on special contract grounds.

16. The statute covers "property of a guest delivered to such keeper, his agent or employee. . . ."

of a statute limiting it. It is certain that tradition even of a baggage check is sufficient delivery of the baggage to fix liability where the basis is contract.[17] But it is not decided in New York, whether *any* delivery, either actual or symbolical, for transport *to* the hotel will evoke the application of the innkeeper's special common law liability. Moreover, even in New York, where liability is grounded exclusively on contract, it would seem that the mere turning over of the baggage or the check appears insufficient unless accompanied by a concomitant intent to become a guest.[18] The hotel keeper promises to convey the baggage safely, not only in consideration for the small charge made, but especially in return for the promise to become a guest.[19]

Under this statute it also becomes of importance to determine when property is in transport. It seems obvious that baggage delivered to the innkeeper at a depot for carriage *to* the hotel is in transport from the instant of delivery. But, when property is entrusted to a host in a hotel for transport *from* the hotel, and the property is lost or damaged while still within the inn, is the property in transport or is it regarded merely as baggage in the custody of the hotel keeper? A different liability attaches depending on the category in which this property is placed. The terminology of the statute would appear to disclose an intent to characterize as *in transport* all property delivered *for transport*.[20]

While referring to "property of a guest" the statute could hardly be construed to be limited to property "owned" by the guest. It would rather seem to extend to property delivered by the prospective guest to the innkeeper whether this was owned by him or another.[21] The law gives little protection to an innkeeper, even where the suing party is not the owner of the goods but merely their possessor.[22]

17. Davidson v. Madison Corp., 257 N. Y. 120, 177 N. E. 393 (1931).

18. Transferring for a mere monetary compensation is the business of the common carrier. The innkeeper, in transporting baggage, is performing a service as innkeeper. His main concern is to get the patronage of the traveler, so that a promise by the traveler to become a guest is the thing sought.

19. Whatever delivery will be demanded by the courts, the keeper shall be bound if this is made to an employee who, even though lacking authority to accept, has been given the appearance of authority. Keith v. Atkinson, 48 Colo. 480, 111 Pac. 55 (1910).

20. Suppose a trunk of clothing is delivered to the innkeeper for transport from the hotel, and its value is not declared by the guest. In the event of loss through no fault of the innkeeper, if the property is regarded as in transport, the guest would be limited to a maximum recovery of $250.00 according to N. Y. General Business Law § 203(a); whereas, if the property is classified as not in transport, but in the special custody of the innkeeper, the guest is limited to a maximum recovery of $100.00, pursuant to N. Y. General Business Law § 201.

21. With reference to property *infra hospitium*, it has long been said that the innkeeper is liable for its loss or damage even though the guest was not the owner. See Robins & Co. v. Gray, 2 Q. B. 506, 507 (1895). In the field of carriers, the consignor is generally given a right of action for damage to goods in transport, even though he was not the owner but a mere agent or bailee. Southern Ry. Co. v. Brewster, 9 Ala. App. 597, 63 So. 790 (1913); Southern Ry. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333 (1907); see Litzenberg v. Cole, 166 App. Div. 134, 136, 151 N. Y. Supp. 687, 688 (1st Dep't 1915).

22. Whether one in wrongful possession of goods could recover damages for their loss or injury is problematical. It is vigorously argued that recovery should be denied, especially where the party causing the injury is ready to compensate the true owner. HARPER, LAW OF TORTS (1933) 57, n. 55. Such a party would, it seems, be a better custodian of the funds and should be permitted to hold them for the true owner.

This statute does not extend to goods entrusted to the host's care pending further instructions. If the guest continues in the capacity of guest, the innkeeper is held accountable for the goods according to the ordinary rules relating to property within the inn.[23] If the guest severs the relationship, the host's severe liability remains unchanged for a reasonable time,[24] after which the innkeeper holds the goods as an ordinary bailee.[25]

To avail himself of the protection of this statute, the innkeeper must conform to the usual provision in limiting legislation of this kind, that he post a copy of the law in a public and conspicuous place.[26] Failure to do this will remit him to the liability borne under the common law.[27] The real purport of this provision is that the guest be informed of the contents of the law. It would seem that an actual personal notice to a guest of the terms of the law is equivalent to the constructive notice provided by the statute, and entitles the hotel keeper to the benefits of the law.[28]

Sound policy is enunciated in this statute. It is in line with earlier enactments reasonably curtailing the severe liability of innkeepers. Yet the residual liability amply and fairly protects the interests of guests. The difficulties of interpretation in such terms as "property," "delivery," and "in transport" which must await the decision of the courts, may be readily resolved by judicial action.

HUSBAND AND WIFE—RIGHT OF ACTION FOR TORTS.—By the enactment of Chapter 669 of the Laws of 1937,[1] one of the last barriers to the emancipation of a married woman from the control of her husband was removed.[2] Under the common law, a husband could inflict bodily injuries upon his wife, or destroy her property and yet have complete immunity against any claim on her part for redress for the in-

23. N. Y. GENERAL BUSINESS LAW (1923) § 200 (1924) § 201.

24. Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524 (1870); Maxwell v. Gerard, 84 Hun 537, 32 N. Y. Supp. 849 (1895); BEALE, INNKEEPERS AND HOTELS (1906) § 234.

25. Wear v. Gleason, 52 Ark. 364, 12 S. W. 756 (1890); Wintermute v. Clarke, 7 N. Y. Super. Ct. 242 (1851); Hoffman v. Roessle, 39 Misc. 787, 81 N. Y. Supp. 291 (Sup. Ct. 1902).

26. N. Y. GENERAL BUSINESS LAW (1937) § 203(b). See Note 1, supra.

27. Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112 (1883). Thus, without the protection of this statute, the innkeeper would be liable for the full value of the article entrusted to him.

28. Purvis v. Coleman, 21 N. Y. 111 (1860); see Herter v. Dwyer, 129 N. Y. Supp. 505, 506 (Sup. Ct. 1911). *Contra:* Batterson v. Vogel, 8 Mo. App. 24, where statute required that notice be posted in bedroom, innkeeper was denied its protection for having failed so to post it, even though in fact the guest had received notice and had read a copy of the law.

1. This amendment adds to the N. Y. DOM. REL. LAW (1909) § 57 the following sentence:

"A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven of the General Construction Law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for a wrongful or tortious acts resulting in any personal injury to her husband or to his property, as if they were unmarried."

2. Some restrictions necessarily remain. For example, the husband's domicile generally determines the domicile of the wife. See Dean v. Dean, 241 N. Y. 240, 243, 149 N. E. 844, 845 (1925).

juries inflicted or for compensation for the property destroyed.[3] Marriage at common law merged the person and rights of a woman with her husband. They were under his absolute control.[4] The husband was liable to third parties for all the frauds and injuries of his wife whether committed before or during coverture. If committed under his coercion, he and he alone was liable;[5] otherwise both were liable.[6] A married woman substantively had the capacity to commit most torts, but her responsibility in a sense was suspended during coverture and the husband was subjected. The husband and wife were one.[7] In the case of torts committed against a married woman, by a third party, her legal personality was substantially recognized, and insofar as the tortious act caused injury to a legally recognized person it was a chose in action of the woman's. Of course the married woman had no capacity to sue or be sued, alone, in her own name, but must join or be joined with her husband. And judgment was rendered in favor of the husband or against both husband and wife.[8] It also was true that she could make no contracts on her own behalf and her promises were unenforceable against her.[9]

Judicial interpretation and indirect legislation has gradually eliminated this early subjection of the married woman. Generally the incapacity which attached to the marital state of a woman to own property, and the inability on her part to make contracts and to sue or be sued, remained unchanged, in theory at least, until 1871, the time of the enactment of the enabling statutes.[10] The primary object of the enabling acts was to free a married woman's property from the control of her husband, and today there is no doubt that a wife can assert property rights against her husband.[11]

The controversial field has been the subject of torts affecting the person. The enabling statutes of the various states have differed in terms and have been construed in the light of what each jurisdiction chose to declare was the legislative intent. There are some statutes which directly forbid tort actions between the

3. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909) (assault); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N. E. 146 (1929) (negligence); Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534 (1925) (negligence); Schultz v. Schultz, 89 N. Y. 664 (1882) (assault); Webster v. Webster, [1916] 1 K. B. 714 (imprisonment and malicious prosecution).

4. SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) § 627 *et seq.*

5. Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270 (1876); Dohorty v. Madgett, 58 Vt. 323, 2 Atl. 115 (1885).

6. Casin v. Delany, 38 N. Y. 178 (1868); McKeown v. Johnson, 1 McCord 578, 10 Am. Dec. 698 (S. C. 1882).

7. White v. Wager, 25 N. Y. 328 (1862); *In re* Bramberry, 156 Pa. St. 628, 27 Atl. 405 (1893).

8. McElfresh v. Kirkendall *et al.*, 36 Iowa 224 (1873); Little v. Garner, 5 N. H. 415, 22 Am. Dec. 468 (1831); Horton v. Payne, 27 How. Pr. 374 (N. Y. 1864); Muser v. Lewes, 50 N. Y. Super. Ct. 431 (1884). The only time the common law disregarded the unity concept was in the case of crimes by one spouse against the person of the other. See Blackbrun J. in Phillips v. Barnet, 1 Q. B. D. 436 (1876); (1924) 37 HARV. L. REV. 616; (1922) 20 MICH. L. REV. 547; (1922) 31 YALE L. J. 337.

9. Pillow v. Sentenelle, 49 Ark. 430, 5 S. W. 783 (1887).

10. For a complete discussion of the historical development of the law of married women with citation of important cases see Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285 (1906).

11. For a complete account of property rights at common law see MCCURDY, CASES ON PERSONS AND DOMESTIC RELATIONS (1927) §§ 507-519 and cases cited therein. (1930) 43 HARV. L. REV. 1030.

husband and wife.[12] Where, however, the statute is silent, one jurisdiction has interpreted the legislative intent to give a right to a married woman to sue her husband in contract as also inclusive of the right to sue him in tort.[13] In another jurisdiction upon the theory that a wrong to a person is a property right and that these statutes gave her a separate estate in property, a married woman has been permitted to maintain suits against her husband for wrongs committed against her with the same force and effect as she is entitled to maintain any property action against him.[14] While many interpretations have been directed with the thought that the legislative and constitutional changes were intended to strike from women the shackles of the common law rules and to make them separate legal entities,[15] at the same time the principle of interpretation that statutes in derogation of the common law should be strictly construed, has on many occasions defeated the intent and purpose of emancipation by denying to the woman a right of action.[16] Finally, other jurisdictions claim that it is only necessary to determine whether such an action is maintainable. The character of the parties is no longer important.[17]

The courts in New York under the enabling acts permitted actions at law between spouses for property torts[18] and for trover,[19] but when it came to the question of personal torts, the courts refused to allow the action holding that a husband might libel or slander his wife, prosecute her, assault her, or falsely imprison her without subjection of himself to her for damages. He was not within his legal rights in thus injuring her, the courts admitted, but the legislature had failed specifically to include the husband in the general grant to her of the right to sue for injuries to her person.[20]

The amendment that has been enacted by the last legislature has been under consideration by that body for some years past.[21] With the growth of insurance

12. LA. CODE PRAC. (Dart. 1922) art. 105; N. J. COMP. STAT. (1911) tit. 124, § 14; PA. STAT. ANN. (Purdon, 1930) tit. 48, § 111.

13. Fitzpatrick v. Owens, 124 Ark. 167, 187 S. W. 460 (1916) (the statute does not specifically name the husband as one who can be sued on the contract).

14. Crowell v. Crowell, 180 N. C. 516, 105 S. E. 207 (1916).

15. Graves v. Peck, 4 Neb. 745, 209 N. W. 617 (1916) (a married woman is a separate legal entity); Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022 (1914) (the courts there holding that the general statute, declaring that a woman shall retain the same legal existence and legal personality after marriage as before and shall receive the same protection of all rights as a woman, which her husband does as a man, gave her the right to sue him for tort).

16. Thompson v. Thompson, 218 U. S. 611 (1897); see, however, the dissenting opinion of Harlan, J., *id.* at 619. In those cases which interpret the statute and deny the wife the right to sue her husband for personal torts, a vigorous dissent from the views of the majority almost invariably appears.

17. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914) (the court held that the right to contract with her husband and to sue him for breach of contract or for tort, is not given the wife by statute. These are rights which belonged to her before marriage and are not now lost to her by the fact of marriage although they would have been at common law); Gilman v. Gilman, 78 N. H. 4, 95 Atl. 657 (1915) (the legislative intent in enacting the statute was to change the legal status of husband and wife).

18. Minier v. Minier, 4 Lans. 421 (N. Y. 1870) (holding a wife had a cause of action in ejectment against her husband under the statute).

19. Berdell v. Berdell, 19 Hun 358 (N. Y. 1871) (the court upheld an action of trover brought by a husband against his wife).

20. See cases cited note 3, *supra*. The ground in these decisions was that statutes in derogation of the common law must be strictly construed.

there has been constant revelation by legislative investigations of frauds committed against insurance carriers. The fact that giving the right to a married woman to sue her husband for personal torts would add yet another opportunity for fraud in the automotive field alone, had been the stumbling block that impeded the progress of this legislation. This difficulty, however, has been met and overcome. As part of the same chapter that confers upon the married woman the right to sue her husband, there have been included amendments to the insurance law[22] and the traffic and vehicular acts[23] which will accord protection to the insurance companies against any possible collusion between husband and wife to defraud them.

The struggle to obtain a proper standing before the courts for a married woman has been long indeed.[24] It may be that in the past, the protection that is now accorded to her was not as necessary as it is today, but with the growth of industrial progress and the attendant destruction of the social barriers and distinctions of other days, it has become necessary that the person of a married woman be held sacred before the courts. The instant statute is in accord with the established trend.

RIGHTS AND LIABILITIES OF UNDISCLOSED PRINCIPAL—SEALED INSTRUMENT—Within recent years, the rule as to the rights and liabilities of an undisclosed principal upon an instrument under seal has become the target of juristic[1] and statutory[2] attack. By amendment,[3] New York has now abrogated the common law rule that an un-

21. First introduced in 1929 in the New York State Assembly by Abbott Low Moffat, present Chairman of the Ways and Means Committee.

22. Chapter 669 of the Laws of 1937, adding Subdivision 3a of § 109 of the Insurance Law. It provides that policies must be extended in writing to include the insured's family, before courts will allow recovery on the basis of the new right granted the wife. It was intended that this subdivision should be construed entirely independently of any other section of the Insurance Law. The amendment of § 57, extending the right of action by a married woman against her husband, added a new liability which, at least, insofar as tort actions are concerned was not covered by any insurance policy in force before the time of the amendment since such right of action did not exist. When the legislation provided the right of action it was felt essential not to extend coverage of policies beyond that which was intended when written.

23. Chapter 669 of the Laws of 1937, amending § 59 of the Vehicle and Traffic Law.

24. For a complete discussion of reasons for opposing this amendment see Comment (1935) 4 FORDHAM L. REV. 475-478.

1. Lagumis v. Gerard, 116 Misc. 471, 190 N. Y. Supp. 207 (Sup. Ct. 1921); see Harris v. Shorall, 230 N. Y. 343, 348, 349, 130 N. E. 572, 573, 574 (1921); Gaynor, J., dissenting in Stanton v. Granger, 125 App. Div. 174, 179, 109 N. Y. Supp. 134, 138 (2d Dep't 1908); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925) 155; Crane, *The Magic of the Private Seal* (1915) 15 COL. L. REV. 24; Comment (1936) 5 FORDHAM L. REV. 144, 148.

2. MD. ANN. CODE (Bagby, 1924) art. 75, § 15; N. Y. CIV. PRAC. ACT (1937) § 342, subdiv. 2.

3. N. Y. CIV. PRAC. ACT (1937) § 342 reads:

"1. A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of consideration. A written instrument, hereafter executed, which changes or modifies or which discharges in whole or in part a sealed instrument shall not be deemed invalid or ineffectual because of the absence of a seal thereon. A sealed instrument may not be changed, modified, or discharged by an executory agreement unless such agreement is in writing and signed by the party against whom it is

disclosed principal can neither sue nor be sued upon a sealed writing.[4] The purpose of such legislation is the elimination of the inequalities resulting from this unjust and anomalous doctrine.

Previously, the law on this point had been unsettled. Relying on the dicta in *Briggs v. Partridge*[5] and in *Harris v. Shorall*,[6] courts of equity disregarded the presence of the seal and granted specific performance for and against the undisclosed principal.[7] In several instances[8] recovery was permitted against the undisclosed principal in simple contract by declaring that the use of the seal on the instrument was superfluous and not essential to the validity of the agreement. But despite extra-judicial utterances to the contrary,[9] the Court of Appeals in *Crowley v. Lewis*[10] expressly held that a contract under seal may not be enforced by or against persons who are not parties to the agreement whether the seal is surplusage or not, and further, that this common law doctrine was subject to change only by legislative fiat. But the court intimated that the undisclosed principal might be held liable in quasi-contract where he has received the benefits of the agreement.[11] This dictum later met with disapproval[12] on the ground that to permit such action would be a circumvention of the established rule. But this rule is now changed by the amendments abolishing the distinction between sealed and unsealed instruments as to the rights and liabilities of the undisclosed principal.

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sought to enforce the change, modification or discharge. A sealed instrument so changed or modified shall continue to be construed as an instrument under seal.

"2. Subject to the provisions of subdivision one hereof, and to the provisions of section forty-seven of the civil practice act, the rights and liabilities of an undisclosed principal under any sealed instrument hereafter executed shall be the same as if the instrument had not been sealed."

4. C. F. Starita Co., Inc. v. Compagnie Havraise Peninsulaire, 52 F. (2d) 58 (C. C. A. 2d, 1931); Van Dyke v. Van Dyke, 123 Ga. 686, 51 S. E. 582 (1905); Case v. Case, 203 N. Y. 263, 96 N. E. 440 (1911); Crowley v. Lewis, 239 N. Y. 264, 146 N. E. 374 (1925); 2 MECHEM, AGENCY (2d ed. 1914) 1734; RESTATEMENT, AGENCY (1933) §§ 191, 303a.

5. 64 N. Y. 357, 364 (1876).

6. 230 N. Y. 343, 348-9, 130 N. E. 572, 573-4 (1921).

7. Lagumis v. Gerard, 116 Misc. 471, 190 N. Y. Supp. 207 (Sup. Ct. 1921) (specific performance granted in favor of the undisclosed principal); Van Ingen v. Belmont, 121 Misc. 109, 200 N. Y. Supp. 847 (Sup. Ct. 1923) (specific performance granted against the undisclosed principal); Diamond v. Talbot, 123 Misc. 339, 205 N. Y. Supp. 209 (Sup. Ct. 1924) (specific performance granted against the undisclosed principal); *cf.* Klein v. Mechanics & Traders Bk., 145 App. Div. 615, 130 N. Y. Supp. 436 (2d. Dep't 1911) (no relief in equity because the sealed contract was made to evade the law).

8. Campbell v. Poland Spring Co., 196 App. Div. 331, 187 N. Y. Supp. 643 (1st Dep't 1921) (action on a lease under seal); Ressler v. Samphimoor Holding Corp., 201 App. Div. 344, 194 N. Y. Supp. 363 (1st Dep't 1922) (action for rescission against dummy corporation); *cf.* O'Grady v. Howe & Rogers Co., 166 App. Div. 552, 152 N. Y. Supp. 79 (4th Dep't 1915) (the contract was not under seal although the preliminary option was under seal).

9. CARDOZO, *loc. cit. supra* note 1; Crane, *supra* note 1.

10. 239 N. Y. 264, 146 N. E. 374 (1925) (action for specific performance).

11. See 239 N. Y. 264, 265, 146 N. E. 374 (1925); *cf.* Klein v. Mechanics & Traders Bk., 145 App. Div. 615, 130 N. Y. Supp. 436 (2d Dep't 1911) (no action lies against the undisclosed principal for benefits conferred).

12. Owners' Holding Corp. v. Kissling, 128 Misc. 14, 217 N. Y. Supp. 189 (Sup. Ct. 1926). It would seem that the court failed to distinguish between a suit on a sealed instrument and one in quasi-contract.

The effects of such revision would seem to be: (1) that an action may be brought by or against the undisclosed principal; (2) that parole evidence is admissible in order to determine the identity of the principal; and (3) that the controverted view as to the right of action in quasi-contract against the undisclosed principal becomes unimportant, since he can now be held liable directly on the contract.

In jurisdictions where the common law still prevails,[13] a dissatisfied judiciary has permitted recovery for and against the undisclosed principal by disregarding the seal[14] or by allowing suit to be brought in quasi-contract.[15] In some states[16] statutes have been enacted declaring that the distinction between sealed and unsealed writings are abolished and that the addition of a seal shall not affect the character or validity of the instrument, and thus an action on the contract may be brought.[17] Maryland, by statute,[18] merely stated that any person entitled to sue or be sued upon a sealed instrument shall have such right notwithstanding the presence of the seal.

By amendment to Section 342 of the Civil Practice Act, the New York statute declared that the rights and liabilities of an undisclosed principal under any sealed instrument shall be the same as if the instrument had not been sealed.[19] But this

13. Badger Silver Mining Co. v. Drake, 88 Fed. 48 (C. C. A. 5th, 1898); Gibson v. Victor Talking Machine Co., 232 Fed. 225 (D. C. N. J. 1916) (parole evidence is inadmissible when the contract is under seal); Lenney v. Finley, 118 Ga. 718, 45 S. E. 593 (1903); Walsh v. Murphy, 167 Ill. 228, 47 N. E. 354 (1897); Seretto v. Schell, 247 Mass. 173, 141 N. E. 871 (1923) (action for specific performance); Borcherling v. Katz, 37 N. J. Eq. 150 (1883) (action in equity on sealed lease).

14. Crane v. U. S., 55 F. (2d) 734 (1932) (action on bond under seal executed in N. Y. where the common law prevailed); Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 Atl. 253 (1893) (case decided before the passage of the statute modifying the use of the seal); Harris v. McKay, 138 Va. 448, 122 S. E. 137 (1924); Kirschbon v. Bonzel, 67 Wis. 178, 29 N. W. 907 (1886).

15. Donner v. Whitecotton, 201 Mo. App. 443, 212 S. W. 378 (1919) (although a statute had abolished the use of the seal, the court held that an undisclosed principal could not be held liable on the deed, but an action could be brought in quasi-contract); *cf.* Ottman v. Nixon-Nirdlinger, 301 Pa. 234, 151 Atl. 879 (1930).

WILLISTON, CONTRACTS (rev. ed. 1936) § 297 criticizes this view on the ground that it is difficult to find also an informal contract upon which to hold the undisclosed principal liable when there is only the formal sealed agreement of the agent. But where the undisclosed principal has received the benefits of the agreement through his agent, why not impose liability upon him under the theory of unjust enrichment?

16. For a full compilation of statutes see 1 WILLISTON, *op. cit. supra* note 15, at § 218 n.

17. Pittsburgh Terminal Corp. v. Bennett, 73 F. (2d) 387 (C. C. A. 3d, 1934); Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128 (1903) (parole evidence is admissible); Efta v. Swanson, 115 Minn. 373, 132 N. W. 335 (1911) (the undisclosed principal was held liable for breach of covenants in deed); Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251 (1912); McLeod v. Morrison, 66 Wash. 683, 120 Pac. 528 (1912) (action for specific performance). *Contra:* Ladwig v. Dean, 120 Kan. 636, 284 Pac. 369 (1930) (no action can be maintained against the undisclosed principal); Sanger v. Warren, 91 Tex. 472, 44 S. W. 477 (1898) (although statute abolished the use of the seal, common law relating to the undisclosed principal still prevails). But see Donner v. Whitecotton, 201 Mo. App. 443, 212 S. W. 378 (1919).

18. MD. ANN. CODE (Bagby, 1924) art. 75, § 15; *cf.* WYO. REV. STAT. (Courtright, 1931) §§ 97-122, stating that the use of the seal has been abolished, and further that there shall be no difference in evidence between sealed and unsealed writings.

19. N. Y. CIV. PRAC. ACT (1936) § 342, subdiv. 2.

legislative enactment presented two difficulties: (1) Could the undisclosed principal enforce an oral executory modification of a sealed instrument? and (2) Was the undisclosed principal subject to the six-year statute of limitations relating to simple contracts rather than to the twenty-year statute relating to specialties? In order to clarify these ambiguities, subdivision 2 of Section 342 of the Civil Practice Act was amended[20] making it subject to the already existing provisions regarding the modification of sealed instruments[21] and to the provisions of Section 47 of the Civil Practice Act.[22] Thus, one remaining effect of the seal is that an action may be brought by or against the undisclosed principal within twenty years. But other difficulties may still remain: for example, will an agent require authority under seal to execute sealed instruments? It seems that since this is a specific statute in derogation of the common law, it should be strictly construed and not held to affect the rules as to the principal-agent relationship, requiring such authority to be under seal.[23] Probably, if such change is to be brought about, it should be accomplished by precise legislative amendment, after proper consideration by the Law Revision Commission.

The question remains: May the parties desiring to do so still escape the effect of the terms of the statute rendering the undisclosed principal liable? In situations where it is desirable to limit liability,[24] several methods may still be used to permit an individual to escape personal liability. The principal can choose the more expensive method of personal incorporation or, he may still escape liability by the use of a negotiable instrument[25] issued by and bearing only the name of his agent. The suggestion[26] has also been made that a carefully worded clause may be included in the contract limiting liability to those signing the agreement and stating that the statutory rule rendering the undisclosed principal liable does not apply. Nevertheless, it is submitted that this enactment has eradicated an antiquated technicality behind which the undisclosed principal could plead freedom from legal liability while reaping the fruits of the agreement.[27]

20. RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE Legis. Doc. (1937) 65 (H).

21. The provisions of the statute relating to consideration and the modification of sealed instruments have been ably treated in (1936) 5 FORDHAM L. REV. 144; (1937) 37 COL. L. REV. 674.

22. N. Y. CIV. PRAC. ACT (1937) § 47 reads: "An action upon a sealed instrument must be commenced within 20 years after the cause of action has accrued."

23. Hanford v. McNair, 9 Wend. 54 (N. Y. 1832); Worrall v. Munn, 5 N. Y. 229 (1851); RESTATEMENT, AGENCY (1934) § 28.

24. See Freidus, *A New Problem in Mortgage Practice,* N. Y. L. J., July 6, 7, 1936 p. 50, 64, col. 1; Fribourg, *Does It Make For Complication?* N. Y. Sun, Feb. 27, 1937, p. 48, col. 1.

25. This statute will not change the related rule in N. Y. NEGOTIABLE INSTRUMENTS LAW (1909) §§ 37-39 which excludes from liability a person whose name does not appear on the instrument.

26. See Fribourg, *supra* note 24.

27. Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550 (1893) (agent brought action on bond under seal for the benefit of the undisclosed principal).