

## DIRECTING A VERDICT FOR PLAINTIFF IN RES IPSA LOQUITUR CASES

The doctrine of *res ipsa loquitur* has been greatly expanded, and today constitutes an important branch of the law of torts and evidence.<sup>1</sup> In the course of its development, however, many difficult problems have arisen,<sup>2</sup> and in their solution the authorities have not agreed.<sup>3</sup> One of these controversial subjects is this: assuming that the plaintiff has established his case as falling within the doctrine, i. e., where it has been shown that (1) the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence, (2) the defendant owned, operated, maintained, or was responsible for the management of the thing doing the damage, and (3) the defendant possessed superior knowledge or means of information as to the cause of the injury,<sup>4</sup> should the court, under any circumstances, direct a verdict in favor of the plaintiff?

### I.

In some jurisdictions, the courts have held that in a *res ipsa loquitur* case the burden of proof, i. e., the burden of establishing to the satisfaction of the jury by a preponderance of the credible evidence that there had been no negligence whatever, and that the damage or injury had been occasioned by an inevitable casualty, or some other cause for which the defendant was not responsible, was shifted upon the defendant.<sup>5</sup> This view is inaccurate, because the "risk of non-persuasion" of the jury never shifts.<sup>6</sup> No "fixed rule of law" can be said to shift,<sup>7</sup> and it is an

1. See for problem in general, note, 56 A. L. R. 1021 (1928); note, 53 A. L. R. 1494 (1928); note, 23 A. L. R. 484 (1923); note, 22 A. L. R. 1471 (1923); note, 13 L. R. A. (N. S.) 601 (1908); comment, 13 Geo. L. J. 373 (1925); comment, 7 N. Y. U. L. Q. Rev. 415 (1929); comment, 54 N. J. L. J. 349 (1931).

2. Such issues as to when the rule will apply, whether a plaintiff who has pleaded specific acts of negligence may rely on the rule, whether the doctrine applies to the master-servant relationship, etc.

3. *Supra*, note 1.

4. 5 Wigmore, *On Evidence* (2d ed. 1923) sec. 2509, l. c. 498; *Kaemmerling v. Athletic Mining & Smelting Co.*, 2 F. (2d) 574 (C. C. A. 8, 1924).

5. *Price v. Met. St. Ry. Co.*, 220 Mo. 435, 119 S. W. 932 (1909); *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799 (1878), overruled by *McCloskey v. Koplar*, 329 Mo. 527, 46 S. W. (2d) 557 (1932); *Meier v. Penn. R. R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581 (1870); *Feitl v. Chicago City R. R. Co.*, 113 Ill. App. 381 (1899); *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 102 N. W. 258 (1906); *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.) 836 (1905).

6. 5 Wigmore, *On Evidence* (2d ed. 1923) sec. 2489, l. c. 448; *McCloskey v. Koplar*, *supra*, note 5.

7. *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315 (1908); *Terryberry v. Woods*, 69 Vt. 94, 37 Atl. 246 (1896); Wigmore, *On Evidence* (2d ed. 1923) sec. 2489.

elementary principle that the burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant.<sup>8</sup>

When the defendant has the burden of proof, and then refuses to assume the duty of affirmatively proving his non-liability by coming forward with explaining evidence, it becomes the duty of the court to direct a verdict in favor of the plaintiff.<sup>9</sup>

## II.

The vast majority of the cases hold that the burden of proof in a *res ipsa loquitur* case remains with the plaintiff as in any other cause in which an affirmative issue is pleaded.<sup>10</sup> If the defendant then produces evidence of his due care and proper precaution, the court should instruct the jury that if after considering such explanation, on the whole case and on all the issues as to negligence, injury, and damage, the evidence still preponderates in favor of the plaintiff, he is entitled to recover, otherwise not.<sup>11</sup>

When the defendant, however, refuses to introduce any exculpatory evidence, some courts speak of the doctrine as creating a presumption; others give it the dignity of a permissible inference, making no distinction between this situation and when the defendant comes forward with evidence.<sup>12</sup>

The difficulty has arisen in part from a confusion of terms and a failure to draw the proper distinction between them.<sup>13</sup> A presumption is a conclusion which the law deduces from a given state of facts.<sup>14</sup> It has a technical force or weight,<sup>15</sup> and the jury, in the absence of evidence to the contrary is compelled to reach

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8. Walker v. Carpenter, 144 N. C. 674, 57 S. E. 461 (1907); McCall v. Alexander, 81 S. C. 131, 61 S. E. 1106 (1908); Bank v. Kirby, 175 S. W. 926 (1915).

9. As said in Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1, 8, 117 Pac. 596 (1911), "The question whether the burden of proof rests with a plaintiff or defendant may be determined by ascertaining which party without evidence, will be compelled to submit to an adverse judgment on the pleadings"; for other cases, see Evidence, Dec. Dig. key no. 90.

10. 24 R. C. L. sec. 161; note, 16 L. R. A. (N. S.) 527 (1908); note, 59 A. L. R. 486 (1929); note, L. R. A. 1916 A, 930.

11. When the defendant introduces sufficient evidence to take the case to the jury, the problem is relatively simple; see for example, Lyles v. Bran-non Carbonating Co., 140 N. C. 25, 52 S. E. 234 (1905); Ryan v. St. Paul Union Depot Co., 168 Minn. 287, 210 N. W. 32 (1926).

12. See for some general discussion, note 53 A. L. R. 1494 (1928).

13. Supra, note 12, l. c. 1494-5.

14. Thomas v. Electric R. R. Co., 169 Cal. 658, 147 Pac. 972 (1915); Ensel v. Lumber Ins. Co. of New York, 88 Ohio St. 269, 102 N. E. 955 (1913).

15. McCagg v. Heacock, 34 Ill. 476, 85 Am. Dec. 327 (1864).

that conclusion.<sup>16</sup> If the opponent offers evidence to the contrary, (sufficient to satisfy the judges requirement of some evidence) the presumption disappears as a rule of law.<sup>17</sup>

An inference, however, is a deduction which the jury makes from the facts proved, without an express direction of law to that effect.<sup>18</sup> It is nothing more than a permissible deduction from the evidence, and the jury is at liberty to find the ultimate fact one way or the other as they are impressed by the testimony.<sup>19</sup>

The leading case in support of the rule which limits the force of the doctrine to a permissible inference is *Sweeney v. Erving*,<sup>20</sup> in which Justice Pitney said:

“*Res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient, that they call for explanation or rebuttal, not necessarily that they require it, that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.”

The rule as here applied, strictly speaking, merely takes the place of evidence as affecting the burden of proceeding with the case, and is not itself evidence.<sup>21</sup> The plaintiff, having at the outset both the burden of proof and the burden of evidence,<sup>22</sup> has by establishing a *res ipsa loquitur* case, satisfied the latter duty, and has taken his case past the judge and to the jury.<sup>23</sup> The

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16. *Cogdell v. R. R. Co.*, 132 N. C. 852, 854, 44 S. E. 618 (1903); as Mansfield said, “It stands good till answered, and if not answered at all, it thereby becomes conclusive.” *Rex v. Almon* (5 Burr. 2686, 1770), 98 Eng. Rep. 411.

17. 5 Wigmore, *On Evidence* (2d ed. 1923) sec. 2490.

18. *Keithley v. Hettinger*, 133 Minn. 36, 157 N. W. 891 (1916); *supra*, note 17.

19. *Williamson v. Salt Lake & O. R. R. Co.*, 52 Utah 84, 172 Pac. 680 (1918), and cases cited.

20. 228 U. S. 233, 57 L. ed. 815, 33 S. Ct. 416 (1913).

21. *Ryan v. St. Paul Union Depot Co.*, 168 Minn. 287, 288, 219 N. W. 32 (1926).

22. *Harke v. Haase*, 75 S. W. (2d) 1003 (Mo. 1934).

23. Wigmore defines the burden of evidence as “the duty of producing evidence to satisfy the judge.” 5 Wigmore, *On Evidence* (2d. ed. 1923) sec. 2489 (b); Ragland's concurring opinion in *McClosky v. Kopljar*, *supra*, note 5, l. c. 564.

defendant, therefore, is not required, as a matter of law, to produce an explanation, and may decline to offer evidence at the peril of the jury inferring negligence on his part.<sup>24</sup>

The minority view is that the proof of the accident and the surrounding circumstances give rise to a presumption of negligence, and impose upon the defendant the duty of introducing some explanatory evidence.<sup>25</sup> If the defendant fails to come forward with evidence, it becomes the duty of the court to direct a verdict in favor of the plaintiff.<sup>26</sup> The only question for the jury then to decide is the amount of damages to be awarded.<sup>27</sup> Such presumption, however, need not be overcome by a preponderance of the evidence to avoid a directed verdict, but merely requires some proof, which will, at the least, have a tendency either to rebut or meet the presumption thus raised.<sup>28</sup>

This presumptive theory has been followed in some jurisdictions in certain types of *res ipsa loquitur* cases and not in others.<sup>29</sup> In Iowa the rule is that upon proof that a person has been injured while a passenger on a train and where the attending circumstances indicate that the injury would not likely have occurred had the carrier exercised the care exacted by law, negli-

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24. *White v. Hines*, 182 N. C. 275, 109 S. E. 31 (1921); *Zoccolillo v. Oregon R. R. Co.*, 53 Utah 39, 177 Pac. 201 (1918).

25. *Colorado Springs & Interurban R. R. Co. v. Reese*, 69 Colo. 1, 169 Pac. 572 (1917); *Fitch v. Mason City & Co. L. Traction Co.*, 124 Iowa 665, 100 N. W. 618 (1904); *Alabama & V. R. R. Co. v. Groome*, 97 Miss. 201, 52 So. 703 (1910).

26. *Halterman v. Hansard*, 4 Ohio App. 268, 22 Ohio C. C. N. S. 443 (1915); *Levine v. Brooklyn, Q. C. & Suburban R. R. Co.*, 119 N. Y. Supp. 315 (1909).

27. *Moglia v. Nassau Electric R. R. Co.*, 111 N. Y. Supp. 70 (1908).

28. In *Plumb v. Richmond Light & R. R. Co.*, 233 N. Y. 285, 135 N. E. 504 (1922), the court said, "Shifting the burden of explanation or of going on with the case does not shift the burden of proof"; supra, note 12, l. c. 1510 where the effect of the presumptive theory is discussed it is said, "the burden of establishing the ultimate fact of negligence abides with the plaintiff to the end of the case; the sole function of the doctrine is to raise a prima facie presumption of negligence from a given state of facts, which will become conclusive if not rebutted by opposing evidence."

29. In *Glowacke v. Northwestern Ohio R. R. & Power Co.*, 116 Ohio St. 451, 157 N. E. 21, 53 L. R. A. 1486 (1927), which accords with the view that *res ipsa loquitur* is a mere permissible inference, the court concedes that in carrier and passenger cases where the rule applies, the carrier would be required to offer evidence to rebut the inference raised against him. The basis for this is largely explained by the fact that when the court departs from their general ruling and hold in a particular case that the doctrine gives rise to a presumption of negligence, there is a statute which requires the "utmost degree of care" as regards such action, and the court, therefore, is merely attempting to give greater force to the substantive law. Supra, note 12, l. c. 1506-10.

gence on its part is presumed.<sup>30</sup> In some states, this has been made the law by statute.<sup>31</sup> Such was the ruling in a United States Supreme Court case of this nature,<sup>32</sup> although that court strongly favors the theory that ordinarily the doctrine of *res ipsa loquitur* is a mere permissible inference.<sup>33</sup> A similar doctrine has been announced where a wire carrying a charge of electric current high enough to endanger human life becomes out of order, broken, etc., and someone comes in contact therewith and is injured.<sup>34</sup>

In Missouri, a marked change in the *res ipsa loquitur* doctrine took place when the Supreme Court decided the case of *McCloskey v. Kopljar*.<sup>35</sup> The court held that it was improper to instruct the jury that in such a case the burden of proof rested upon the defendant. A long line of previous cases had upheld instructions which tended to bring about this result.<sup>36</sup> The majority of the court discussed the distinction between the burden of proof and the burden of evidence, and the shifting of the burden of evidence from the plaintiff to the defendant and from the defendant to the plaintiff, and so on. They failed, however, to state clearly whether the defendant must, as a matter of law, come forward with evidence in the first instance, or whether a failure to do so would merely warrant the jury in drawing an inference of negligence. Justice Ragland, in his concurring opinion, strongly stressed the latter view as being the proper function of the doctrine.<sup>37</sup>

Subsequent Missouri cases have not been directly faced with the issue of determining whether the doctrine gives rise to a presumption or an inference when the defendant fails to come forward with evidence.<sup>38</sup> In the majority of them, however, there is dicta to the effect that the purpose of the doctrine, under all circumstances, is to take the case past the judge to the jury,

30. *Dorn v. Chicago, R. I. & P. R. R. Co.*, 154 Iowa 140, 134 N. W. 855 (1912).

31. *St. Louis, I. M. & S. R. R. Co. v. Armbrust*, 121 Ark. 35, 181 S. W. 131 (1917).

32. *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458 (1891).

33. *Supra*, note 20, and cases cited.

34. *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810 (1894); *contra*, *Glowacke v. Northwestern Ohio Ry. & Power Co.*, *supra*, note 29.

35. 329 Mo. 527, 46 S. W. (2d) 557 (1932).

36. *Supra*, note 4, and cases cited.

37. *McClosky v. Kopljar*, *supra*, note 35, l. c. 564.

38. That is, where the defendant failed to introduce any evidence, and the plaintiff asked the court to direct a verdict in his favor.

and it is then within the power of the jury to draw the inference.<sup>39</sup>

Such was the language in *Givens v. Spalding Cloak Co.*,<sup>40</sup> where the Court of Appeals said, "There appears to be in the evidence, reasonable foundation for the jury, if it so believes and finds, to draw an inference of negligence. It is not an inference which the law itself draws, but it is an inference of fact which, if properly supported by evidence, the law permits the jury to find if they deem it proper from the evidence before them."

In *Glasco Electric Co. v. Union Electric Light & Power Co.*,<sup>41</sup> the Supreme Court said, "When the doctrine is applicable, it constitutes an exception or qualification to the general rule that negligence is not to be presumed, but must be affirmatively proven, and operates as a substitute for specific proof of negligence so as to make a prima facie case, which, if unexplained carries the question of negligence to the jury, and is sufficient to warrant and sustain a finding of negligence on the part of the defendant."

In *Hartnett v. May Department Stores Co.*,<sup>42</sup> however, although the defendant came forward with evidence, the language accepted by the Court of Appeals leaves no doubt that they were considering the doctrine as creating a presumption of negligence. Commissioner Sutton, whose opinion was affirmed by the court, said, "It thus appears that the presumption arising under the *res ipsa loquitur* rule—is not a mere inference such as may be drawn or not by the jury as they see fit, but it is a rebuttable presumption of law."

### III.

Not only would it be more practical, but the maxim of *res ipsa loquitur* should, as a matter of theory and sound reasoning, give rise to a presumption of negligence.

The term presumption finds its place in the expression of legal concepts as the result of common experience with things and men. Observation has taught us that we have like results when we have like causes operating under like conditions. The same experience leads us to conclude that like causes have been operat-

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39. *Harke v. Haase*, 335 Mo. 1104, 75 S. W. (2d) 1001 (1934); *Sakowski v. Baird*, 334 Mo. 951, 69 S. W. (2d) 649 (1933); *Noce v. St. Louis-San Francisco R. R. Co.*, 85 S. W. (2d) 637 (Mo. 1933).

40. 63 S. W. (2d) 819, 826 (Mo. 1933).

41. 61 S. W. (2d) 955, 957 (Mo. 1933).

42. 85 S. W. (2d) 644, 648, (Mo. 1935).

ing if under like conditions we get like results.<sup>43</sup> Presumptions, therefore, have played an important and useful part in reaching expedient and efficient judgments, especially in such situations as, conditions of bodily health or strength,<sup>44</sup> corporate existence,<sup>45</sup> personal<sup>46</sup> or legal status,<sup>47</sup> occupation,<sup>48</sup> the course of business dealings between persons,<sup>49</sup> etc.

In the *res ipsa loquitur* cases, powerful and dangerous agencies, which, if properly constructed and managed do not endanger human life, have in some manner caused serious injuries to an unsuspecting victim.<sup>50</sup> The nature of the accident, plus the fact that the plaintiff is not in a position to know the exact manner in which the defendant has been negligent, constitute the two essential elements upon which presumptions are based, i. e., (1) common experience and inherent probability that a certain fact is true, and (2) a lack of direct evidence by which that contention may be proved.<sup>51</sup>

In a word it may be said, that to make it incumbent upon the defendant in a *res ipsa loquitur* case, as a matter of law, to come forward with sufficient explaining evidence to remove the presumption of negligence which should be raised, would be to substitute a sensible for a mechanistic approach to this problem.

#### IV.

There is another basis upon which some courts will, in any type of case, direct a verdict in favor of the plaintiff. This may arise when the facts and surrounding circumstances disclosed are of such a nature that the court can say that reasonable men would not differ as to the conclusion to be drawn therefrom, and that a verdict in favor of the defendant would be set aside as being against the weight of evidence.<sup>52</sup>

43. O'Dea v. Amodeo, 170 Atl. 486 (1934); see for good discussions on nature and purpose of presumptions, comment, 14 Boston U. L. Rev. 1. c. 442 (1934); note, 22 Mich. L. Rev. 207 (1924); note, 44 Harv. L. Rev. 906 (1931).

44. Powell v. Travelers Protective Ass'n of America, 160 Mo. App. 571, 140 S. W. 939 (1911).

45. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080 (1905).

46. Texas & P. R. R. Co. v. Lacey, 185 F. 225 (C. C. A. 5, 1911).

47. Lehigh Valley Coal Co. v. Washko, 231 F. 42 (C. C. A. 2, 1916).

48. Westinghouse Electric & Mfg. Co. v. Hodge, 181 Mo. App. 232, 167 S. W. 1186 (1914).

49. Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 34 N. E. 289 (1893).

50. Hughes v. Harbor & Suburban Bldg. & Sav. Assn., 115 N. Y. Supp. 320 (1909).

51. Read citations, supra, note 42.

52. Webber v. Axtell, 110 Minn. 52, 124 N. W. 453 (1910); Marshall v. Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807; the court in Keithley v. Het-

The majority view, however, is that the weight to be given to the evidence, under all circumstances, is for the determination of the jury.<sup>53</sup> If the jury returns a verdict contrary to what the court believes the evidence merits, this verdict will be set aside as being against the weight of evidence.<sup>54</sup>

Applying this general rule to the *res ipsa loquitur* situation, its impracticability becomes apparent. Whenever there is a constant recurrence of certain results and certain factors are always in operation, in the absence of direct proof that these factors are present, such results are circumstantial evidence that they have been active.<sup>55</sup> In the *res ipsa loquitur* case, it is essential that the nature of the accident is one which does not ordinarily occur in the absence of negligence.<sup>56</sup> This is circumstantial evidence,<sup>57</sup> which has weight, and the jury, even when the defendant produces an explanation, cannot give it less consideration than the trial judge believes it merits.<sup>58</sup> Therefore, whenever the jury fails to draw an inference of negligence when the defendant fails to come forward with the least evidence, this verdict will be against the weight of evidence, because the circumstantial evidence resulting from the nature of the case, necessarily preponderates over the *nothing* which the defendant has produced. It would then become the duty of the court to set this verdict aside, or to assume an inconsistent position. To allow a case to go to the jury when only one conclusion can be accepted is an idle ceremony.<sup>59</sup> To remedy this particular defect when the defendant refuses to explain, the courts could follow the presumptive theory. To remedy this entire problem, the courts should aban-

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tinger, 133 Minn. 36, 39, 157 N. W. 897 (1916), a *res ipsa loquitur* case, said: "Unless the facts and circumstances disclosed are so full and convincing that the court can say that reasonable minds would not differ as to the conclusion to be drawn therefrom, the question as to the negligence, is for the jury, not the court."

53. *Foster v. Metropolitan Life Ins. Co.*, 233 S. W. 499 (Mo. 1921); *Lafferty v. Kansas City Casualty Co.*, 229 S. W. 750 (Mo. 1921).

54. *Linderman v. Nolan*, 16 Okl. 352, 83 Pac. 796 (1905).

55. Wigmore, *Principles of Judicial Proof* (2d ed. 1931) sec. 6 et seq.

56. *Supra*, note 3.

57. As was said in *Sweeney v. Erving*, *supra* note 20, "that the facts of the occurrence—furnish circumstantial evidence of negligence where direct evidence of it may be lacking."

58. In *Herries v. Bond*, 84 S. W. (2d) 153 (Mo. 1935), the defendant introduced very little evidence, and the plaintiff relied solely on the occurrence of the accident. The jury returned a verdict in favor of the defendant. Thereupon the plaintiff duly filed her motion for a new trial, and the court sustained it on the grounds that the verdict of the jury was against the weight of evidence.

59. *Heath v. Jaquith*, 68 Me. 438 (1878).

don the steadfast rule of not directing a verdict in favor of the party bearing the burden of proof, under any circumstances.

The propriety of the trial court's refusal to direct a verdict in favor of the party bearing the burden of proof, when it realizes in advance that an adverse judgment will be set aside, is unfortunately sanctioned by countless precedents. The grounds on which such refusal seems to be based are (1) that it is within the sole province of the jury to pass upon the evidence, and the credibility of the witnesses, and (2) that when a court sets aside a verdict on the same evidence which it considered when it refused to direct a verdict, it is merely exercising its time-honored privilege of changing its own mind as to the weight that is to be accorded to the evidence.<sup>60</sup>

As to the latter reason, it seems absurd that the court should be prevented from acting correctly in the first instance, and be denied the power to direct a verdict when it realizes a contrary one will be set aside, merely in order to preserve the illogical right of "changing its mind." Nor does it seem that the other justification is basically sound.<sup>61</sup> The court, in considering the evidence before verdict instead of after, is not depriving the jury of any of its duties.<sup>62</sup> It cannot truthfully be said that a person is denied any of those rights assured by trial by jury if he has a verdict directed against him under these circumstances. He may ask for a new trial, or appeal the same as if the case had gone to the jury.<sup>63</sup>

A well known author correctly states the matter thus:<sup>64</sup>

"The basic principle underlying the cases which deny the court the right to instruct the jury in favor of the party having the burden of proof, is, as already indicated, that the jury has the right to disbelieve all the witnesses even though the facts to which they testify are uncontroverted and inherently credible, and the witnesses unimpeached.

60. *Luhrs v. Brooklyn Heights R. R. Co.*, 42 N. Y. Supp. 606 (1897); comment, 10 Harv. L. Rev. 453 (1897); comment, U. of Mo. Law Bull. 22 Law Series 46 (1919).

61. Comment, 9 Central L. J. 102 (1879); note, 11 Mich. L. Rev. 198 (1913); supra, note 58, except the *Luhrs* case.

62. *Inhabitants of Wellington v. Inhabitants of Corinna*, 104 Me. 252, 254, 71 Atl. 889 (1908); in *Morgan v. Durfee*, 69 Mo. 469 (1879), *Sherwood C. J.* observed that it was not usurping the power of the jury for the court to direct a verdict in favor of either party, but rather it was a duty which it should exercise, and which it often shirked. He speaks of this as a power seldom used "owing to a pitiful and powerful weakness in the dorsal region."

63. *Meyer v. Houck*, 85 Iowa 319, 52 N. W. 235 (1892).

64. *Sunderland, Directing a Verdict for the Party Having the Burden of Proof* (1913) 11 Mich. L. Rev. 198, 206.

Why the jury should be given any such license is hard to understand. Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants. They must conduct themselves as sensible and reasonable men. They cannot be suffered to base verdicts on caprice, conjecture, passion or prejudice."

## V.

In summary, it has been shown that a verdict will, in some jurisdictions, be directed for the plaintiff in a *res ipsa loquitur* case in the following situations: (1) Where the burden of proof is shifted upon the defendant, and the defendant refuses to assume it by coming forward with explanatory evidence; (2) Where the doctrine gives rise to a presumption of negligence and the defendant fails to produce sufficient evidence to remove it; and (3) When the evidence is of such a nature that the court can say that a verdict in favor of the defendant must be set aside as being against the weight of evidence. It is submitted that the latter two rulings, although not the prevailing law, are more consistent and in harmony with logic and sound reasoning. These problems, however, are far from settled. Their development has been largely a process of judicial interpretation of past precedents. It is hoped, therefore, that in the course of time, the courts will come to recognize what seems to be the more practical and sensible solutions.

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