mitting the case to the jury. The court cites authorities to prove that the practice of taking verdicts subject to the opinion of the court on points of law reserved was settled at the time the Seventh Amendment was adopted.[6] It refers also to its own approval of such practice. In *Chinoweth v. Haskell* (1830) 3 Pet. 92, the court submitted the case to the jury subject to its opinion on defendant's demurrer to the evidence, and the Supreme Court, holding that the demurrer should have been sustained, entered judgment for defendant. But on the other hand, in *Baylis v. Traveler's Ins. Co.* (1885) 113 U. S. 316, the trial court, after it had submitted the case to the jury subject to its opinion on the sufficiency of plaintiff's evidence, gave judgment for defendant and the Supreme Court held it should have granted a new trial. That case is certainly contra to the present one. The present decision does not go as far as the state decisions in eliminating new trials because whether the appellate court can enter judgment without granting a new trial is made to depend on whether the trial court in the exercise of its discretion reserves the point of law. But hereafter, should counsel make the request there is no reason why the court should deny it; hence the decision is not objectionable on this point. However, in the light of logical analysis it is apparent that the Supreme Court has either reversed its opinion that the right to a verdict on the pleadings is a substantial one, or else it has permitted that right to be denied on exceedingly technical grounds.

R. Y. '36.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR NECESSARIES—ATTORNEY'S FEES IN DIVORCE ACTION.—A sued his wife for divorce. During the suit she made no application for an allowance for attorney's fees, and after its termination her attorneys brought an independent action against the husband to recover for their services as necessaries furnished the wife. *Held* for plaintiff.[1]

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[6] Carleton v. Griffin (1758) 1 Bur. 549, 97 Eng. Rep. 443; Coppendale v. Bridgen (1759) 2 Bur. 814, 97 Eng. Rep. 576; Bird v. Randall (1762) 3 Bur. 1345, 97 Eng. Rep. 866; Price v. Neal (1762) 3 Bur. 1355, 97 Eng. Rep. 871; Bassett v. Thomas (1763) 3 Bur. 1441, 97 Eng. Rep. 916; Timmins v. Rowlinson (1765) 3 Bur. 1603, 97 Eng. Rep. 1003; 2 Tidd's Practice (4th Ed.) 900; Thayer on Evid. 241. The theory of the English courts on this point is, according to the opinion in Treacher v. Hinton (1821) 4 B. & Ald. 413, that the jury hears the reservation of the right to enter judgment against its verdict, and if no objection is made, the jury will be held to have impliedly consented. According to Dublin Ry. v. Slattery (1878) 3 App. Cas. 1155 at 1204 however, the theory is that upon a new trial the jury would be bound to render a verdict as directed, and it is desirable that the court enter the verdict itself thus obviating the expense and inconvenience of a new trial. For state cases illustrating the practice of taking verdicts subject to opinion of the court on legal issues reserved see Rees v. Clark (1906) 213 Pa. 617, 63 Atl. 364; Newhard v. Pa. Ry. (1893) 153 Pa. 417, 26 Atl. 105; Shellington v. Howland (1873) 53 N. Y. 371.

[1] Robinson v. Roberts (1935) 281 N. Y. Supp. 23, 24.

The weight of American authority holds that a husband is not liable, in an independent action by the attorney, for legal services rendered to his wife in the prosecution or defense of divorce proceedings.[2] Some cases arrive at this result on the principle that legal services in divorce proceedings are not within the class of "necessaries."[3] Another line of reasoning is that regardless of whether the fees could be classed as necessaries, the liability of the husband, imposed with reference to a state of marriage, does not extend to the expenses of its dissolution.[4] The better reasoned cases hold that since it is always possible, during divorce proceedings, to obtain an allowance to the wife of necessary expenses of litigation,[5] there is no necessity for securing them on the husband's credit.[6]

The minority holdings on the question of the husband's liability in an independent action by the attorney are far from uniform. Some American courts adopt the English view, holding that recovery is possible, but only where the wife's attorney prosecuted or defended the suit for divorce in good faith and for probable cause.[7] Other jurisdictions make distinction between a proceeding instituted by the wife and one instituted by the husband, holding the husband liable if he prosecuted, and denying recovery where he defended a divorce suit.[8] Still others distinguish between a suit for separation and a suit for absolute divorce, allowing recovery by the attorney in the former case (if the suit was actually necessary to the wife's protection) and denying it in the latter.[9]

Underlying all the minority holdings is the principle that counsel fees for the wife can be recovered for as necessaries only when a real necessity for the services of an attorney for the wife existed; as where she instituted a bona fide suit for divorce on good grounds,[10] or where she defended one instituted by her husband in order to protect her character and good name.[11] (Another characteristic of all the holdings allowing this recovery, as in all

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[2] Cooke v. Newell (1874) 40 Conn. 596; Dow v. Eyster (1875) 79 Ill. 254; McCullough v. Robinson (1851) 2 Ind. (2 Cart.) 630; Meaher v. Mitchell (1914) 112 Me. 416, 92 Atl. 492, Ann. Cas. 1917A, 688; Coffin v. Dunham (1851) 62 Mass. (8 Cush.) 404, 54 Am. Dec. 769; Grimstad v. Johnson (1921) 61 Mont. 18, 201 Pac. 314, 25 A. L. R. 351; Ray v. Adden (1870) 50 N. H. 82, 9 Am. Rep. 175; Rogers v. Daniel (1923) 92 Okla. 47, 217 Pac. 881.

[3] Wing v. Hurlburt (1843) 15 Vt. 607, 40 Am. Dec. 695.

[4] Shelton v. Pendleton (1847) 18 Conn. 423.

[5] All states except Tennessee have statutes to this effect; and in the absence of statute it is held that the granting of such an allowance is an incident to divorce. 2 Vernier, *American Family Laws*, sec. 110; 2 Bishop on *Marriage, Separation and Divorce*, sec. 976.

[6] Sumner v. Mohn (1920) 47 Cal. App. 142, 190 Pac. 368; Zent v. Sullivan (1907) 47 Wash. 315, 91 Pac. 1088, 15 Ann. Cas. 19, 13 L. R. A. (N. S.) 244.

[7] Billing v. Pilcher (1847) 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523.

[8] Johnson v. Williams (1851) 3 Greene (Ia.) 98, 58 Am. Dec. 491; Porter v. Briggs (1874) 38 Ia. 166, 18 Am. Rep. 27.

[9] Peck v. Marling (1883) 22 W. Va. 708.

[10] Ceccato v. Deutschmann (1898) 19 Tex. Civ. App. 434, 78 S. W. 739.

[11] Gosset v. Patten (1880) 23 Kan. 340.

recoveries for necessaries, is that the husband is held liable only for the reasonable value of the services, not for the contract price.)[12]

Prior to the instant case, the New York decisions have not considered the question when the suit in which the legal services were rendered was one for absolute divorce; but when the suits were for limited divorce or judicial separation two lines of reasoning, a mixture of minority rules already mentioned, have appeared. When the wife instituted the original suit, the general principle has been adopted of permitting recovery in a separate action for counsel fees, where the suit was on reasonable grounds.[13] But where the wife has defended, the court has held that her counsel may recover from the husband without proving any justification for defending the suit, public policy and the effort of the wife to preserve the marriage being sufficient reasons.[14]

In the instant case the original proceeding between the husband and wife was one for absolute divorce.[15] It is said in the opinion that the rule would be otherwise where the wife began the divorce suit, no distinction being made as to whether it was reasonably justified or not. The decision extends the rule laid down in the separation cases to cases where the wife was defendant in an action for absolute divorce, but intimates that it would not be followed where she was plaintiff. Thus in New York there is a tendency toward adopting the rule and distinctions recognized in Iowa at the present time.[16] V. C. B. '37.

LANDLORD AND TENANT—INNKEEPER—LIABILITY OF PROPRIETOR FOR INJURY TO OCCUPANT.—The plaintiff sued to recover for personal injuries sustained by a fall in her apartment kitchenette. The plaintiff was standing on her tiptoes attempting to turn on the kitchen light, balancing against a drainboard with her left hand, when the drainboard suddenly collapsed, precipitating plaintiff to the floor whereby she sustained a fracture of her right arm. The evidence showed that plaintiff's apartment was one of many located in the "Hotel Claremont," operated under a hotel keeper's license; that the plaintiff with her two daughters occupied the apartment under an oral contract for a monthly rental, payable weekly; that the defendant controlled the entire building, fixtures and equipment, furnished the light, heat, water, telephone and janitor service; that the defendant con-

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[12] Sprayberry v. Merk (1860) 30 Ga. 81, 76 Am. Dec. 637; Bord v. Stubbs (1899) 22 Tex. Civ. App. 242, 54 S. W. 633.

[13] Naumer v. Gray (1898) 28 App. Div. 529, 51 N. Y. Supp. 222.

[14] Hays v. Ledman (1899) 28 Misc. Rep. 575, 59 N. Y. Supp. 687.

[15] Though no point is made of it, this decision necessarily involved holding that the statute allowing suit money to be granted by the court in the divorce action was not an exclusive method of obtaining it. This again is contra to the weight of authority, Hamilton v. Salisbury (1908) 133 Mo. App. 718, 114 S. W. 563; Zent v. Sullivan, supra., note 6, but it had already been decided that the New York statute was not an exclusive remedy for the attorney in separation suits. Naumer v. Grey, supra, note 13.

[16] See Sherwin v. Maben (1899) 78 Ia. 467, 43 N. W. 292; Gordon & Belsheim v. Brackey et al. (1909) 143 Ia. 102, 120 N. W. 83.