Cornell Law Review

Volume 1
Issue 1 *November 1915*

Article 9

Notes and Comment

Notes and Comment

Constitutional Law: Civil Rights: Grandfather's Clause. In the State of Mississippi a majority of the males over twenty-one years of age, according to the census of 1910, were colored and this was true also of South Carolina; in four other states more than one-third of such males were colored, namely in Georgia, Florida, Alabama and Louisiana. The percentage of illiteracy of native-born white males in said states ran from 5.1 to 15.61 and of such colored males from 25.9 to 48.3. Prior to 1890 colored citizens were frequently disfranchised in such states by force or fraud. Such methods were inconvenient and not consonant with the maintenance of due respect for law. In that year Mississippi put into force a constitution containing the so-called "understanding" clause excluding from suffrage every man who had not paid a poll tax or was "unable to read or write any section of the constitution of the State" or "to understand the same when read to him, or give a reasonable interpre ation thereof."[1] In Williams v. Mississippi[2] the Supreme Court decided, on writ of error upon conviction for murder, that indictment and conviction by white jurors who were electors as prescribed by such constitution was not in violation of the Fourteenth Amendment as a denial of the equal protection of the laws, the provisions not being discriminatory on their face and the actual administration not having been shown to be discriminatory. The bolder form of exclusion known as the "grandfather clause" first appears in the constitution of Louisiana of 1898 providing an educational qualification for the exercise of suffrage, but exempting from this test all persons ent'tled to vote on Januray 1st, 1867, or the sons or grandsons of such persons, not less than twenty-one at the date of the adoption of the constitution.[3] .

Apparently this exemption was to avoid disfranchisement of whites then illiterate, but by later amendment the favored descendants are exempted who attain twenty-one years not later than 1912. A somewhat similar constitutional provision was adopted in North Carolina which expired by limitation, Dec. 1, 1908.[4] In Alabama, Georgia and Virginia those exempted from the educational requ'rement were

[1]Constitution of Mississippi, Art. XII, Sec. 244.

[2]170 U. S. 214 (1898).

[3]Constitution of Louisiana, Article CXCVII, Sec. 5. J. W. Summers in "The 'Grandfather' Clause," 7 Lawyer & Banker 39, points out somewhat similar provisions, notably that of the Constitution of Massachusetts, Article XX, held valid in Stone v. Smith, 159 Mass. 413 (1893) and that of the Constitution of New Hampshire, Part I, Art. 11 as amended 1902. The Massachusetts provision is, "No person shall have the right to vote, or be eligible to office under the constitution of this commonwealth, who shall not be able to read the constitution in the English language and write his name; provided, however, that the provisions of this amendment shall not apply to any person prevented by a physical disability from complying with its requisitions, nor to any person who now has the right to vote, nor to any persons who shall be sixty years of age or upwards at the time this amendment shall take effect."

[4]Constitution of North Carolina, Art. VI, Sec. 4.

descendants of certain soldiers, including those on either side in the civil war,[5] a type of provision not so obviously directed against the negroes. Attempts to have the Supreme Court pass on the val dity of the Alabama provisions failed in Giles v. Harris[6] where the court held that it had no jurisdiction in equity to compel a board of registers to enroll certain negroes, both because if the plaintiff's contentions were sound the entire registration plan was invalid and because the court could not undertake the task of enforcing political rights; and also in Giles v. Teasley[7] decided on jurisdictional grounds.

The question at issue has now been definitely decided in Guinn v. United States[8] and Myers v. Anderson[9], holding invalid as in conflict with the fifteenth amendment provisions of the constitution of Oklahoma and a statute of Maryland.

The Oklahoma provision adopted in 1910 involved in the Guinn case was as follows:

"No person shall be registered as an elector of this state or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution."[10]

The court says that a literacy test would be valid, reaffirming the position that the states may fix suffrage standards even in case of elections, as in the Guinn case, for members of Congress.[11] The Court, however, answers questions certified by Circuit Court of Appeals on a prosecution of election officers under Section 5508, Revised Statutes, now section 19, Penal Code, for conspiring to deprive certain negroes of a right to vote, holding the above constitutional provision invalid. Mr. Chief Justice White writes the opinion for the entire court (Mr. Justice McReynolds taking no part[12]). The case is of interest:

1. As being the first decision to hold a state law invalid under the fifteenth amendment. This settles the controversy[13] with reference to the validity of the amendment, though this had been adjudicated in Neal v. Delaware.[14]

---

[5]Constitution of Alabama of 1901, Section 180; Constitution of Georgia, Art. II, Sec. 1; Constitution of Virginia of 1902, Art. II, Sec. 19.

[6]189 U. S. 475 (1902).

[7]193 U. S. 146 (1904).

[8]35 Sup. Ct. Rep. 926 (June 21, 1915).

[9]35 Sup. Ct. Rep. 932 (June 21, 1915). This case affirms 182 Fed. 223. The Oklahoma State Courts had sustained the Oklahoma provision in Atwater v. Hassett, 27 Okla. 292 (1910) and Cofield v. Farrell, 38 Okla. 608 (1913), Justice Williams writing careful opinions in both cases.

[10]Constitution of Oklahoma, Art. III, Sec. 4a.

[11]Minor v. Happersett, 21 Wall. 162 (1874); James v. Bowman, 190 U. S. 127 (1903).

[12]It is erroneously stated that Mr. Justice McReynolds concurred in the decision in 100 Nation 699 and 51 Literary Dig. 5.

[13]23 H. L. R. 169 and 10 C. L. R. 416.

[14]103 U. S. 370 (1880).

2. The standard of 1866 as a basis for suffrage, though not in form relating to race or previous condition of servitude, violates the fifteenth amendment, for, as Mr. Justice White says, to hold otherwise would be to declare the provisions of the amendment inoperative 'because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the provisions of the Amendment by creating a standard of voting which, on its face, was in substance but a revitalization of conditions which, when they prevailed in the past, had been destroyed by the self-operative force of the Amendment."

3. This exemption clause being invalid, the literacy test itself falls, as it is clear persons embraced in the 1866 standard were not to be subjected to a literacy test.

4. A criminal action under section 5508, Revised Statutes, against election officers is an available remedy in such a case.[15] In Myers v. Anderson judgments against election officers for money damages were affirmed on similar facts.

As there are no states other than Oklahoma and Maryland where a "grandfather" clause, as distinguished from an "old soldier" clause, exists as applicable to new voters, the decision does not seem to have as great immediate political effect as might be supposed from comment in the periodical press.[16] The Nation says of the decision "The whole constitutes a rounded decision of the utmost Constitutional and political importance. It means as much forward as the Dred Scott case did backward."[17]

Alfred Hayes.

Deeds: Covenant of Warranty: Measure of Damages.—In a recent interesting case the defendant contracted to convey land to a land company for the sum of $320 and, pursuant to his contract with the company, conveyed to the plaintiff, the vendee of the land company. It was held that the plaintiff, failing to get a good title, could recover $1,280, the amount paid by the plaintiff to the land company. Hunt v. Hay, 214 N. Y. 578 (1914).

The courts of New York have adopted the early common law rule that in case of breach of warranty in a deed the measure of damages is the value of the land at the time of the making of such covenant.[1] No damages are allowed for the enhanced value of the land.[2] This rule is a rule of necessity rather than a rule of reason and is adopted to protect an innocent grantor from the hardship that might fall upon him due to the fluctuating value of land.[3] This rule seems to prevail

[15]Cf. United States v. Mosley, 35 Sup. Ct. Rep. 904.

[16]100 Nation 699, 51 Literary Dig. 5; 110 Outlook 486; 83 Independent 3.

[17]Nation, supra. For discussion of the subject see "The Latest Phase of Negro Disfranchisement" by Julien C. Monnet, 26 H. L. R. 42; "The Grandfather Clause" by Moorfield Storey, 6 Lawyer & Banker 358 and notes in 24 H. L. R. 388 and 14 C. L. R. 336.

[1]Staats v. Ten Eyck, 3 Caines (N. Y.) 111.

[2]Pitcher v. Livingston, 4 Johns. (N. Y.) 1.

[3]Pitcher v. Livingston, 4 Johns. (N. Y.) 1; Staats v. Ten Eyck, 3 Caines (N.Y.) 111.

in the United States, except in a few of the New England States, where damages are awarded for the value of the land at the time of the breach.[4] There seems to be no good reason why any distinction between real and personal property should exist, but the courts have recognized such a distinction on account of the fluctuating value of land.

A covenant of warranty of title being a covenant which runs with the land, the maker may therefore be sued by subsequent grantees of the land who have been injured by a breach thereof.[5] The value of the property is conclusively presumed to be the consideration of the sale. By some courts it is held that the measure of damages in such a case is the consideration paid by the original covenantee and not the price paid by the plaintiff;[6] by others it is the price paid by the plaintiff, but he can recover no more than the defendant received.[7] The latter seems to be the rule generally in this country and is the rule which prevails in New York.[8]

In the principal case the equitable title having passed from the defendant to the land company by virtue of the contract to convey and from the land company to the plaintiff, the situation would seem analogous to one where a remote grantee sues a predecessor in title upon a covenant of warranty. Applying the rule in New York, it would seem that the amount of recovery by the plaintiff in the principal case would be the amount of consideration received by the defendant. The court of appeals, however, took a different view of the situation and held the defendant liable on his direct covenant.

The question decided in Hunt v. Hay has never arisen before in New York and there seems to be very little authority in other states upon this point. There seem to be a few cases that are analogous to this case. In the case of Cook v. Curtis[9] the lots were sold by Curtis to one Cressy who traded them to Cook for other property. By an agreement between the three Curtis deeded direct to Cook. It was held that the consideration to be recovered of the defendant was what he received for the land and not what the plaintiff may have paid Cressy. In the case of Staples v. Dean[10] it was held that the amount received by the defendant was the true measure of damages, if it could be ascertained; if not, then the value of the land at the time of the covenant. It should be noted in this connection that the measure of damages for breach of a covenant of seisin in Massachusetts is the damages sustained at the time of the covenant. The case of Browne v. Walcott[11], approves of the rule in Cook v. Curtis[12],

[4]Cushman v. Blanchard, 2 Me. 266; Hasford v. Wright, Kirby 3; Drury v. Shambay, 1 Am. Dec. 704.

[5]Geizler v. DeGraaf, 166 N. Y. 339; Rawle on Covenants for Title, Sec. 213 et seq.

[6]Laurance v. Robertson, 10 Rich (S. C.) 8; Hopkins v. Lane, 9 Yerg. (Tenn.) 79; Brook v. Black, 68 Miss. 161.

[7]Jenks v. Quinn, 61 Hun 427, aff'd. 137 N. Y. 223; Crisfield v. Stocrs, 36 Md. 150; Taylor v. Wallace, 20 Colo. 211.

[8]Jenks v. Quinn, 61 Hun 427, aff'd 137 N. Y. 223.

[9]68 Mich. 611.

[10]114 Mass. 125.

[11]1 N. D. 497. [12]68 Mich. 611.

but sec. 4584 of the compiled laws of North Dakota covers a case like the principal one. Graham v. Leslie[13] holds that where the parties have expressed the consideration in a deed they are estopped from showing a lesser amount. However, such a rule does not prevail in this country and the parties may show the actual amount by parole.[14] Moreover, there are dicta in the case of McClure v. McClure[15] to the effect that the defendant might be held liable on his covenant made directly to the plaintiff.

It would seem, therefore, that the case of Hunt v. Hay is not in accord with the authority in other states. The argument advanced by the plaintiff is that the general theory of damages is to place the plaintiff in as good a position as he was before the covenant and thereby allow him to recover the amount he has paid on the faith of such covenant. It seems that the arguments on behalf of the defendant are stronger, as he was bound to convey to the plaintiff, pursuant to his contract, whereas the plaintiff could have obtained specific performance against the land company. Having consented to accept a conveyance from the defendant, it would seem that he would have no just ground to complain, if he only recovered the amount of consideration received by the defendant.

Harry Ginsburg.

Divorce: Interpretation of Sec. 1756, N. Y. Code of Civil Procedure. —The case of Barber v. Barber, 89 Misc. (N. Y.) 519, presents the jurisdictional requisites for a divorce decree in New York under section 1756 of the Code of Civil Procedure. In this case the husband and wife were married in New York and then immediately moved to Pennsylvania where they acquired a residence. The plaintiff left her husband in Pennsylvania, and at the commencement of the action for the divorce, and for several years prior thereto, had lived in New York state. The husband at all times continued to be a resident of Pennsylvania.

The adultery for which the divorce was sought was committed by the defendant in the state of New York while on a visit to that state and while the plaintiff resided there. The summons in the case was served on the defendant by publication and he did not appear.

The court held that the mere fact of the parties having been married in New York was not sufficient in itself to give the court jurisdiction over the matrimonial status of the parties. This holding seems to be directly in contravention of the express wording of the Code of Civil Procedure, sec 1756, subdivision two, which reads: "In either of the following cases, a husband or wife may maintain an action against the other party to the marriage, to procure a judgment divorcing the parties and dissolving the marriage, by reason of the defendant's adultery. * * * * * * *

"2. Where the parties were married within the state."

[13]4 Upper Can. C. P. 176.
[14]Gavin v. Buckles, 41 Ind. 528.
[15]65 Ind. 482.

This is the only decision in New York state that necessarily construes subdivision two above. The court refers to and bases its decision largely upon the language of Judge O'Brien in Gray v. Gray,[1] but there the point was merely passed over because it was unnecessary to the decision of the case and the dictum was not stated with positiveness.

Consequently in the principal case the court for its holding must rest upon the following statement in its opinion: "The presumption is against the construction contended for. In view of that fact and of the evil results to follow that construction, * * * * I think the mere fact of the marriage within the state, irrespective of the residence of the parties, is not sufficient to confer jurisdiction." In a word, the court nullifies the express statutory provision. Nevertheless, this seems to be the common sense view, for surely the mere fact that the parties came within the state for only long enough to get married should not give the New York courts jurisdiction over their matrimonial status, irrespective of their domicile. From the creation of the matrimonial status it does not follow that a matrimonial domicile has been acquired.

The other issue in Barber v. Barber arose on the interpretation of subdivisions three and four of sec. 1756 of the Code of Civil Procedure which reads as ollows: "In either of the following cases, a husband or wife may maintain an action, against the other party to the marriage, to procure a judgment, divorcing the parties and dissolving the marriage, by reason of the defendant's adultery. * * *

3. Where the plaintiff was a resident of the State, when the offense was committed, and is a resident thereof, when the action is commenced.

4. Where the offence was committed within the State, and the injured party, when the action is commenced, is a resident of the State."

The question was, what is the meaning of the word "residence." The court correctly held that within the meaning of the statute the word "residence" in divorce proceedings is equivalent to "domicil."[2] The domicil of the wife is presumptively that of the husband.[3] But this presumption that the wife's domicil is that of the husband may be rebutted by proof that the wife left the husband and took up a bona fide residence elsewhere for reasons which the court deems sufficient to justify her in leaving him. Then the New York courts say, and they are sustained by the United States Supreme Court in their contention,[4] that she may acquire a bona fide residence, i. e., domicil, in New York sufficient to confer jurisdiction on the courts of that state to give her a divorce decree, without the necessity of securing personal service of the summons on the defendant, service by publication being deemed sufficient. In this case apparently, the matrimonial domicil of the parties would be destroyed.[5]

---

[1]143 N. Y. 354, 357.
[2]De Meli v. De Meli, 120 N. Y. 485.
[3]Atherton v. Atherton, 181 U. S. 155.
[4]Haddock v. Haddock, 201 U. S. 562.
[5]Gray v. Gray, 143 N. Y. 354; Dœme v. Dœme, 96 N. Y. App. Div. 284, 289.

The matrimonial domicil having been destroyed, then the state having personal jurisdiction over one of the parties could determine that party's matrimonial status toward the absent party, *within its own jurisdiction*, but such decision would have no extra-territorial effect, and no other jurisdiction would be compelled to recognize that decree.[6] The inconsistency of the attitude of the New York courts is clearly shown by a large number of decisions which have repeatedly refused to recognize such divorce decrees of other states, where the state granting the decree has no jurisdiction over the matrimonial domicil of the parties and has secured no personal jurisdiction of the defendant; while in exactly the same kind of a case the courts of New York will grant a divorce and expect other states to recognize it on the grounds of comity.

Where a state has jurisdiction over the matrimonial domicil of the parties, other states must recognize a divorce decree of that state, where the defendant has been only constructively served with the summons.[7] In such a case the law is now settled, but where the matrimonial domicil has been destroyed and she has acquired a bona fide residence in another jurisdiction, or when she has left him for justifiable cause, and attempts to secure a divorce, there is a great conflict of authority, and some very absurd results are obtained when such a decree is granted. Olmstead v. Olmstead, 216 U. S. 386, is a typical case. In a state of facts like that stated above, though the courts of the jurisdiction in which one party has acquired a bona fide residence can grant a decree valid within its own borders, as previously stated, such decree would have no extra-territorial effect, and the party to whom such decree is given, or the party against whom it is given, on a subsequent marriage in another jurisdiction could there be prosecuted for bigamy. For this state of affairs there should be some remedy provided.

The following question apparently has not, up to the present time, been decided by the Supreme Court of the United States, namely, when the husband deserts the wife in one jurisdiction, does the matrimonial domicil of the marriage remain with the wife while she is within the jurisdiction or has it been destroyed?

It certainly seems that there is urgent need of a uniform divorce law throughout the country or as Justice Laughlin said in Ransom v. Ransom[8], "It would seem that the Legislature of our own state at least, should revise the Laws with respect to granting divorces and confine the authority of the court to cases where jurisdiction can be obtained which will insure the validity of the divorce not only in the state where granted, but in every other state." And as Justice Crouch said in the opinion of the principal case, "It seems reasonably clear, that the divorce statute is in need of overhauling in other respects, * * * * particularly subdivision two, section 1756 of the Code of Civil Procedure."

H. S. Bareford.

---

[6]Haddock v. Haddock, 201 U. S. 562.
[7]Atherton v. Atherton, 181 U. S. 155.
[8]125 N. Y. App. Div. 915.

Employer's Liability: Definition of Interstate Commerce.—The case of Shanks v. Delaware, L. & W. R. R. Co., 214 N. Y. 413 (1915), apparently sets a limit beyond which the New York courts will not go in holding an employee within the terms of the federal employers' liability act of 908 (35 Stat. at L. 65, chap. 149). The plaintiff in this case was generally employed on a "shaping-machine" making small parts used in the repair of locomotives, used both in interstate and intrastate traffic. At the time of his injury he was engaged in shifting the counter-shaft which supplied power to his machine in order to make room for another machine. He brought suit under the federal act. The question arose, "Was he engaged in interstate commerce at the time of his injury?" This is always a crucial question under the federal act, for, though the act also specifies that the defendant railroad must be engaged in interstate commerce, if the employee was engaged in interstate commerce, the railroad must necessarily have been so engaged, since the employee is the servant of the railroad. On the other hand, if the employee was not engaged in interstate commerce, the fact that the railroad was so engaged does not aid him. The holding was that the plaintiff was not engaged in interstate commerce.

"Interstate traffic," as distinguished from the broader term, "interstate commerce," may be defined as the transportation of freight and passengers between the several states. Employees engaged in the actual act of such transportation are obviously within the Federal Act and the courts have so held even when the interstate traffic is inseparably bound up with intrastate traffic.[1]

Most of the other cases where the injured employee has been held entitled to the benefits of the federal act have been cases in which he was engaged in the repair of instrumentalities used either in interstate traffic or indiscriminately in interstate and intrastate traffic. Such instrumentalities include engines[2], engine-tenders[3], bridges[4],

---

[1]The following have been held to be within the federal act; a switchman engaged in switching both interstate and intrastate cars; Pittsburgh C. C. & St. L. Ry. Co. v. Glynn, 219 Fed. 148 (1915); contra, Illinois Centr. R. Co. v. Behrens, 233 U. S. 473 (1913): a trucker engaged in loading a car destined for interstate traffic; Illinois Centr. R. Co. v. Porter, 207 Fed. 311 (1913); a brakeman on an interstate train; Second Employer's Liability Cases, 223 U. S. 1. (1911); even though he is engaged in cutting intrastate cars out of the train; Carr v. N. Y. Centr. & H. R., 77 Misc. 346 (1912); affirmed, 157 App. Div. 941; contra, Van Brimmer v. Texas & P. Ry. Co., 190 Fed. 394 (1911): an engineer switching interstate cars; Barlow v. Lehigh Valley R. Co., 214 N. Y. 116 (1915): a fireman on his way to join an interstate crew; Lamphere v. Oregon R. & M. Co., 196 Fed. 336 (1912): an engineer on an interstate run to whose engine the interstate cars have not yet been coupled; No. Carolina Ry. Co. v. Zachary, 232 U. S. 248 (1914).

[2]Law v. Illinois Centr. R. Co., 208 Fed. 869 (1913).

[3]Darr v. Baltimore & O. R. Co., 197 Fed. 665 (1912).

[4]Pedersen v. Delaware, L. & W., 229 U. S. 146 (1913); Thompson v. Columbia & P. R. Co., 205 Fed. 203 (1913); contra, Taylor v. Southern Ry. Co., 178 Fed. 380 (1910).

tracks and roadbed[5], switches[6], freight sheds[7], and cars[8]. The leading case in this class is the Pedersen case[9] where the plaintiff was injured while carrying bolts from a tool car to a bridge, used both in interstate and intrastate traffic, then undergoing repairs. He was held to be under the federal act on the theory that such work was indispensable to interstate traffic.

The Shanks case is obviously an attempt to extend the doctrine of the Pedersen cases to all cases where an injury to the employee will have a detrimental effect on interstate traffic. Under such a rule the mining of coal would come under the federal act, for coal is indispensable to interstate traffic and an injury to a miner might conceivably be a detriment to such traffic. Coal mining ,however, can scarcely be said to have been within the contemplation of the framers of the federal act.[10] It should be noticed that the prevailing opinion, in holding that Shanks was not engaged in interstate commerce, held that he was not repairing his machine, while the dissenting opinion went on the ground that he was repairing it. Under this decision it is possible that, if Shanks had been operating his machine or had been making "necessary repairs" upon it, he would have been held to be under the federal act.

The Matter of Parsons v. Delaware & Hudson Co., 167 App. Div. 536 (1915), should be noted in this connection. This case concerns an application for compensation under the workman's compensation law[11] by an employee who was injured while repairing in a repair shop a freight car that was used indiscriminately in interstate and intrastate traffic. The court held that he was not engaged in interstate commerce and was entitled to the benefits of the state act, on the theory that "the true test is the nature of the work being done at the time of the injury." This case seems to draw a distinction between repairs in the shop and repairs to bridges and tracks and "running repairs"[12]. If followed, this case will decidedly cut down the field covered by the federal act and correspondingly increase that covered by the state act. *L. I. Shelley.*

Fixtures: Constructive Severance by Contract of Sale.—In the case of Melton and Son v. Fullerton-Weaver Realty Co., 214 N. Y. 571, recently decided by the court of appeals, the defendant, Fullerton-Weaver Realty Co., was the owner of a five story and basement brick apartment house and the plaintiffs, Melton and Son, were in the business of wrecking buildings. The defendant planned to erect a new

[5]Tralich v. Chicago M. & St. P. Ry. Co., 217 Fed. 675 (1914); San Pedro L. A. & S. L. Co. v. Davide, 210 Fed. 870 (1914); Zikos v. Oregon R. & Nav. Co., 179 Fed. 893 (1910); Lombardo v. Boston & M. R. R., 223 Fed. 427 (1915).

[6]Central R. of N. J. v. Colsurdo, 192 Fed. 901 (1911).

[7]Eng v. Southern Pac. Co., 210 Fed. 92 (1913).

[8]Northern Pac. Ry. Co. v. Mærkl, 198 Fed. 1 (1912); contra, Heinbach v. Lehigh Valley R. Co., 197 Fed. 579 (1912); Parsons v. Delaware & Hudson Co., 167 N. Y. App. Div. 536 (1915).

[9]Pedersen v. Delaware L. & W., 229 U. S. 146 (1913).

[10]Delaware, L. & W. v. Yurknois, 35 Sup. Ct. Rep. 902 (1915).

[11]Consol. Laws, chap. 67; Laws of 1914, chap. 41.

[12]See also Darr v. Baltimore & O. R. Co., 197 Fed. 665 (1912).

building on the premises where the apartment house stood. On June 3d, 1911, defendant entered into an agreement in writing and under seal with the plaintiffs, that, for the consideration of $900, the plaintiffs could have the building and its contents with the exception of one boiler. The plaintiffs agreed to tear down the buildings and remove all of the materials down to the level of the cellar. The plaintiffs commenced work June 5, 1911 and on July 25, 1911 the building was removed to the street level. The plaintiffs continued until July 28 or 29, 1911, when they were ejected by the defendant and another contractor was employed to finish the work. The plaintiffs brought an action in conversion to recover the value of the material which they were not permitted to remove.

The court held that it was competent for parties to contract that one be the owner of the buildings and another the owner of the land on which the buildings stand. In the principal case there was an absence of any claim of interest by mortgagees, lessees or parties interested in any manner in the realty, except the buyer and seller of the house. The court held that when the title became vested in the plaintiffs the building was constructively severed and they could recover in conversion for the old material which they had not actually severed.

On principle this case seems to have been correctly decided. The material out of which the building was erected was personalty, but after the construction of the building it lost its identity as such and acquired the character of realty.[1]

Nevertheless, it is competent for parties by contract so to regulate their respective interests that one may be the owner of the building and another the owner of the land.[2] This result may be reached either by contracting that an article which is to be attached to real property shall remain the personal property of another than the landowner or by contracting that an article already attached to realty shall resume its original character as personalty. This latter agreement amounts to a conversion of the fixture into a personal chattel without immediate physieal detachment of it from the realty. But, in order to convey the legal title to a fixture, when there has been no actual severance or physical detachment, the contract must be in writing and be executed with the formality required for a conveyance of realty.[3]

The contract in the principal case complied with the requirements of the statute of frauds, since it was in writing and under seal.[4]

The fixture became personalty after the making of the contract for severance but before actual severance and, since the plaintiffs got a valid title to the house, they became the owners of personal property.[5]

[1]Dutton v. Ensley, 51 N. E. 380; Madigan v. McCarthy, 108 Mass. 376; Lipsky v. Borgman, 9 N. W. 158.

[2]People ex. rel. Van Nest et al. v. Commissioners, 80 N. Y. 573; People ex. rel. Muller v. Board of Assessors, 93 N. Y. 308.

[3]Johnston v. Philadelphia Mortgage and Trust Co., 129 Ala. 515; Dudley v. Foote, 63 N. H. 57: Leonard v. Clough, 133 N. Y. 292; Meyers v. Schemp, 67 Ill. 469.

[4]New York Real Property Law, section 242.

[5]Tyson v. Post, 108 N. Y. 217.

The case of Long v. White, 42 Ohio State 59, is in point. The court there held "that buildings are realty or personalty, according to the intention of the parties, and when parties in interest agree that they may be severed and moved from the realty, buildings are held and treated as personalty." Shaw v. Carbrey, 13 Allen (Mass.) 462, is also in point. The court there held "that buildings which are sold without the lands on which they stand, with the intention of all parties to sever them from the land, pass to the purchaser, with a right to remove them as personal property within a reasonable time."

According to section 156 of the New York Personal Property Law, (section 76 of the uniform sales act), which went into effect September 1, 1911, only a few months after the contract involved in the principal case was made, the word "goods" is defined as including "emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." This statute lays down a rule which reaches the same result as that reached in the Melton case, but on different grounds. The house was obviously a thing "attached to or forming a part of the land," which was agreed to be severed under the contract of sale. It was, therefore, under the sales act, "goods" under the contract for its sale and conversion would be the proper action to bring for the refusal to allow the materials to be taken. The Melton case allowed conversion because the house had been changed from real to personal property by a contract complying with the real property section of the statute of frauds. The sales act would allow conversion in a similar case because the house was personal property as the subject of the contract for sale and severance and the personal property section of the statute of frauds had been satisfied.

Apparently a change in the attitude of the courts towards fructus naturales and fixtures will be necessary as a result of the adoption of the sales act.

Herman B. Lermer.

Landlord and Tenant: Termination of Tenancies from Month to Month.—The uncertainty of the state of the law as to the length of notice necessary to terminate a tenancy "from month to month" is illustrated in the recent New York case of Mandel v. Kœrner, 90 Misc. 9.

The landlord, Mandel, failed in his business, that of a private banker in New York City, and the superintendent of banks took possession on August 4, 1914. According to the agreed statement Kœrner occupied apartments belonging to Mandel, as a tenant from month to month, but it was not stated when the agreement was made. Kœrner was a depositor in Mandel's bank and seeks to offset the September rent against his deposits. The question to be decided was whether the rent due for September existed as a debt on August 4, when the bank was closed. Since it does not appear in the statement when the agreement was made, no debt is shown to have existed on August 4 and so the rent could not be offset against the deposit. This was one of many similar cases and the court for that reason said

in regard to such tenancies from month to month as were made prior to August 4; "Where there is a tenancy from month to month, the landlord must give the tenant thirty days' notice to quit and the mutual obligation rests on the tenant to give the same notice to the landlord."

A clear understanding of the distinction between "monthly" tenancies and tenancies "from month to month" is necessary for this discussion, a distinction which many of the courts seem not to appreciate. Where a tenant holding for one month, a definite and determined period of time, holds over his term without objection from the landlord a *monthly* tenancy is created. In such a case a new lease is presumed for each month with the same terms as the original lease and no notice is necessary, for a tenancy for a definite length of time terminates automatically at the end of that time.

A tenancy *from month to month* is one of uncertain duration, that is, it is for one month and for an indefinite number of months thereafter until notice of termination. Such a tenancy is also presumed when there is a parol lease for more than a year or a lease for any other reason void under the statute of frauds and a monthly rent is reserved. In some states statutes define other circumstances by which tenancies from month to month are created.[1]

The purpose of this note is to discuss the state of the law at present on the question of the length of notice necessary to terminate a tenancy of this kind.

In general the notice required to terminate a periodic tenancy is equal to the period of that tenancy. According to this rule, then, a month's notice is required to terminate a tenancy from month to month and the requirement of notice is reciprocal, binding both landlord and tenant.[2] In states where statutes prescribe the length of notice which shall be necessary the rule is generally made to work to the mutual advantage of both parties.[3]

In a great majority of the cases notice of either one month or thirty days is required and in most of these states the difference between the two has not been seriously considered. In some states, however, the difference has been discussed and, of eighteen states where the question has been brought up, ten mention one month as the proper time and eight hold to thirty days.

Even those holding that one month is the proper notice are not uniform in their requirements. In New Jersey, where the requirement is one month, the courts hold that, when a tenancy commenced

[1]Withnell v. Petzold, 104 Mo. 409; Corbett v. Cochrane, 67 Conn. 570; Rothschild v. Williamson, 83 Ind. 387.

[2]Lockwood v. Lockwood, 22 Conn. 425; Brownell v. Welch, 91 Ill. 523; Arbenz v. Exley, Watkins & Co., 52 W. Va. 476; Hungerford v. Wagoner, 5 N. Y. App. Div. 590.

[3]In Kansas, where the statutes provide only for notice by the landlord, the courts have held that the common law requirement of notice on the part of the tenant has been entirely superseded by the statute and that notice by the tenant is *not* necessary (Nelson v. Ware, 57 Kan. 670), while in Illinois, though the statute requires the landlord to give a *thirty days' notice in writing* the court holds that the common law requirement of *one month's verbal notice* is still applicable to the tenant and that such a notice is sufficient. Eberlein v. Abel, 10 Ill. App. 626.

on the 13th of a month, the day of termination would be the 13th of some succeeding month, and a notice given on that date of any month would be sufficient to terminate it on the 13th of the next.[4]

The court in Steffens v. Earl, 40 N. J. L. 128, holds that a notice given on the first of the month is sufficient to terminate a tenancy on the first of the following month and justifies its theory by saying that "the law is ignorant of fractions of a day." A notice given on the first of the month may be considered as applicable to every period of the day so that "the very moment the tenancy expires the tenant is confronted with a notice to quit." "On what process of reasoning," the court continues, "can it be said that a new tenancy has commenced before notice is given?" In opposition to this, the Minnesota court clearly takes the view that the tenancy expires on the last rather than on the first of the month and that the notice must be served on the last of the preceding month.

In Searle v. Powell, 89 Minn. 278, the notice served on May 31st demanded that the premises be delivered up on the first of July following. "Because the landlord conceded that he might have until the next day to vacate, granting him a *favor* in this respect, is no sufficient reason why the tenant should be permitted to take technical advantage of his kindness and good will. By this notice the tenancy was terminated as of the last day of June." The following appears in Corby v. Book & Stationery Co., 76 Mo. App. 506, "The written notice must be served on the other party before the beginning of the succeeding or last rental month."[5]

In New York there are cases supporting nearly all of the views expressed above and in many of them it is difficult to tell what principle is laid down, for the rule stated applies only to a particular state of facts. The general rule in New York seems to be that the common law requirement of one month's notice shall be enforced.[6]

Much of the trouble in this state arises from the confusion of the monthly tenancies and the tenancies from month to month. These words appear in the case of Gibbons v. Dayton, 4 Hun, 451: "It is very clear that the tenancy of the intestate was *from month to month.* Neither party was bound to give any notice to the other in order to terminate the tenancy at the expiration of any month," and later, "in this case the express terms of the lease are '*that this term of letting and hiring is for one month only* and will expire' at noon on the first day of the following month." In this case no notice was required. From the description of the tenancy this was the correct holding

---

[4]Baker v. Kenny, 69 N. J. L. 180.

[5]Supporting this view are: Williams v. McAnany, 12 Pa. Co. Ct. Rep. 191; Drey v. Doyle, 28 Mo. App. 249. In the later Missouri case of Gerhart Realty Co. v. Weiter, 108 Mo. App. 248, the court refers to sec. 4110, Revised Statutes 1899, as requiring thirty days' notice to quit. That section, however, clearly provides for one month's notice and so the case is of little importance except to illustrate the looseness with which some of these terms are used.

[6]Hoffman v. Van Allen, 3 Misc. 99; Burckle v. Adams Bros. Co., 59 App. Div. 109; People v. Darling, 47 N. Y. 666; Klingenstein v. Goldwasser, 27 Misc. 536; Hungerford v. Wagoner, 5 App. Div. 590; Geiger v. Braun, 6 Daly 506; Contra, Gilfoyle v. Cahil, 18 Misc. 68.

but to call such a tenancy one from month to month is a clear misnomer. Again in People v. Gœlet, 64 Barb. 476: "He testified that the renting was by the month and to be from month to month. There can be but one interpretation, viz., that to be continued, it must be renewed monthly. The contract for August was to the first of September. * * * It contained no agreement for extending it beyond that time, and left the contract as originally made, to be from month to month." As in the former case no notice was required to terminate the tenancy. In both, the description corresponds to that of a *monthly* tenancy. With this in view and keeping in mind the fact that the naming of the tenancy by the court was error, the apparent conflict of many of the authorities is cleared.

The legislature of New York has left the question to its common law determination except for a limited qualification in the city of New York. Section 232 of the Real Property Law, providing that the indefinite rentings in the city of New York shall be deemed to continue to the first of May next after the possession commences under the agreement, seems to apply to true tenancies from month to month. The case of Olson v. Schevlovitz, 91 App. Div. 405, is sometimes cited as contrary to this, but this is a case of a monthly tenancy and clearly the statute would not apply to that, for it is for a determined length of time. Chapter 352 of the laws of 1889 requires a five days' notice in writing to be served in order to terminate a *monthly* tenancy. The statute does not purport to affect a tenancy from month to month. "The five days' notice thus required was designed for the protection of the tenant, and not to interfere with the common law rights of a tenant that existed prior to the passage of the statute." Bent v. Renken, 86 N. Y. S. 110.

It appears, then, that out of the conflict of authorities in the various states and in New York this principle stands out most clearly; that to terminate a tenancy "from month to month" a month's notice must be given on or before the last day of the period in order to terminate the tenancy on the last day of the succeeding period. The weight of authority seems to reject the view that a tenancy from month to month, begun on the *first of the month*, will terminate on the first of some succeeding month, but rather supports the rule, which is by far more reasonable, that the tenancy will end on the *last of some month*. In reality, and dispensing with legal fictions, the notice must be served on the last day of the month in order that a new month may not be started before notice is given. This view, supported by common sense and the law should be more universally followed.[7]

Don C. Allen.

Marriage: Annulment for Fraud.—Recent decisions in the New York courts bring into prominence the question of what amounts to fraud as a ground for the annulment of marriage. Sobol v. Sobol, 88

[7]Hart v. Lindley, 50 Mich. 20; Corby v. Book & Stationery Co., 76 Mo. App. 506; Drey v. Doyle, 28 Mo. App. 249; Searle v. Powell, 89 Minn. 278; Williams v. McAnany, 12 Pa. Co. Ct. Rep. 191; Olson v. Schevlovitz, 91 App. Div. 405.

Misc. 277, held, where the defendant concealed from the plaintiff the fact that he had tuberculosis, saying that he had a cold, that "any misrepresentation of a material fact incidental to the contract of marriage is sufficient to avoid it" and annulled the marriage. Bahrenburg v. Bahrenburg, 88 Misc. 272, held, where the defendant misrepresented to the plaintiff that her child was legitimate under a former marriage and subsequently married the plaintiff, that the marriage was not voidable for fraud, for the reason that the plaintiff did not prove his ignorance of the illegitimacy of the child. Robert v. Robert, 87 Misc. 629, held, where the defendant induced the plaintiff to marry him by suggesting that they pool their money to buy a hotel and where, upon receiving the plaintiff's money, the defendant deserted the plaintiff, that the marriage was voidable for fraud.

Equity has long had inherent jurisdiction to annul a marriage for fraud[1], but at present this jurisdiction is usually expressed or added to by statute. In cases of annulment for this cause marriage is looked upon as a civil contract and as such is voidable, but, because of the interest of the public in the matrimonial status, a high degree of proof should be required to annul the contract[2]. If, when the relation is entered into, the parties are competent to make a contract and competent to perform the duties which the contract involves and physically able to meet its obligations, nothing more is required.

The early history of annulment of the marriage contract for fraud shows a great reluctance on the part of the courts to dissolve the marital relation for this cause, the analogy to a civil contract not being complete. Even now in England gross fraud can not make a marriage voidable.[3] But the present New York decisions show a tendency to render more comprehensive the scope of fraud as a ground for annulment and in cases where there are no children, is no consumation, no creation of debts, no establishment of a status in the community, or change in property interests, the courts are less reluctant to annul.[4] The leading case of di Lorenzo v. di Lorenzo, 174 N. Y. 467, enunciates the broad rule that "Public Policy is concerned with the regulation of the family relation; nevertheless, our law considers marriage in no other light than as a civil contract. * * * every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement, and without which he would not have done so, justifies the court in vacating the agreement." Such misrepresentation must, however, be such that if it had not been practiced, the parties deceived would not have consented to the contract. Furthermore, the fraud must be such as would deceive an ordinarily prudent man and the one deceived is bound to have investigated the circumstances within reason.

The fraud required to avoid the marital status is measured by two fundamental tests, namely, first, its materiality must go to the con-

---

[1]Fisk v. Fisk, 6 App. Div. 432.
[2]Svenson v. Svenson, 178 N. Y. 54.
[3]Moss v. Moss, (1897) Probate 263.
[4]Sobol v. Sobol, 88 Misc. 277.

sent to the contract and does not apply to the capacity to perform[5]; and second, after discovery of the fraud, there must be no condonation by continued co-habitation or otherwise.[6] The application of these tests shows that various concealments or representations may amount to fraud; for example, concealment of incurable or venereal disease[7].

Generally concealment of unchastity on the part of the wife previous to the marriage is no ground for annulment and the same rule applies in the case of antenuptial misconduct of the husband. Glean v. Glean, 70 App. Div. 576, holds that "marriage covers with oblivion antenuptial incontinence and lapses from virtue." Domschke v. Domschke, 138 App. Div. 454, holds, however, that, if the marriage was conditioned upon chastity, the concealment of unchastity is fraud which makes such contract voidable.

Pregnancy of the wife at the time of the marriage is fraud, it being held that the husband should not be required to take an illegitimate into his family or have his wife incapacitated for any period, however brief.[8] But if the husband has meretricious relations with his wife previous to marriage, and is induced to marry her upon false representations that he is the father of her illegitimate child, he is not in a position to plead fraud[9]. But to this last statement there are two cases which are exceptions. In Scott v. Schufeldt, 5 Paige Ch. 43, the defendant gave birth to a child, which she represented to the plaintiff as being his, thereby inducing marriage. After the marriage the plaintiff claimed that he found the child was of negro blood and the court indicated that, if proper proof of the plaintiff's claim was made, the marriage was voidable for fraud. In di Lorenzo v. di Lorenzo, 174 N. Y. 467, the defendant procured a child in the plaintiff's absence, and on his return falsely represented the child to be the plaintiff's. The marriage subsequently entered into was avoided for fraud. It will be noticed that in the two cases last mentioned, while the relations preceding the marriages were illicit, the representations were obviously false, which may be a possible ground for distinction from the case where the fatherhood is only putative in nature.

Marriage may be annulled because of the previous conviction of either consort for felony.[10] In the case last referred to the defendant had been convicted of larceny. The use of gross trickery or deceit is also a ground for annulment, as in Robert v. Robert, 87 Misc. 629. In Moot v. Moot, 37 Hun 288, defendant induced an immature girl to marry him by falsely representing that he had obtained her parents' consent and the marriage was avoided. In Hides v. Hides, 65 How. Pr. 17, defendant induced voidable marriage with

---

[5]Domschke v. Domschke, 138 App. Div. 454.

[6]Svenson v. Svenson, 178 N. Y. 54.

[7]Sobol v Sobol, 88 Misc. 277; Anonymous, 21 Misc. 765, holding that "The wife as well as the husband has the right to offspring, and a fraud which conceals his disability to discharge his proper functions towards that end should entitle her to release," and that concealment of venereal disease is such fraud.

[8]Schrady v. Logan, 17 Misc. 329.

[9]Tait v. Tait, 3 Misc. 218.

[10]Keyes v. Keyes, 6 Misc. 355.

an aged man by imposing on his credulity by means of pretended admonitions from spirits.

Fraud sufficient to warrant the annulment of a marriage should be of a degree commensurate with the importance of the marriage status. Misrepresentations as to character, rank, fortune, ordinary sickness, and affection are insufficient.[11] But at the same time the present general trend in New York is toward an increased liberality in the allowance of an annulment for fraud. The case of di Lorenzo v. di Lorenzo, 174 N. Y. 467, opened up a large field. In addition the later decisions above cited, notably Robert v. Robert, in avoiding marriage for fraud, have nearly, if not actually, reduced the marriage contract to the level of a mere civil agreement.

George H. Hall.

Marriage: Common-law Marriage in New York: Effect of Statutory Attempt to Modify it.—It must seem strange to the layman that, by the common law, if a man and woman agree presently to take each other for husband and wife, it is ipsum matrimonium. The facility with which the status is formed contrasts most singularly with its indissolubility when established. To uphold it is to pave the way for the adventuress to claim the rights of the common law widow, particularly after the death of a man of wealth; if its validity is denied, society may find itself burdened with the care of children under the disabilities and disgrace of bastardy. These are the two pictures and society must choose between them. The arguments, pro and con, can better be addressed to the legislator and student of sociology. The lawyer is interested more especially with the law as it is. Whether the common law marriage, after attempts to modify it by statute, is again legal in New York, it is the purpose of this note to inquire.

The early New York common law always recognized the validity of the informal or so-called common law marriage. By it marriage was said to be a civil contract, differing from other civil contracts only in that it could not be rescinded at the will of the parties. The early New York courts seem not to have distinguished between the marriage contract and the status of marriage. As a matter of fact, marriage is not a contract at all, but a status which springs into being through the operation of contract.[1] A valid marriage might exist without any formal solemnization, without the presence of a magistrate or clergyman or the sanction of a church. The only requisite for its validity was a contract per verba de presenti, the deliberate consent of competent parties entering into a present agreement to be husband and wife.[2] After the free expression of mutual and present consent, cohabitation was not essential.[3]

Mutual promises to marry, contracts per verba de futuro, are executory, and even when followed by intercourse were never held in

---

[11]Anonymous, 21 Misc. 765; Riley v. Riley, 73 Hun. 575 (ordinary sickness); Schæffer v. Schæffer, 160 App. Div. 48 (lack of affection).

[1]Maynard v. Hill, 125 U. S. 190 (1887).

[2]Fenton v. Reed, 4 Johns. 51 (1809); Clayton v. Wardell, 4 N. Y. 230 (1850).

[3]Davis v. Davis, 7 Daly (N. Y.) 308 (1877).

this state to constitute marriage in fact. Whatever indiscretions the parties may commit after making such executory promises, they do not become husband and wife until they actually give themselves to each other in that relation; otherwise there would be no seduction and no breach of promise.[4]

Except in prosecutions for bigamy or actions for criminal conversation, the informal marriage contract could be proved either by express words or by proof of other facts from which it could be inferred or presumed. Fenton v. Reed, supra. Thus it might be established by proof of a matrimonial cohabitation, declarations of the parties, reputation of marriage among friends and neighbors, and recognition by the parties of each other as holding that relation. While these facts did not constitute marriage, they evidenced it, because they were circumstances which usually attended and characterized that relation, and permitted the court to infer that the parties actually entered into a marriage contract when the cohabitation commenced. In this way a prior actual marriage could be presumed, even though there was a subsequent ceremonial marriage. So evidence of a general repute was admissible and of a divided repute; but in the latter case, the evidence admitted could not exceed the range of knowledge of the cohabitation, else it would be mere hearsay.[5] These rules are predicated upon the competency of the parties to enter into the civil contract.[6] Mere reputation, when admissible, was always regarded as the weakest kind of evidence. Since marriage could be inferred only from a matrimonial cohabitation, cohabitation and repute merely did not constitute marriage. An agreement to be presently husband and wife was an absolute and vital prerequisite to a valid marriage; merely living together as such was not sufficient.[7] But this rule did not prevent proof of marriage by circumstantial evidence and a preponderance of evidence was all that was necessary.

The presumption of marriage from cohabitation apparently matrimonial is one of the strongest known to the law and this is especially true in cases involving legitimacy. The rule obtains even where the cohabitation was meretricious in its origin, if there is any evidence upon which to predicate a change from the meretricious to a matrimonial relationship. The law presumes morality, not immorality; marriage and not concubinage; legitimacy and not bastardy. Where there are sufficient facts to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence.[8]

The difficulty in the proof of marriage naturally arises from equivocal facts which give rise to conflicting presumptions. Two classes of cases most frequently arise; first, where parties, competent to contract, cohabit with no intention to contract a marriage; second,

---

[4]Cheney v. Arnold, 15 N. Y. 345 (1857).

[5]Betsinger v. Chapman, 88 N. Y. 487 (1882); Brinkley v. Brinkley, 50 N. Y. 184 (1872); Badger v. Badger, 88 N. Y. 546 (1882); Matter of Brush, 25 App. Div. (N. Y.) 610 (1898).

[6]Dietrich v. Dietrich, 128 App. Div. (N. Y.) 564 (1908).

[7]Matter of Hamilton, 76 Hun. (N. Y.) 200 (1894).

[8]Hynes v. McDermott, 91 N. Y. 451 (1883).

where parties, incompetent to contract, actually do intend to contract. The wide difference in the proof of these two classes of cases has obliged the courts to recognize a well defined distinction between illicit relations, forbidden because of an undisclosed disability on the part of one or both of the parties thereto, and such relations as are mutually meretricious, involving on the part of each party knowledge that its character is not, and is not intended to be, matrimonial. While either of these two cases may result in marriage, no presumption of a contract of marriage can be raised where its direct consequence is to involve both parties in the crime of bigamy.[9] The presumptions applicable to these two classes of cases will now be considered:

I. Evidence that the cohabitation was meretricious in its origin rebuts the presumption of marriage; and a meretricious relation, once begun, is presumed to continue until the contrary is shown.[10] In such a case a marriage will not be presumed from cohabitation and repute, but proof of a subsequent actual marriage must be had. This proof may be by circumstantial evidence, but it must be such as to exclude the presumption that the former relation continued and to prove satisfactorily that it was changed at some time into that of actual marriage by mutual consent.[11] In Gall v. Gall, 114 N. Y. 109 (1889), where the intercourse was meretricious at first and subsequently assumed a matrimonial character surrounded by the evidences of a valid marriage, it was held to be a question for the jury whether or not there had been at some time a valid marriage. Judge Vann, writing the opinion, said, "It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife." In cases involving legitimacy the fact of continued cohabitation with its attending matrimonial appearances may be so strong as to compel the presumption of marriage as a matter of law.[12] More evidence and evidence of a great deal stronger character is required to prove a marriage to a loose and licentious woman than to a chaste, delicate and refined woman.[13]

II. Where the parties come together under a contract which is void for the reason that one of the parties is under a disability to contract, which fact is unknown to the other party, a subsequent marriage is presumed as a matter of law from acts of recognition, continued cohabitation matrimonial in character, and general repute, after the removal of the disability. The marriage is presumed to have taken place at the time of the removal of the disability and it is

---

[9]Foster v. Hawley, 8 Hun. (N. Y.) 68 (1876).
[10]Fagan v. Fagan, 32 N. Y. State Reporter 994 (1900).
[11]Bates v. Bates, 7 Misc. (N. Y.) 547 (1894); Caujolle v. Ferrie, 23 N. Y. 90 (1861).
[12]Matter of Spink, 62 Misc. (N. Y.) 158 (1909).
[13]Bell v. Clark, 45 Misc. (N. Y.) 272 (1904).

not important that either party should know of such removal.[14] In Matter of Schmidt, supra, a child born during the period of disability was held legitimatized by the presumed marriage of the parents after the removal of the disability.

The common law marriage as affected by the statutes. Before January 1, 1902, there could be no question as to the validity of the so-called common law marriage in this state. It was manifestly recognized by the early common law and this sanction was made statutory by the laws of 1896, ch. 272, section 10, which section restated the doctrine of the common law that marriage was a civil contract, and then provided, "This article does not require any marriage to be solemnized in the manner herein specified, and a lawful marriage contracted in the manner heretofore in use in this state. . . is as valid as if this article had not been enacted." Section 11 of this act had this introductory clause, "*For the purpose of being registered and authenticated as prescribed by this article,* a marriage must be solemnized by either," etc., and then provided for the filing of the marriage certificate.[15] Common law marriages were here expressly allowed.

The laws of 1901, ch. 339, section 10, however, repealed the above express permission contained in the law of 1896, struck out the introductory clause to section 11, supra, made this section then read, "A marriage must be solemnized by either," etc., and then added a 4th sub-division providing for a marriage by a *written* contract signed and acknowledged by the parties and witnessed in the manner required for the acknowledgement of a conveyance of real property, to entitle the same to be recorded, which contract must be recorded within six months. This act of 1901 also added a new section numbered 19 which provided, "That no marriage claimed to have been contracted on or after January 1, 1902, within this State, otherwise than in this article provided, shall be valid for any purpose whatever." This act of 1901 thus expressly prohibited the common law marriage.

This act, however, was amended in part and repealed in part by the laws of 1907, ch. 742. Section 5 of this act provided simply, "Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law in (*sic*) making a contract is essential." This clause was contained in all the statutes from the very first, but here it stood alone. Section 11 of the act of 1901 was renumbered and amended by section 6 of the act of 1907 to read after the first word "recorded," "provided, however, that all such contracts of marriage must, *in order to be valid,*[15] be acknowledged before a judge of a court of record." This act repealed all other provisions of the act of 1901, including section 19, the express prohibitory clause, and made certain provisions with reference to marriage licenses. Section 18 provided that copies of the records of marriages and all other records pertaining thereto duly certified by the clerk

[14]Rose v. Clark, 8 Paige, (N. Y.) 573 (1841); Fenton v. Reed, supra; Matter of Schmidt, 42 Misc. (N. Y.) 463 (1904); Townsend v. Van Buskirk, 33 Misc. (N. Y.) 287 (1900); Geiger v. Ryan, 123 App. Div. (N. Y.) 722 (1908); Matter of Wells, 123 App. Div. (N. Y.) 79 (1908).

[15]The italics are the writer's.

of the county where the same are recorded under his official seal shall be evidence in all courts. The sections being renumbered as they were in the law of 1896, this act was enacted into the Consolidated Laws, and is now a part of the Domestic Relations Law.

The result of the statutory changes has been to cast doubt upon the validity of the common law marriage in this state. The opinion seems to prevail in the lower courts, however, that the common law marriage by *oral* contract is again legal, since the repeal of the express prohibition left the statutes with no express words of nullity.[16] The Matter of Smith, supra, held that although a common law marriage by oral contract was impossible while section 19 of the laws of 1901, the express prohibitory clause, was in force, still such a marriage may be had since the repeal of that section by the laws of 1907, notwithstanding that the Domestic Relations Law specifies particular formalities for the solemnization of marriage. Such formal provisions are construed as directory merely and not as being destructive of a common law right to form the marriage relation by words of present assent. A learned and able writer, having studied the cases, writes, "It has been established in authority that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity."[17] In the Matter of Hinman, supra, Judge Kellogg says at page 456, "The repeal of section 19 of the law of 1901, ch. 339, shows the changed public policy of this State and that the legislature became satisfied that the provision making the marriage void unless performed in a particular manner was against the public good and public morals and that the repeal was intended and did make common law marriages valid in this State." This case was affirmed in 206 N. Y. 653, but the court of appeals expressly excepted from its consideration the question of the present validity of a common law marriage in this state, doubtless because the question was not involved in the case before it nor its determination essential.

Only one case thus far seems to have construed section 11 of the law of 1901 as amended by section 6 of the law of 1907.[18] This case held that a marriage entered into by written contract as prescribed by sub-div. 4, section 11, laws of 1901, as amended by section 6 of the laws of 1907, ch. 742, was valid, although the contract was not recorded as prescribed by the statute. Hence it would seem that section 11 amended as aforesaid which is now section 11 of the Domestic Relations Law, means that the *written* contract therein provided for, "must, in order to be valid" *for purposes of evidence*, "be acknowledged before a judge of a court of record", and not that the marriage itself is invalid. Obviously the statute does not contemplate marriage by oral contract.

Only one conclusion can be drawn from the acts of the legislature and the opinions of the few judges who have had opportunity to

[16]Matter of Smith, 74 Misc. (N. Y.) 11 (1911); Matter of Hinman, 147 App. Div. (N. Y.) 452 (1911).

[17]I Bishop, Marriage, Divorce and Separation, Section 424.

[18]Kahn v. Kahn, 60 Misc. (N. Y.) 334 (1908).

express judicially their construction of the several statutes. The law of 1896 expressly permitted the common law marriage. This express permission was repealed by the law of 1901 which act further provided, "That no marriage claimed to have been contracted on or after January 1, 1902, within this State otherwise than in this article provided shall be valid for any purpose whatever." This express prohibition was repealed by the law of 1907, leaving the statute silent as to the validity or invalidity of the common law marriage, the effect of which was to recognize its validity inferentially. Consistent herewith is the Matter of Smith, supra, the dictum of Judge Kellogg, supra, and the case of Kahn v. Kahn, supra, holding that the validity of a marriage, attempted to be formed by written contract as prescribed by the statute, was not to be questioned, even though the statute was not complied with. This evidence leads to the conclusion that the common law marriage by parol contract, has been valid in this state since the act of 1907 became effective, viz., January 1, 1908.

Leon A. Plumb.

Negligence: Duty of Municipality as to Icy Sidewalks.—Just how far a municipality is liable in case of accidents due to the presence of snow and ice upon sidewalks in winter has been the subject of much litigation. The question has often arisen as to whether the duty resting upon the city to keep its sidewalks free from ice and snow creates an absolute liability in cases of personal injuries arising therefrom, or whether only a reasonable performance of the duty is expected. This latter view is accepted now in practically all jurisdictions,[1] so that now in the absence of negligence the city is not liable.[2] It is interesting, however, to notice just what the different courts have held to constitute negligence in such cases. It is ordinarily held that where there was merely a general slippery condition, due to the natural result of snow and ice forming a smooth coating over the pavement, the city is not liable.[3] However, if the snow and ice has been allowed to accumulate for such a length of time that dangerous ridges and depressions have been formed, rendering the sidewalk unsafe for public use, the city is liable,[4] although where such an accumulation has formed but is covered with a new layer of ice and snow and an injury then occurs upon the new surface before the city would be chargeable with negligence in not removing it, it will not be liable

---

[1]Clark v. City of Chicago, 5 Fed. Cas. No. 2817, 4 Bliss 486; Kleng v. Buffalo, 72 Hun (N. Y.) 541 (affirmed 156 N. Y. 700); Village of Gibson v. Johnson, 4 Ill. App. 288; Rogers v. City of Rome, 96 N. Y. App. Div. 427; Hyler v. City of Janesville, 101 Wis. 371.

[2]Harrington v. Buffalo, 121 N. Y. 147; Moran v. New York, 98 N. Y. App. Div. 301; Kannenberg v. City of Alpena, 96 Mich. 53.

[3]Kinney v. Troy, 108 N. Y. 567; Anthony v. Village of Glens Falls, 4 N. Y. App. Div. 218 (affirmed 153 N. Y. 682); Smyth v. City of Bangor, 72 Me. 249; Lueking v. City of Sedalia, 180 Mo. App. 203.

[4]Keane v. Village of Waterford, 130 N. Y. 188; Brennan v. New York, 130 App. Div. 267 (affirmed 197 N. Y. 544); Smith v. City of Cloquet, 120 Minn. 50; Wyman v. Philadelphia, 175 Pa. St. 117; McAuley v. Boston, 113 Mass. 503.

unless it can be shown that the original condition due to the old accumulation was a proximate cause of the injury.[5]

Before the city can be charged with negligence, however, it must have had reasonable notice of such condition. Accordingly, it has been held in one jurisdiction[6] that the falling of snow was sufficient to charge the city with notice, while another court has decided that the passing of five or six days after the snowfall and freezing is necessary[7]. The general rule seems to be that the municipality is not liable unless the snow and ice have accumulated for a long enough period for the city by the exercise of reasonable care to have notice. Whether or not it is contributory negligence to walk upon a pavement covered with ice and snow when the pavement on the other side of the street and all the others about have been cleaned is a question to be left to the jury.[8]

It would seem that until recently there was a difference of opinion in the treatment of this class of cases in the different departments of the appellate division of the New York supreme court. In the first department there was a strong tendency to nonsuit in many actions which would almost certainly have gone to the jury if they had been brought in the second department. To remedy this condition an appeal was allowed in the case of Williams v. City of New York, 214 N. Y. 259, and a restatement of the law covering the question as it exists in New York was made. It would seem that New York is in line with other jurisdictions on this question and accepts the general principles of the law affecting the subject. The rule of liability as propounded in this case states that there are two essentials to recovery for injuries due to the presence of snow and ice on sidewalks. There must be shown (1) a dangerous and unusual condition of the street and (2) the lapse of sufficient time to charge the city with constructive notice of that condition. In other words, the city is only liable when it allows snow and ice to accumulate in a particular place until it becomes of a permanent character and a dangerous obstruction to pedestrians. It is to be noted, however, that this duty resting upon the city to keep its sidewalks free from ice and snow, in the absence of some express provision of statute, does not apply to the same extent to a crosswalk or crossing of a public street.[9] This rule is exceptional in New York, but it is held so because it is claimed that the removal of snow and ice at every crossing would materially interfere with the convenient and practical use of the street for trucking and driving and for the further reason that, even if the entire removal of snow from the crossings were desirable, the ordinary travel upon a street necessarily carries more or less snow upon the crosswalk. In any case the liability of the city is to be founded upon negligence and to determine

---

[5]Durr v. Village of Green Island, 71 Hun (N. Y.) 260; Templin v. City of Boone, 127 Iowa 91.

[6]Foxworthy v. City of Hastings, 25 Neb. 133.

[7]See Williams v. City of New York, infra.

[8]Twogood v. City of New York, 102 N. Y. 216; Evans v. City of Utica, 69 N. Y. 166; Todd v. City of Troy, 61 N. Y. 506.

[9]Du Pont v. Village of Port Chester, 204 N. Y. 351.

this the climate of the locality and the peculiar circumstances surrounding the particular case must be taken into consideration.

Frank B. Ingersoll.

Nuisance Distinguished from Negligence.—In the recent case of Herman v. City of Buffalo, 214 N. Y. 316, action was brought to recover damages occasioned by a nuisance which arose from the construction of a building. The injury was due to a failure by the builders to construct in accordance with proper plans. The dangerous condition was not intended, either actually or impliedly, and, therefore, it was held that the action sounded not in nuisance, but rather in negligence.

Nuisance has been defined as anything that worketh hurt, inconvenience, or damage[1], while negligence is primarily the doing of something which a reasonable man would not have done, or the omission to do something which a reasonable man would have done.[2]

The main differences between negligence and nuisance are threefold.

In the first place, the duty to refrain from the commission of a nuisance is an absolute one.[3] The wrong lies in the act itself, the result or condition complained of, which result is the direct culmination of acts intended by the wrongdoer.[4] This does not mean that the injury resulting was necessarily intended, but that the condition or act was intended, or else—and here we see a close resemblance to negligence—the result was one which ought reasonably to have been expected.[5]

On the other hand, the duty in negligence is not absolute but relative.[6] The duty is that of exercising reasonable care, foresight, and prudence in performance. And the wrong in negligence is not the act or condition itself, as it is above, but the way in which the act was performed or the condition attained.

The question is not, what is the thing complained of, but, how was that result brought about?

Secondly, whereas in negligence the degree of care used is all-important, this is immaterial in nuisance[7], except where the negligence is so gross as to imply the intent mentioned above.[8] The reason for this is that, inasmuch as the care taken was ineffective, it must be considered as immaterial[9]. This is true even when the nuisance was committed in the abatement of another nuisance[10], or where the business was a lawful one and could not be otherwise conducted[11].

---

[1]3 Blackstone Com. 216; Meeker v. Van Rensselaer, 15 Wendell 397, 398.
[2]Lehigh & Wilkes Barre Co. v. Lear, 9 Atl. 267; Ahern v. Co., 24 Ore. 276, 294.
[3]Engel v. Club, 137 N. Y. 100.
[4]Herman v. City, 214 N. Y. 316.
[5]Herman v. City, 214 N. Y. 316, 325.
[6]Boston & Maine R. R. v. Sargent, 72 N. H. 455.
[7]Rosenheimer v. Company, 36 App. Div. 1; Jutte v. Hughes, 67 N. Y. 267.
[8]Clifford v. Dam, 81 N. Y. 52; Congreve v. Smith, 18 N. Y. 79; Herman v. City, 214 N. Y. 316.
[9]Lamming v. Galusha, 135 N. Y. 239.
[10]Jutte v. Hughes, 67 N. Y. 267.
[11]Pritchard v. Company, 92 App. Div. 178.

Finally, nuisance implies a positive act,[12] while negligence may result either from acts of commission or omission[13]. In McCluskey v. Wile, supra, the complaint alleged a nuisance which was "permitted" to exist, and in Hayes v. R. R., supra, it stated that the objectionable condition was "suffered" to remain. However clearly the wrongs in these cases amounted to nuisances, it was held that the complaint alleged negligence, and not nuisance, because the words were words of omission instead of commission and nuisance is a positive act. It seems that these decisions conflict with the definitions of some text writers which define a nuisance as "anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights."[14]

The differences between the two are, however, often so slight that the line of demarcation becomes almost indistinguishable. Especially does this hold true in cases of habitual or protracted negligence.[15] The turntable cases which are referred to as "alluring nuisances"[16], are treated as cases of negligence.[17]

A further illustration is found in a case where employees either maliciously or carelessly continually threw bits of iron out of a window to the knowledge of the employer.[18] The first time this would clearly be a case of negligence. After a month it would have become a nuisance. The question arises, where shall the line be drawn?

Probably the decision in each case involving the drawing of this line of demarcation would depend upon its peculiar facts and no general rule concerning the method of fixing this line could be given.[19]

Henry Klauber.

Police Power: Change in Attitude of New York Court of Appeals.— It is interesting at this period, when the attention of the legal fraternity is focussed, in a general way at least, upon the growth of a new social tendency in juristic thought to note how the courts, and especially the court of appeals of this state, are being affected by the movement or are affecting it. It is a principle well recognized by thoughtful lawyers that the decisions of our highest courts are expressions, though sometimes belated, of the dominant social tendencies of a particular period and locality. Legislatures are noted for their inconsistency in this respect, as they may be easily prevailed upon to formulate different types of social legislation and it is only in the decisions of the courts regarding these statutes that we are able to spell out the more permanent tendencies of the times.

Constitutional law, and especially that branch of it which deals with the police power of the state as affecting liberty of person and

---

[12]McCluskey v. Wile, 144 App. Div. 470; Hayes v. R. R. 200 N. Y. 183.
[13]Kibele v. City, 105 Pa. 41; Callan v. Pugh, 54 App. Div. 545.
[14]Cooley on Torts, 2d edition, p. 670.
[15]Hogle v. Company, 199 N. Y. 388, 393.
[16]Burdick on Torts, 3d ed. p. 525.
[17]R. R. v. Stout, 17 Wall. 657.
[18]Hogle v. Company, 199 N. Y. 388.
[19]Snow v. R. R., 136 Mass. 552; Fletcher v. R. R., 168 U. S. 135; Walton v. Company, 139 Mass. 556.

contract under the constitution, is the field of law in which these tendencies show greatest development and in which they may be most fruitfully studied.

The decision in the recent case of People v. Charles Schweinler Press, 214 N. Y. 395, is important as marking clearly an epoch in this development in New York and, if closely followed in the future, will have a strong and lasting influence upon the effectiveness of this so-called social legislation. The decision, which holds constitutional a statute forbidding the employment of women in the factories of the state before six o'clock in the morning or after ten o'clock in the evening, shows a marked change in the attitude of the court regarding the police power as formerly expressed in People v. Williams, 189 N. Y. 131. The court in that case, in construing a statute similar in all important respects to the one under consideration in the Press case, decided it to be unconstitutional as a clear abridgement of the personal liberty of the individual as guaranteed by both the state and national constitutions. The alleged ground of distinction between the cases is of itself indicative of a changed conception on the part of the court as regards this form of legislation. It is pointed out that since the decision of the Williams case the report of the factory investigating commission has made it more apparent that night work by women is injurious to their health and to some extent to their morals. It is urged that this change, coupled with the fact that the later statute expressly recites as its purpose the protection of the health and morals of women, is a sufficient ground of distinction.

It is suggested here that the fact that governing conditions are better known now than formerly is not a ground of distinction, but is merely the statement of a reason for a change of opinion on the subject. Practically the same conditions existed at the time of both decisions, which are only eight years apart, and the fact that they were not as fully understood at the time of the earlier one does not distinguish the case itself from the later one, but merely furnishes a good reason for overruling the former decision, which was done in substance. It is also suggested that the recital of purpose in the later statute is unimportant. The former statute could obviously not have been passed for any other purpose than that of the later one, as they are practically identical in their scope and application.

The only important ground of the decision in the Press case, therefore, seems to be that the community, and the court expresses to a greater or less degree the sentiments of the community, is awakening to its needs. We are taking a keener interest in the affairs of our fellow men as we are becoming more mindful of the effect of their actions upon our own welfare through that of the public.

The position taken by the court in the Press case is a step further than it has ever advanced, although in the period previous to the decision of the Williams case it held more liberal views than were expressed in that case. The Williams case seems to have been a strong reaction in favor of the individualistic attitude which had been expressed by several learned judges previously in strong minority opinions in cases in which there was reason to doubt the constitutionality of the statutes in question.

In the case of People v. Havnor[1], a representative case of the period before the Williams case, the basis of the decision was that the police power, being necessary to the promotion of the health and welfare of the community, should be exercised by the legislature even though it involve some sacrifice of natural rights. This liberal attitude resulted during that period in the court's declaring constitutional many important regulatory statutes, among them one compelling the owners of tenement houses to supply running water, Health Department v. Rector[2], and one fixing the maximum rate to be charged for elevating grain, People v. Budd[3]. The decision in this last case is noteworthy, as the statute under consideration could affect only three of the large cities of the state. It is interesting to note in this respect that Judge Gray, who wrote the opinion in the Williams case, dissented from the decisions in both the cases of People v. Havnor and People v. Budd. The case of In re Jacobs[4], which decided unconstitutional a statute prohibiting the manufacture of cigars in tenement houses, while an important decision on the general subject does not reflect seriously upon the comparative liberality of the period, as the primary test of constitutionality, as to whether the statute in question would tend to promote the general welfare, was not sufficiently met. The difficulty encountered in this case will be obviated if the voters of the state at the next election vote favorably upon article III, section 29 of the proposed constitution, which reads "The legislature shall have the power to regulate or prohibit manufacturing in tenement houses."

The completeness of the reaction in the Williams case can be best illustrated by an extract from the opinion of Judge Gray therein[5], which reads, "The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts, plainly transcending the powers conferred by the constitution upon the legislative body."

That the effect of this Press case will be far-reaching is the opinion of several distinguished legislators, among them Senator Wagner, who was a member of the factory investigating commission upon the basis of whose report the decision was partly founded. Senator Wagner, in commenting in the recent constitutional convention, upon the proposed amendment to the constitution mentioned above, said that even cases like the Jacobs case could be easily met in the future, so great is the advance made in this recent decision[6]. Another distinguished member of the constitutional convention, Mr. Louis Marshall, the great constitutional lawyer, expressed the view in the

---

[1]149 N. Y. 195.
[2]145 N. Y. 32.
[3]117 N. Y. 1.
[4]98 N. Y. 98.
[5]At p. 135.
[6]Record of Constitutional Convention, Sept. 2, 1915, p. 3885.

debates of that body that the Press case constituted a practical overruling of the Williams case.[7]

Mahlon B. Doing.

Police Power: Constitutionality of Statute Providing for Day of Rest.—Section 8a of the Labor Law (L. 1913, ch. 740), known as the "One day of rest in seven law," provides with certain exceptions and qualifications that every employer carrying on any factory or mercantile establishment shall allow every person employed in such factory or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days. Its constitutionality was contested on the ground that it attempted to limit the right of a male adult to contract for his labor in the pursuits named, violating art. I, secs. 1 and 6 of the state constitution and the 14th amendment of the federal constitution. In was held in the recent case of People v. Klinck Packing Co., 214 N. Y. 121, that as the statute was a valid exercise of the police power of the state for the promotion of the public health and welfare, it was constitutional.

The setting apart of any day in the week, Wednesday for instance, as a day of rest would satisfy the provisions of this statute. It cannot then be classified as a Sunday law. The court, however, had occasion to consider and determine an important question relative to the proper ground upon which to rest the decisions in those cases which have sustained the constitutionality of a Sunday law. Should a Sunday law be held constitutional because of the inherent power of the legislature to promote by legislation the observance of the Sabbath, thereby encouraging religion, or because the enforcement of such a law results in a day of rest and recreation, thus promoting the public health and welfare? The court adopted the latter ground as the basis of the important decision in the leading case[1] on the subject, giving the religious idea a position of secondary importance. Query, however, whether the prohibition of the many forms of recreation and amusement upon which the ban of a Sunday law falls promotes the public health and welfare? The court in the Lindenmuller case and in Sunday law decisions in general found authority for the recognition of the principle of one day of rest in seven, and support for the constitutionality of the present statute.[2]

The police power of a state is, of course, one of the necessary attributes of a civilized government, but there is a limit to its valid exercise. It must be exercised reasonably, and it must be exercised subject to the provisions of both the federal and the state constitutions. The mere assertion that the subject relates, though but in a remote degree, to the public health does not necessarily render the enactment valid.[3] Is the present statute a reasonable exercise of the police power? The Lochner case just cited and commonly spoken of as the "bake-shop case" considered a statute which made it a misdemeanor

[7]Record of Constitutional Convention, Sept. 2, 1915, p. 3887.
[1]Lindenmuller v. People, 33 Barb. 548.
[2]See the case of People v. Havnor, 149 N. Y. 195, also cited in the opinion.
[3]Lochner v. New York, 198 U. S. 45; Fisher v. Woods, 187 N. Y. 90.

for an employer to permit or require employees in bake shops and confectioneries to work more than ten hours a day or sixty hours a week. Consequently if an employee worked ten hours upon each of six days he could not be employed upon the seventh. As an enforcement of its provisions would thus invariably result in a day of rest, it was very similar in effect to the statute considered in the principal case. The United States Supreme Court held that the statute was not a legitimate exercise of the police power of a state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract for his labor and therefore in conflict with the 14th amendment and unconstitutional. This was a reversal of the decision of the New York court of appeals in the same case.[4] The court, however, in the principal case distinguished the Lochner case on the ground that the law in the latter case not only limited the amount of labor to be performed in seven days, like the statute under discussion, but that it also contained the added provision that no employee should be allowed to work in excess of a certain number of hours during any day and that the condemnation was directed against this feature of the limitation.

It is submitted that this distinction is not sound. The court in the Lochner case does not appear to have condemned any particular feature of the statute. Instead its decision seems to have been directed against the spirit and purpose of the whole statute. It was apparently unable to find anything in the business of baking which could be considered so detrimental to the health of those employed therein as to warrant upon the grounds of protecting the public health any limitation whatsoever of the right to contract for labor in this employment. The court then concluded that there was no justification for this interference with the freedom of contract. This is the true basis of the decision in that case. It will therefore be of great interest to see how the United States Supreme Court, confronted by the Lochner case, will settle, if it has occasion to do so, the question as to the constitutionality of this "One day of rest in seven law," now under discussion. Whereas the statute considered in the Lochner case, and held unconstitutional because it could not be justified as a health measure, affected only the business of baking, which business might easily be considered an unhealthy occupation, this present statute affects all factories and all mercantile establishments regardless of whether or not they are in their nature dangerous and detrimental to the health of those employed therein. It is therefore very difficult to perceive how the court will sustain this statute as one protecting the public health and at the same time maintain a line of reasoning consistent with that followed in the Lochner case. The statute may possibly be declared unconstitutional upon the same grounds as set forth in the Lochner case.

Selby G. Smith.

---

[4]See People v. Lochner, 177 N. Y. 145.