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Faith A. Seidenberg

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THE SUBMISSIVE MAJORITY: MODERN TRENDS IN THE LAW CONCERNING WOMEN'S RIGHTS

Faith A. Seidenberg†

The popular assumption that the law is even-handed does not hold true in the area of women's rights. Under the guise of paternalism (and you notice the word refers to a father), women have systematically been denied the equal protection of laws. Recently, however, there has been an upsurge of the feminist movement, and men are being forced to take a second look at some of the paternalistic laws they have propounded. Although challenge to the laws adversely affecting women is presently at about the same stage that the civil rights movement occupied in the 1930's, in the last few years there has nevertheless been a small beginning towards equal rights.

I

CRIMINAL LAW

The idea that a "bad" woman is much worse than a "bad" man probably can be traced to the witch hunts that took place in the early days of the American Colonies; however, it survives to the present day. For example, it is a crime for a woman to engage in prostitution¹ but not for her customer to use her services. She is breaking the law, it seems, while he is only doing what comes naturally. However, in *City of Portland v. Sherill*² a city ordinance that punished women but not men who offered themselves for immoral purposes was held unconstitutional.

In addition, in several states higher penalties are imposed on a woman who commits a crime than on a man who commits the same crime.³ The constitutionality of greater penalties for women was re-

† President, Syracuse Chapter of National Organization for Women. B.A. 1944, J.D. 1954, Syracuse University.

¹ See THE SOCIAL EVIL (Seligman ed. 1902); George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60 MICH. L. REV. 717 (1962).

² No. M-47623 (Circuit Ct., Multnomah County, Ore., Jan. 9, 1967).

³ E.g., Pennsylvania, Connecticut. See statutes upheld in *Ex parte Gosselin*, 141 Me. 412, 44 A.2d 882 (1945); *Platt v. Commonwealth*, 256 Mass. 539, 152 N.E. 914 (1926).

cently challenged in two cases. In *Commonwealth v. Daniels*⁴ a woman was first sentenced to a term of from one to four years for the crime of robbery; one month later the sentence was vacated and the defendant resentenced to up to ten years under Pennsylvania's Muncy Act.⁵ The Muncy Act provided that a woman imprisoned for a crime "punishable by imprisonment for more than a year" should be sentenced to an indeterminate period of up to three years except when the crime for which she was sentenced had a maximum of more than three years, in which case she had to receive the maximum sentence. That is, for a crime carrying a sentence of one to ten years, a man might have been sentenced to one to four years, but a woman could only be sentenced to an indefinite term of up to ten years. The discretion of the trial judge to set a maximum term for a woman of less than the maximum for the crime involved was thereby eliminated. The Superior Court of Pennsylvania affirmed the trial court's action, holding that longer incarceration for women is justifiable because of "the physiological and psychological make-up of women . . . their roles in society [and] their unique vocational skills and pursuits"⁶ Whatever their significance, these characteristics did not convince the Pennsylvania Supreme Court that the Muncy Act's classification was reasonable. The court held that women are entitled to the protection afforded by the equal protection clause of the United States Constitution and, since the maximum sentence is the real sentence, that a sentence of ten years for women as opposed to four years for men is unconstitutional.⁷ In *United States ex rel. Robinson v. York*⁸ a federal district court held a

⁴ 210 Pa. Super. 156, 232 A.2d 247 (1967).

⁵ PA. STAT. tit. 61, § 566 (1964), *as amended*, (Supp. 1969).

⁶ 210 Pa. Super. at 164, 232 A.2d at 252. The philosophy of the statute is more cogently, if not convincingly, explained as follows:

There is little doubt in the minds of those who have had much experience in dealing with women delinquents, that the fundamental fact is that they belong to a class of women who lead sexually immoral lives. . . .

[Such a statute] would remove permanently from the community the feeble-minded delinquents who are now generally recognized as a social menace, and would relieve the state from the ever increasing burden of the support of their illegitimate children.

Commonwealth v. Daniels, 210 Pa. Super. 156, 171 n.2, 232 A.2d 247, 255 n.2 (1967) (dissenting opinion). Oddly enough, the material quoted from the *Daniels* case was supplied by Philadelphia District Attorney Arlen Specter in a brief urging the unconstitutionality of the Muncy Act.

⁷ 430 Pa. 642, 243 A.2d 400 (1968). Shortly thereafter the Pennsylvania legislature enacted a statute that required the court to set a maximum sentence, but prohibited it from setting a minimum term. PA. STAT. tit. 61, § 566 (Supp. 1969).

⁸ 281 F. Supp. 8 (D. Conn. 1968).

Connecticut statute⁹ similar to the Muncy Act unconstitutional. The decision was appealed by the state's Attorney General, but he withdrew the appeal after the decision came down in the *Daniels* case. Sixteen women, who had already served more time than a man's maximum sentence, were released.¹⁰

Criminal abortion statutes¹¹ are another example of the law's discrimination against women. That a woman has a right to control her own body is perhaps an idea whose time has yet to come, but there is at least a glimmering in some legal minds. Most lawyers and legislators, if they are talking about the subject at all, are still talking in terms of abortion reform instead of abortion repeal.¹² They discuss a need for change, but they sound a cautious note.¹³ One case moving against the prevailing winds, however, is *People v. Belous*,¹⁴ recently decided in the Supreme Court of California. The defendant was convicted for performing an abortion, and an amicus curiae counsel argued that

[t]he right of reproductive autonomy sought to be protected here is clearly more basic and essential to a woman's dignity, self-respect and personal freedom than those personal rights . . . for which Constitutional protection has already been afforded. Probably, nothing except death itself can affect a woman's life more seriously than enforced bearing of children and enforced responsibility for them for perhaps the remainder of her and their lives. The choice must be that of the woman unless some overwhelming state interest requires otherwise, and those state interests generally adverted to will be shown below to be significantly, for constitutional purposes, less important than the interest of the woman

⁹ CONN. GEN. STAT. ANN. § 17-360 (1958).

¹⁰ Middletown Press, Aug. 12, 1968, at 1, col. 1 (Middletown, Connecticut).

¹¹ *E.g.*, CAL. PENAL CODE § 274 (West 1955). Prior to its liberalization in 1967, it was similar to statutes in 41 other jurisdictions. Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 n.2 (1964).

¹² *But see* Brief for Appellant as Amicus Curiae at 37-38, *People v. Belous*, 71 Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), reporting that Father Robert Drinan, Dean of Boston College Law School, has come out for repeal on the grounds that it should be a matter of individual conscience, not law.

¹³ *See, e.g.*, L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 27 (1969):

Though very few people would urge the legalization of all abortions, the principle of legal equality of the sexes is an additional reason for extending the circumstances under which therapeutic abortions should be legally justified.

¹⁴ 71 Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

herself. That right should be protected to the fullest by a holding that no state interest can control this field.¹⁵

In New York two bills, one for reform of abortion¹⁶ and one for repeal,¹⁷ were before the state legislature in the spring of 1969. Only the former had any chance of passing. Had it not been for the National Organization for Women's coming out strongly in 1968 for abortion repeal,¹⁸ followed by agreement by the State Council of Churches¹⁹ and the American Civil Liberties Union²⁰ on this position, the bills would probably not have been considered at all. However, as is beginning to be seen in California, where the abortion laws were just reformed,²¹ abortion reform is worse from the standpoint of freedom of choice for the woman than no reform at all.²²

II

CIVIL RIGHTS

For untold years there have been so-called "protective" laws regulating the working conditions of women. Necessary changes are beginning to be made, but the progress is slow; even legal experts do not always recognize the full dimensions of the problem. One commentator, for example, has remarked of women's working laws:

With regard to social policy, the initial reaction is that the modern woman should not be subjected to state protective restrictions on her right to work should she choose to experience the conditions from which she is being protected. However, it is clear that the extent to which sex differences constitute "discrimination" is a question of degree, depending upon what social mores it seems desirable to perpetuate. . . . [Here], *considerations of preserving femininity and motherhood appear.*²³

¹⁵ *Belous* Brief, *supra* note 12, at 10-11 (footnotes omitted).

¹⁶ (1969) Assy. Int. No. 3473-A (Mr. Blumenthal).

¹⁷ (1969) Assy. Int. No. 1061 (Mrs. Cook).

¹⁸ *See 2 NOW ACTS 14* (Winter-Spring 1969).

¹⁹ New York State Council of Churches Leg. Release No. 8 (Feb. 10, 1969).

²⁰ American Civil Liberties Union Release (March 25, 1968).

²¹ CAL. PENAL CODE § 274 (West Supp. 1968).

²² Two actions were just filed in New York to have that state's abortion statutes declared unconstitutional. N.Y. Times, Oct. 8, 1969, at 53, col. 1; *id.*, Oct. 1, 1969, at 55, col. 3.

²³ Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L. REV. 344,

Unfortunately, this misses the point. The net effect of these laws is to limit the advancement of women in industry and, since women are everywhere the majority, to ensure that there is always a large supply of poorly-paid persons.

California has a particularly stringent system of governing women's employment. Section 1350 of the California Labor Code,²⁴ for example, prohibits an employer from employing women workers for more than eight hours a day or forty-eight hours a week. The effect of this restriction is to prevent women, solely because of their sex, from pursuing certain better-paid occupations, such as running test equipment, doing final assembly work, and working as supervisors, and from earning overtime pay in the positions they now hold. In addition, paragraph 17 of the California Industrial Welfare Commission's Order No. 9-68²⁵ not only regulates wages, hours, and working conditions of women and minors in the transportation industry but also limits the number of pounds a woman may lift to twenty-five.

This regulatory system was recently challenged. In *Mengelkoch v. Industrial Welfare Commission*²⁶ plaintiffs asked that a three-judge court be convened because the constitutionality of section 1350 was an important constitutional issue to be resolved. The request was denied. However, in a similar case, *Rosenfeld v. Southern Pacific Co.*,²⁷ the judge ruled in favor of plaintiff. This case concerned both section 1350 and paragraph 17. In it, plaintiff, a woman, applied for a job that had

375 (1967) (emphasis added). *But see* R. Seidenberg, *Our Outraged Remnant*, 6 PSYCHIATRIC OPINION, Oct. 1969, at 18:

The exaggeration of the difference between the sexes has been used to justify misogyny. Our young people want to make it difficult to distinguish between the sexes to show that everything feminine is not contemptible. One can wear long hair proudly; to be taken for a woman is not something to despair. Make the sexes undifferentiated, and then, perhaps, the mythology of "feminine" and "masculine" will be revealed for what it really is—a ruse to keep women subjugated and to guarantee men an unearned superiority.

²⁴ CAL. LABOR CODE § 1350 (West Supp. 1968):

No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, . . . cleaning and dyeing establishment, hotel, public lodging house . . . in this state, more than eight hours during any one day of 24 hours or more than 48 hours in one week . . .

Females covered by the Fair Labor Standards Act, however, are exempt from the prohibitions of § 1350. *Id.* § 1350.5.

²⁵ CAL. ADMIN. CODE tit. 8, § 11460 (1968). The division of public welfare is given specific enforcement power of § 1350. CAL. LABOR CODE § 1356 (West Supp. 1968).

²⁶ 284 F. Supp. 950 (C.D. Cal.), *vacated*, 393 U.S. 993 (1968).

²⁷ 293 F. Supp. 1219 (C.D. Cal. 1968):

just opened up at the defendant company's facilities at Thermal, California. Although she was the most senior employee bidding for the position and was fully qualified, the company assigned a male with less seniority than plaintiff. The company never tested or evaluated plaintiff's ability to perform the work required, but argued that the appointment was within its discretion as an employer and, since plaintiff was a woman, that her assignment to the position would violate the California Labor Code. The court, however, held both that the California hours and weights legislation discriminates against women and is therefore unconstitutional and that defendant's refusal to assign plaintiff to Thermal was not a lawful exercise of its discretion as an employer.

Restrictions on the amount of weight a woman can legally lift²⁸ are under attack in other states. An employer's thirty-five pound limitation²⁹ was tested in *Bowe v. Colgate-Palmolive Co.*,³⁰ where the court held it legal and proper for an employer to fix a thirty-five pound maximum weight for carrying or lifting by female employees. In another case, *Weeks v. Southern Bell Telephone & Telegraph Co.*,³¹ defendant company took the position that because the job of switchman required lifting weight in excess of thirty pounds, the legal limit in Georgia,³² a woman could not hold the job. The company conceded that plaintiff had seniority over the male awarded the position and that she was paid \$78 per week as opposed to the \$135 she would receive if she were a switchman. The sole issue in the case was whether or not sex is a bona fide occupational qualification, entitling defendant to bar a

²⁸ The typical restriction to 30 or 35 pounds is ironic if the goal is to preserve the femininity of women laborers; mothers commonly lift their children until they are 6 or 7 years old, when they weigh at least 70 pounds.

²⁹ Originally instituted because of substantial female employment during World War II, this practice continued even when the men returned to work. *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 340 (S.D. Ind. 1967).

³⁰ 272 F. Supp. 332 (S.D. Ind. 1967). The provision was also challenged in *Sellers v. Colgate-Palmolive Co.*, — F.2d — (7th Cir. 1969), which held in favor of the plaintiffs.

The *Bowe* court did hold, however, that use of a seniority list segregated by sex, which resulted in certain female employees being laid off from employment while males with less plant seniority were retained, resulted in discrimination in violation of the 1964 Civil Rights Act. 272 F. Supp. at 359.

³¹ 408 F.2d 228 (5th Cir. 1969).

³² Rule 59, promulgated by Georgia Commissioner of Labor, pursuant to GA. CODE ANN. § 54-122(d) (1961): "[f]or women and minors, not over 30 pounds." A more flexible rule, setting no specific limitations, replaced Rule 59 in 1968. See 408 F.2d at 233.

woman, as such, from consideration for the job of switchman, her capacities notwithstanding. The lower court held for defendant, but the Fifth Circuit reversed, finding illegal discrimination based on sex.

Segregated "help wanted" advertisements are another aspect of discrimination against women. Although the Civil Rights Act of 1964 forbids most such ads to be placed in newspapers³³ and forbids discrimination by sex in employment, the Equal Employment Opportunity Commission guidelines³⁴ nonetheless allowed two columns classified by sex to stand in the newspapers. In July 1968, therefore, the National Organization for Women brought a mandamus suit against the EEOC to compel it to enforce the law as written. The court summarily dismissed the complaint, saying that obviously some jobs were better suited to men and others to women,³⁵ but the suit did cause the EEOC to change its guidelines to conform with the law.³⁶ The American Newspaper Publishers Association brought an action to enjoin enforcement of the guidelines;³⁷ both the district court and the court of appeals found for the EEOC. However, although the *New York Times* and some other New York newspapers have now desegregated their want ads, most newspapers around the country still refuse to abide by the law.

The public accommodations section³⁸ of the Civil Rights Act of 1964, unlike the employment section, does not forbid discrimination on account of sex. A test case³⁹ was recently brought in New York against a Syracuse hotel that does not allow women to sit at the bar unescorted, and the action was dismissed. The court emphasized, first,

³³ Civil Rights Act of 1964, § 704(b), 78 Stat. 257, 42 U.S.C. § 2000e-3(b) (1964):

It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

³⁴ 31 Fed. Reg. 6414 (1966).

³⁵ The court pointed out that secretaries are obviously female, despite the presence in front of the bench of the male stenographer.

³⁶ 29 C.F.R. § 1604.4 (1969).

³⁷ American Newspaper Pub. Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968).

³⁸ 42 U.S.C. § 2000a (1964).

³⁹ DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968).

that there was no state action, since the women who sat in at the bar were not arrested; and second, because the public accommodation law does not forbid discrimination on the basis of sex, that the hotel could discriminate if it so wished.⁴⁰

The case was not appealed because the author, whose case it was, thought it would be relatively easy to obtain state action in an arrest. Accordingly, she and another member of the National Organization for Women sat in at several bars, including one in New York City that has not served women for the last one hundred and fourteen years. Although they suffered many indignities, they were not arrested. The author then decided to bring an action in a New York state court under a new section of the state civil rights law⁴¹ that makes it illegal to refuse to serve a customer "without just cause." Summary judgment was granted to defendants and the case was dismissed. The author filed a third case, however, that was heard on August 6, 1969 and that was decided in favor of plaintiff.

III

PRIVATE LAW

Some colleges have strict rules covering the hours when coeds must be in their dormitories and an inflexible system of signing in

⁴⁰ *Id.* at 532. It is interesting to note that the court did not find the hotel's admitted discrimination offensive; this is in accord with public opinion. The *Syracuse Post-Standard* said in a lead editorial:

The campaign waged for several months by the National Organization for Women (NOW) against Hotel Syracuse for its long-standing policy of refusing to serve drinks to unescorted women at the bar in the Rainbow Lounge has reached another absurd point.

All sororities at Syracuse University have been asked to refuse to patronize Hotel Syracuse "because they discriminate against women at their bar," in a letter from Faith A. Seidenberg, one of three directors of the Central New York Chapter of NOW.

.....
 Hotel Syracuse has had the no-unescorted-women-at-the-bar rule ever since Prohibition was repealed in an effort "to maintain the dignity of the room" and to discourage undesirables and wouldbe pickups from frequenting the Rainbow Lounge, which is at street level, just off the main entrance to the hotel.

.....
 Hotel Syracuse should be commended for running a decent place, instead of being subjected to the repeated persecution of sit-ins and boycott efforts. Surely any women's rights group could find a better cause than this!
Syracuse Post-Standard, Nov. 8, 1968, at 12, col. 1.

⁴¹ N.Y. CIV. RIGHTS LAW § 40-e (McKinney Supp. 1969).

and out.⁴² Regulation is the product of the idea that a university stands *in loco parentis* to its students, an idea that is hopefully changing. After all, a married women of eighteen is considered to be "emancipated" from her parents under the law.⁴³ Why then is a college student living away from home not equally adult? But in any case, the rationale is not consistently applied; male students are not subjected to the same restrictions as women in the use of the dormitories, or even to the requirement that they live on campus. The Oneonta College curfew was challenged, but the case was dismissed on technical grounds without examination of the merits. Possibly because of the suit, however, the college voluntarily rescinded its curfew regulations,⁴⁴ so the students were the ultimate winners.

A double standard is also apparent in the law governing married women. Under present law, a married woman loses her name and becomes lost in the anonymity of her husband's name. Her domicile is his no matter where she lives,⁴⁵ which means she cannot vote or run for office in her place of residence if her husband lives elsewhere. If she wants an annulment and is over eighteen, in certain cases she cannot get one,⁴⁶ but her husband can until he is twenty-one.⁴⁷ In practice, if not in theory, she cannot contract for any large amount, borrow money, or get a credit card in her own name. She is, in fact, a non-person with no name.

Women receive little in exchange for this loss of status. Although in theory the husband and wife are one person, the relationship "has worked out in reality to mean . . . the one is the husband."⁴⁸ For example, husband and wife do not have equal rights to consortium,⁴⁹ the exclusive right to the services of the spouse and to his or her society, companionship, and conjugal affection.⁵⁰ Until re-

⁴² *E.g.*, Syracuse University at Syracuse, N.Y. Letter sent to parents of freshmen, January 1969 (freshman curfew); State University of New York at Oneonta, Experimental Women's Hours Policy, spring semester 1968 (freshman curfew).

⁴³ *E.g.*, N.Y. DOM. REL. LAW § 140(b) (McKinney 1964).

⁴⁴ State University of New York at Oneonta, Experimental Women's Hours Policy (Rev. Sept. 1968).

⁴⁵ *New York Trust Co. v. Riley*, 24 Del. Ch. 354, 16 A.2d 772 (1940). *But see* N.Y. DOM. REL. LAW § 61 (McKinney 1964).

⁴⁶ *E.g.*, CAL. CIV. CODE §§ 56, 82 (West Supp. 1968).

⁴⁷ *E.g.*, *id.*

⁴⁸ *United States v. Yazell*, 382 U.S. 341, 361 (1966) (dissenting opinion).

⁴⁹ *Burk v. Anderson*, 232 Ind. 77, 81, 109 N.E.2d 407, 408 (1952) (dictum).

⁵⁰ *Smith v. Nicholas Bldg. Co.*, 93 Ohio 101, 112 N.E. 204 (1915).

cently it was everywhere the law that only the husband could recover for loss of consortium, and this is still the law in about two-thirds of the states.⁵¹ The major breakthrough came in 1950 in *Hitaffer v. Argonne Co.*,⁵² which reversed the prevailing rule. In a more recent case, *Karczewski v. Baltimore & O.R.R.*,⁵³ the court concluded, "[m]arriage is no longer viewed as a 'master-servant relationship,'"⁵⁴ and in *Owen v. Illinois Baking Corp.*⁵⁵ the court held that denying a wife the right to sue for loss of consortium while permitting such suit to a husband violates the equal protection clause.⁵⁶

The unreasonableness of denying an action for loss of consortium to the wife is well expressed by Michigan Supreme Court Justice Smith:

The gist of the matter is that in today's society the wife's position is analogous to that of a partner, neither kitchen slattern nor upstairs maid. Her duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort, and warmth of the home, she puts her arm and shoulder to the plow. We are now at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short, when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her

⁵¹ See *Moran v. Quality Alum. Casting Co.*, 34 Wis. 2d 542, 549-50 nn.15 & 16, 150 N.W.2d 137, 140 nn.15 & 16 (1968); Simeone, *The Wife's Action for Loss of Consortium—Progress or No?*, 4 Sr. Louis U.L.J. 424 (1957).

⁵² 183 F.2d 811 (D.C. Cir. 1950).

⁵³ 274 F. Supp. 169 (N.D. Ill. 1967).

⁵⁴ *Id.* at 175. The court summarized the rationale of the prevailing rule:

The early status of women during the sixteenth and seventeenth centuries vitally affected the common law attitude toward relational marital interests. The wife was viewed for many purposes as a chattel of her husband, and he was entitled to her services in the eyes of the law. . . . The wife, however, as a "servant" was not entitled to sue for the loss of services of her husband, since in theory he provided none.

Id. at 171.

⁵⁵ 260 F. Supp. 820 (W.D. Mich. 1966).

⁵⁶ "To draw such a distinction between a husband and wife is a classification which is unreasonable and impermissible." *Id.* at 822.

peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?⁵⁷

CONCLUSION

In theory all persons should be equal, but in practice women are less "equal" than men. In all phases of life women are second-class citizens leading legally sanctioned second-rate lives. The law, it seems, has done little but perpetuate the myth of the helpless female best kept on her pedestal. In truth, however, that pedestal is a cage bound by a constricting social system and hemmed in by layers of archaic and anti-feminist laws.

⁵⁷ *Montgomery v. Stephan*, 359 Mich. 33, 48-49, 101 N.W.2d 227, 234 (1960), *quoted with approval*, *Millington v. Southeastern Elev. Co.*, 22 N.Y.2d 498, 503-04, 239 N.E.2d 897, 900, 293 N.Y.S.2d 305, 309 (1968).