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Note and Comment

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NOTE AND COMMENT

THE INTERNATIONAL LAW ASSOCIATION AND ITS LAST MEETING.—The twenty-fourth conference of the International Law Association occurred at Portland, August 29-31, and immediately succeeded the meeting of the American Bar Association, commented on in our November issue, being, in a sense, a prolongation of its sessions. This is the second meeting of the Association in this country. The earlier one was held under similar circumstances at Buffalo in 1899. The International Law Association is in reality a child of American parents, for it had its origin in the minds of Elihu Burritt and James B. Miles, active workers in the American Peace Society. David Dudley Field, President Woolsey, Wm. Beach Lawrence, and Emory Washburn joined with Mr. Miles in the call which brought the Association into being. It was organized at Brussels in 1873, only a few weeks subsequent to the first meeting of its fellow, The Institute of International Law. The organization of both these bodies was doubtless inspired by contemporary events—the two great wars in Europe and America, and the success of the Geneva Arbitration. But the character and methods of the two Associations have always been distinct. The Institute is composed exclusively of persons "who have rendered

eminent service in the development of international law either in theory or in practice." Its membership is therefore limited to persons who have published writings of special merit in this field, and its work is purely juristic and scientific. The ranks of the International Law Association, on the other hand, are open to all persons "interested in the improvement of international relations, whether from the point of view of law or of social science," and it aims to formulate recommendations likely to have practical influence. The Institute abstains from making any direct attempt to influence the action of governments or public bodies. Both have rendered eminent service in the development of this department of jurisprudence.

The session of the Association at Portland was well attended, though probably the total number present was not as great as at meetings of the Association on the other side of the Atlantic. Among the well known Englishmen who came were the Rt. Hon. Sir W. Rann Kennedy, Lord Justice of Appeal, Sir Frederick Pollock, Sir Kenlemn Rigby, Sir J. H. Balfour, Browne, etc. Mr. Justice Kennedy, in the capacity of president of the conference, presided over its meetings. Judge Simeon E. Baldwin, of Connecticut, the honorary president, delivered the inaugural address. In the course of his paper he made some very pertinent and sensible remarks on the practical limitations to reform in the law of nations, and the peaceful settlement of international disputes. They may be read with profit by some of the too optimistic friends of the peace movement.

"The progress of international law in modern times," said Judge Baldwin, "has been largely in the direction of preventing war. It has also been largely in the direction of ameliorating the conditions which war brings. One is as important as the other, for the absolute prevention of war, in however remote a future, is to the scientific student of history and psychology impossible, unless all nations climb to an equal plane of civilization and morals, and that a far higher plane than any nation has yet attained.

"It must be frankly acknowledged to be precisely here that we find the most serious obstacle to the reform and codification of international law. The different powers still represent very different states of social advancement. Conduct to be confidently anticipated from an enlightened nation cannot be reasonably looked for on the part of one yet unaccustomed to follow the rules which sound politics prescribe for the just regulation of public duties.

"Nevertheless the theory of equality between independent nations is the very soul of the science which we meet to cultivate."

Judge Baldwin also alluded to the four recent Hague conferences on private international law, and to the fact that the United States and Great Britain had not been represented at these conferences, because of the divergence of Anglo-Saxon and continental theories of jurisprudence on certain questions which were there under discussion. He referred more particularly to the American and English rule that domicile shall determine status, particularly in matrimonial causes.

"England and the United States," he said, "cannot shut their eyes to the fact, for instance, that ten European nations have thus agreed, with respect to an institution on which all human society depends, that, as between their

subjects, nationality shall be the criterion of civil rights in respect to assuming or dissolving the marriage relation.

"It is not to be forgotten that whichever standard be adopted—nationality or domicile—for the determination of any question of status, the result will ordinarily be the same. Few ever have a domicile in a country to which they do not bear allegiance."

In the interesting program which followed the principal subjects treated were, international arbitration, contraband of war, the treaty-making power, protection of subjects abroad, and so forth. Dr. W. Evans Darby, Secretary of the Peace Society of London, presented his annual review of the progress of arbitration during the past year. Of the great value of Dr. Darby's services to the cause of peace there can be no question. But his annual review, usually presented at the meetings of the Association, would have greater force if he were to distinguish between cases of arbitration, properly so called, and cases which have been adjusted diplomatically or by commissioners acting in a purely ministerial capacity; as, for example, the marking of a boundary. In other words, he ought to set apart the cases which are really judicial in character. For if law is to be substituted for force in the settlement of disputes between nations, the application of legal principles must be made chiefly, if not exclusively, before courts of arbitration, proceeding according to legal forms. If this distinction is kept in mind, we shall not hold any unfounded illusions as to actual progress made.

There were other interesting statistics in Dr. Darby's report. His personal investigation shows that the average cost per year of maintaining the Bureau of the Permanent Court of Arbitration at the Hague is only about twelve thousand dollars—a small sum when balanced against the good results which have already come from the mere fact of the existence of such a court.

The paper which prompted most discussion was that of Mr. Everett P. Wheeler, Chairman of the Committee on International Law of the American Bar Association. It was entitled, "The Treaty Making Power of the United States in its International Aspect."

Referring to the recent controversy over the treaty rights of Japanese school children at San Francisco, Mr. Wheeler pointed out, that to deny that the powers of the federal government extend to such a case is in effect to raise the old objection, sometimes put forward by foreign critics, that there is "no sanction to a treaty made by the United States, and no national power capable of enforcing its provisions within the federal limits."

"I maintain further, that a treaty, when made by the President of the United States and ratified by the Senate, is binding upon every resident of the United States and every citizen of the republic, wherever he may be, and that the President and the federal courts are vested with power to enforce the provisions of the treaty, and that it is the duty of Congress to pass all laws which may be necessary to carry these provisions into effect."

Of course there are some limitations to the treaty-making power, implied from its very nature. "A treaty must of necessity relate to some matter which is a proper subject of international regulation." As was said by Mr. Justice FIELD in *Geofroy* v. *Riggs*, 133 U. S. 266: "It would not be contended

that it (the treaty-making power) extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent." But with these exceptions it is not perceived that there is any limit to the question which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. With the San Francisco incident still in the minds of those present, the subject was certain to bring out opposing views. Members from the southern states rose to speak in defense of the reserved rights of the states, maintaining that the treaty-making power is limited by the distribution of the powers between the federal government and the states, and can not extend to matters reserved exclusively to the latter. Until the question raised by the Japanese treaty comes before the Supreme Court, it must remain an open one. But it would seem that the southern members overlooked a line of cases in which that court has held that the regulation by treaty of the rights of aliens to succeed to real property within the states supersedes state laws opposed to the treaty. (*Hauenstein* v. *Lynham*, 100 U. S. 483.)

An interesting paper was read by Mr. Gaston de Leval, adviser to the British legation at Brussels, on "Diplomatic Protection of Citizens Abroad." Claims based on injuries received in foreign countries arise *ex delicto* or *ex contractu*. Protection or redress in the former case may be demanded to the fullest extent. In the case of claims based on contract, resort to force should not be made to obtain their collection. But here the distinguishing test is, whether the results flowing from the contract could not have been foreseen. "A creditor knows or should know that states may go bankrupt, but not that having to pay, they simply will refuse to do so, nor that they will give privileges or prior rank to citizens over foreign creditors," nor where the claim becomes the subject of litigation that "the administration of justice will be tampered with." Speaking generally, "the use of force to collect debts is more a political than a legal question."

Creditors must, in the first instance, resort to the courts for redress. This presupposes "a body of independent judges whose good faith and impartiality can not be reasonably or generally doubted."

If the claim becomes the subject of diplomatic consideration, then the question may be as to the extent of the liability. In case of delicts, "where the fault of the state is voluntary and the damage is the consequence of a wilful wrong, there is no reason why the indemnity to be paid should not be as complete as possible." If not wilful, then the liability is limited to the damage actually sustained.

A state is liable for the delinquencies of its subordinate agent, where he exceeds his instructions, omits to afford protection where opportunity offers, is incapable, or unfit, or when in such cases his government fails to take correctional measures against him. In cases of claims based on mob violence, the rule is that governments are not liable to foreigners injured thereby, if all reasonable efforts were made to prevent or control the action of the mob, and if redress in the courts is not afterwards denied to the injured persons. Mr. Leval appears to think that the law adopted in France and Belgium in

1795, and still in force in the latter country, is a good one. This "renders all the inhabitants of the city concerned jointly and severally liable to pay compensation for all public crimes committed against persons and property by a mob." And he adds, "although framed in a bygone age, it might still perhaps be usefully applied elsewhere than in Belgium."

Papers on contraband of war were read by Mr. Justice Kennedy and by Judge Charles B. Elliott of the Supreme Court of Minnesota; also one by Sir Thomas Barclay on the "Most Favored Nation Clause in Treaties of Commerce."

J. F. B.

THE EXTENT TO WHICH THE ACTION OF MEDICAL BOARDS MAY BE CONTROLLED BY MANDAMUS.—This question is considered by the Supreme Court of Missouri in the recent case of *State ex rel. McCleary* v. *Adcock et al.* (Nov. 6, 1907), 105 S. W. Rep. 270, and the discussion and conclusion therein are such as to warrant notice and comment. It appears that the medical law of the state by its terms does not apply to the student who was matriculated in a medical college on or prior to a date named, but provides that it shall be the duty of the state board of health, which is by law the medical board of the state, upon receiving the fee named in the statute from such student, to issue to him a license to practice medicine, if he present to such board a diploma from any medical college of the state. The relator had complied with the requirements of the statute as to the payment of the fee and as to the presentation to said board of a diploma from a medical college of the state, and he claimed to have complied with it as to the time of his matriculation in a medical college and to be entitled to a license to practice from said board. The board, however, denied him a license upon the ground that he had failed to produce evidence satisfactory to the board that he was a medical college matriculate on or prior to the date mentioned in the statute. The relator then began mandamus proceedings, which resulted in an issue in the supreme court, upon which testimony was taken by a commissioner specially appointed by the court for that purpose. His report, with which all the testimony in the case was returned, concluded with the findings that the relator had matriculated prior to the date mentioned in the statute, "and had established that fact by the great weight of evidence both at the hearing before the board of health and before" the commissioner; that "the board of health did not give to the relator's evidence the weight and consideration to which it was entitled, and in that respect acted without due regard to the legal rights of relator"; that the relator had complied with all other conditions of the statute. The commissioner recommended that the peremptory writ issue. The conclusions of the commissioner as to the facts were adopted by the supreme court, and a peremptory writ was ordered in accordance with his recommendation.

The respondent board claimed that in deciding the question as to whether or not relator was a medical matriculate on or prior to the date mentioned in the statute, adversely to relator, it had exercised its discretion in regard to a matter within its jurisdiction, and that its conclusion was final. But the supreme court, while recognizing apparently that such a board may be

clothed with discretionary powers and that, when such powers are properly and reasonably exercised, they cannot be controlled by mandamus, holds that the writ should issue to correct the abuse of discretion; that whether or not discretion has been reasonably exercised or abused, is a question for the courts; that the great weight of evidence shows that the relator matriculated prior to the date named in the statute and that it is an injustice to him, which the courts should correct by mandamus, for the board, under the circumstances, to withhold his license.

From a reading of the case it is quite apparent that the attitude of the supreme court in regard to the weight of evidence is correct. And the court was undoubtedly right in its conclusion that the abuse of discretion on the part of the board was such as to warrant the issuing of the peremptory writ. But there is an opportunity for a difference of opinion in regard to the suggestion of the court that in a matter of this kind the medical board acts ministerially. After having discussed the question of the arbitrary exercise of discretionary power, and reached the conclusion indicated above, the court says: "But beyond all this, and decisive of this case, the board acts ministerially in a matter of this kind. If the conditions exist, the license must be granted. If the conditions exist, there is no discretion, but the license must be issued. If the board cannot act judicially, * * * this case resolves itself into the plain proposition,—do or do not the conditions exist? If so, the license must go." In the issuing of the license, the board undoubtedly acts ministerially, but in determining as to whether or not the conditions exist that warrant the issuing of a license, it would seem that the board acts in at least a quasi-judicial capacity. Such is apparently the opinion of this court in other cases involving similar questions. While in *State ex rel. McAnally* v. *Goodier et al.*, 195 Mo. 551, 93 S. W. Rep. 928, it is said that the state board of health, which is the medical board, "is merely a governmental agency, exercising ministerial functions," and that "the duties of the board are of an administrative or ministerial character," yet in *State ex rel. Granville* v. *Gregory*, 83 Mo. 123, 136, this court said: "The board of health, in the discharge of duties in reference to the issuance of certificates, is engaged in the performance of those things which essentially partake of a judicial nature, requiring the examination of evidence and passing on its probative force and effect, requiring the exercise of judgment and the employment of discretion." And in *State ex rel. Hathaway* v. *State Board of Health*, 103 Mo. 22, 15 S. W. Rep. 322, this court, in considering that part of the medical law that authorizes the refusal and revocation of certificates for unprofessional or dishonorable conduct, said: "This section of the statute imposes upon the board duties which are quasi-judicial in their character. The question whether the applicant is guilty of unprofessional or dishonorable conduct calls for the exercise of judgment and sound discretion. It is a question as to which the board must hear the evidence and pronounce a conclusion."

It would seem to be a correct statement of the functions of a board of medical examiners to say of it, as is said substantially in the last cited case, that in the performance of its duties, other than those that are merely formal, it acts in a quasi-judicial capacity, as it must pass upon facts and reach

conclusions, but that in so doing it is not exercising judicial functions, as that term is used when applied to the regularly constituted judicial tribunals, and that it does not, therefore, trench upon the judicial department of the government. See *Raaf* v. *State Board of Medical Examiners,* 11 Idaho 707, 84 Pac. Rep. 33; *People* v. *Hasbrouck,* 11 Utah 291, 39 Pac. Rep. 918; *State* v. *Hathaway,* 115 Mo. 36, 21 S. W. Rep. 1081; *Iowa Eclectic Medical College Assn.* v. *Schrader,* 87 Iowa 659, 55 N. W. Rep. 24, 20 L. R. A. 355; *Van Vleck* v. *Board of Dental Examiners,* (Cal.) 48 Pac. Rep. 223; *State* v. *Chittenden,* 127 Wis. 468, 502, 107 N. W. Rep. 500.

The foregoing is pertinent in this connection in view of the fact that the judicial quality of many of the functions of medical boards is a matter of supreme importance in any attempt to determine the extent to which the action of such boards may be controlled by mandamus.

In general, the office of the writ of mandamus is to compel the performance of mere ministerial acts prescribed by law. It may compel a board of medical examiners, for example, to perform any act that is strictly within the ministerial functions of the board. The writ also may issue to subordinate judicial tribunals to compel them to act where it is their duty to act. But it is not a part of the office of the writ to interfere with the exercise of judicial power or discretion, in the absence of abuse, whatever may be the character of the officer or body that exercises that power or discretion. As is said by the New York Court of Appeals, in speaking of the general functions of the writ: "It is not, like a writ of error or appeal, a remedy for erroneous decisions. * * * A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The character of the duty, and not that of the body or officer, determines how far performance of the duty may be enforced by mandamus. Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be." *People ex rel. Francis* v. *Common Council of the City of Troy,* 78 N. Y. 33. In accordance with this principle, a medical board may be compelled by mandamus to decide a question that calls for the exercise of its judgment and discretion, but it cannot be compelled to decide in a particular way, nor can its conclusion be disturbed in the absence of abuse by the board of its discretionary authority. The Supreme Court of Missouri, in discussing the question in *State ex rel. Granville* v. *Gregory,* 83 Mo. 123, uses the following language: "While courts on suitable occasions will apply the spur of mandamus to put the discretion of inferior courts and officers in motion, yet after that discretion has been exercised, as in the case at bar, no matter in what way, the mandatory authority to compel the doing of the particular act prayed for is at an end. Of course these remarks have no relevancy to acts simply ministerial, where no judgment is to be exercised; but this case is not regarded as of that character, and whenever an element, shred or degree of discretion enters into the duty to be performed, the functions of mandatory authority are shorn of their customary potency and become powerless to dictate terms to that discretion. Were the rule other-

wise, instead of officers discharging their duties in accordance with their own official discretion, that of a court would be substituted therefor."

The whole matter may be summed up in the following statement, which finds abundant support in the cases cited: The purely administrative or ministerial functions of a board of medical examiners are subject to control by mandamus. If a board should fail to act when it is its duty to act, action may be compelled. But insofar as the functions of a board are discretionary in their nature, and hence of a quasi-judicial character, they cannot, in the absence of abuse of discretion, be reached by mandamus. Abuse of discretion, however, or any acts on the part of a board that are arbitrary or irregular will justify the use of the writ. *People ex rel. Sheppard* v. *State Board of Dental Examiners,* 110 Ill. 180; *Dental Examiners* v. *People,* 123 Ill. 227; *Illinois State Board of Health* v. *People,* 102 Ill. App. 614; *State ex rel. Powell* v. *State Medical Examining Board,* 32 Minn. 324, 20 N. W. Rep. 238, 50 Am. Rep. 575; *State ex rel. Granville* v. *Gregory,* 83 Mo. 123; *Williams* v. *Dental Examiners,* 93 Tenn. 619, 27 S. W. Rep. 1019; *State ex rel. Kirchgessner* v. *Board of Health of Hudson County,* 53 N. J. Law 594, 22 Atl. Rep. 226; *Van Vleck* v. *Board of Dental Examiners* (Cal.), 48 Pac. Rep. 223.

H. B. H.

LIABILITY FOR INJURIES ARISING FROM THE USE OF DANGEROUS SUBSTANCES SOLD IN THE OPEN MARKET.—The defendant, Rommeck, a retail hardware dealer, sold to the plaintiff a package of stove polish manufactured by defendant, Crosby & Co. When plaintiff attempted to use the polish, it exploded, injuring her. The declaration proceeded on the theory that there rested upon both defendants the positive duty of knowing that the polish was a dangerous substance, and that they should not manufacture and sell dangerous and inflammable substances. There was no averment that defendants had actual knowledge of the inflammable nature of the goods, nor was it averred in what manner they were negligent in not knowing their inflammable nature. Both defendants demurred, Rommeck's demurrer being sustained, and that of Crosby & Co. being overruled. The Supreme Court in *Clement* v. *Crosby & Company,* 148 Mich. 293, 111 N. W. 745, affirmed the overruling of the corporation's demurrer, and in the present case the court affirms the judgment sustaining Rommeck's demurrer. *Clement* v. *Rommeck* (1907), — Mich —, 113 N. W. Rep. 286.

The question which presents itself squarely for decision is whether a retail merchant who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable, *in the absence of negligence,* if it turn out that the article is not adapted to the use and causes injury. In *Clement* v. *Crosby & Company,* supra, the court overruled the demurrer, but the declaration was so drawn that it was not necessary to decide whether or not actual knowledge of the dangerous properties must be shown to be in the manufacturer to render it liable in the circumstances, and the court expressly said that they did not mean to determine the necessity of a scienter, although the allegation of

deceitful and artful withholding of knowledge from the public necessarily implied a knowledge on the part of the defendant. The court cited the following cases to show that one who places upon the market a dangerous article may be chargeable for injuries done to third persons; but a reading of the cases discloses the fact that the defendants either knew of the dangerous qualities of the goods or else were guilty of negligence. *Barney* v. *Burstenbinder,* 7 Lans. (N. Y.) 210; *Davis* v. *Guarnieu,* 45 Ohio St. 470; *Hall* v. *Rankin,* 87 Ia. 261; *Shubert* v. *J. R. Clark Co.,* 49 Minn. 331; *Carter* v. *Towne,* 98 Mass. 567; *Wellington* v. *Downer Kerosene Oil Co.,* 104 Mass. 64; *Elkins, Bly & Co.* v. *McKean,* 79 Pa. 493.

There are cases, however, which upon principle would seem to indicate that knowledge by the manufacturer is not necessary to charge him with liability. In *Randall* v. *Newsom,* 2 Q. B. Div. 102, the court held that in the sale of a pole furnished by the defendant for plaintiff's carriage there was an implied warranty that the pole was free from latent as well as discoverable defects. In *Carleton* v. *Lombard,* 149 N. Y. 137, it was held that in a contract for the sale of a quantity of petroleum of a certain quality, the contract was not satisfied unless the oil was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement, or in the selection of material by reasonable care and skill. See also *Kellogg Bridge Co.* v. *Hamilton,* 110 U. S. 108; *Rodgers* v. *Niles,* 11 Ohio St. 48.

In the principal case the plaintiff relied on the decisions in *Craft* v. *Parker,* 96 Mich. 245, and *Hoover* v. *Peters,* 18 Mich. 51. These cases ruled that in the sale of articles of food by a dealer in such goods for domestic consumption, there is an implied warranty that the food is wholesome. See also *Van Bracklin* v. *Fonda,* 12 Johns. 468. The contention was that an analogous principle ought to be applied in the case before the court, but the court refused to so rule, saying, "We are not aware that the rule of these cases has been extended to the sale of commodities like stove polish." The decision was based on the case of *Brown* v. *Marshall,* 47 Mich. 576. The facts in this case were briefly these: Plaintiff sent her sister to defendant's drug store to purchase some salts and was waited upon by a clerk of the defendant. The clerk delivered what he said was the article called for, but in fact it was a poison. Plaintiff took a portion of it and immediately became ill. At the trial the court instructed that if the defendant's clerk sold and delivered to the plaintiff a poison instead of a harmless drug, and the plaintiff took it supposing it to be harmless, and was thereby injured, the defendant was liable for all damages so caused. The Supreme Court ordered a new trial, for the reason that the trial court erred in the above instruction, in that it did not include negligence as an element to be necessarily considered. The court distinguished the case from the leading case of *Thomas* v. *Winchester,* 6 Seld. (N. Y.) 397, saying that in that case the liability was expressly grounded upon actual negligence. The case presents a confusion of ideas regarding tort actions based on negligence of manufacturers or dealers, and actions upon implied warranties. The case of *White* v. *Oakes,* 88 Me. 367, seems to be in point with the principal case. The defendants, being dealers in furniture and

not manufacturers, sold a folding bed to the plaintiff without any express warranty of any kind. The bed proved dangerous to persons using it, not from defective parts but from faulty design. By reason of the fault the bed collapsed, injuring plaintiff. The defendants had no knowledge of this danger. The mechanism of the bed could be observed by the plaintiff as well as by the defendant, but neither, unless skilled in mechanics, would have been likely to have discovered the danger. The court held there was no liability.

R. F. M.

THE EFFECT UPON AN ILLEGAL MARRIAGE OF COHABITATION AFTER THE REMOVAL OF THE IMPEDIMENT.—The defendant's wife obtained a decree of divorce from him, but before the decree became absolute he married another woman. The parties involved in this latter marriage separated, but subsequently cohabitated after the divorce obtained by the first wife was made absolute. On an indictment charging defendant with polygamy, the Massachusetts court held that the invalidity of such second marriage was not cured by the subsequent cohabitation of defendant and his second wife after such decree became absolute. *Commonwealth* v. *Stevens* (1907), — Mass. —, 82 N. E. Rep. 33.

The question whether a marriage, void because of an existing marriage, can be made valid by cohabitation after the removal of the impediment, is decided in the following cases: *Williams* v. *State,* 44 Ala. 24, where the court held that cohabitation, though evidence of marriage, cannot make a void marriage valid. The Illinois court, in *Cartwright* v. *McGown,* 121 Ill. 338, held that cohabitation after the removal of the impediment will not alone change the marriage from being meritricious. Similar holdings are found in *Summerlin* v. *Livingston,* 15 La. Ann. 519; *Thompson* v. *Thompson,* 114 Mass. 566; *Voorhees* v. *Voorhees,* 46 N. J. Eq. 411; *Pettit* v. *Pettit,* 105 App. Div. 312, 93 N. Y. S. 1001; *Collins* v. *Collins,* 80 N. Y. 1; *Hunt's Appeal,* 86 Pa. St. 294.

On the other hand the following cases are opposed to the doctrine laid down in the principal case: *Stein* v. *Stein,* 66 Ill. App. 526; *Blanchard* v. *Lambert,* 43 Iowa 228; *Donnelly* v. *Donnelly,* 8 B. Mon. (Ky.) 113; *Turner* v. *Turner,* 189 Mass. 373, 109 Am. St. Rep. 643, 75 N. E. 612; *State* v. *Worthington,* 23 Minn. 528; *Chamberlain* v. *Chamberlain,* 68 N. J. Eq. 414, 62 Atl. 680; *Fenton* v. *Reed,* 4 Johns. (N. Y.) 52; *Rose* v. *Clark,* 8 Paige (N. Y.) 574; *Taylor* v. *Taylor,* 25 Misc. Rep. (N. Y.) 566, 55 N. Y. S. 1052; *The Breadalbane Case,* L. R. 1 H. L. Sc. 182; *De Thoren* v. *Attorney General,* L. R. 1 App. Cas. 686. *Taylor* v. *Taylor,* supra, decided that a marriage entered into by a woman whose former husband was absent for five successive years, and who was not known to be living, is voidable and is made valid by the continued cohabitation of the parties after the former husband's death. The court in *Chamberlain* v. *Chamberlain,* supra, followed the holdings of *The Breadalbane Case* and *De Thoren* v. *Attorney General.* The case was distinguished from *Voorhees* v. *Voorhees,* supra, decided by the same court fifteen years before, in that the marriage was contracted in good faith, the parties

having reason to believe that the wife's former husband was dead; while in *Voorhees* v. *Voorhees* the marriage was meretricious, and the court held that cohabitation after the decree of divorce did not make the marriage valid, as the decree put the parties back in their matrimonial relations just where they were when the decree was pronounced. *Turner* v. *Turner,* supra, came within the provisions of a statute, and on that account the marriage was declared valid.

The common law rule that marriages, voidable because of the lack of age of one or both of the parties, are made valid if the parties continue to cohabit after reaching the proper age, is followed by *Smith* v. *Smith,* 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362; *Koonce* v. *Wallace,* 52 N. C. 194; *Holtz* v. *Dick,* 42 Ohio St. 23, 51 Am. Rep. 791. The common law placed slaves in the same category as infants, as neither had the capacity to contract a valid marriage. Practically all the cases agree that a marriage between slaves is rendered valid by their cohabitation after emancipation. The more recent cases which hold the marriage valid are *Lewis* v. *King* (1899), 180 Ill. 259, 54 N. E. 330; *State* v. *Melton* (1897), 120 N. C. 591, 26 S. E. 933; *Ross* v. *Ross* (1882), 34 La. Ann. 860; *Dowd* v. *Hurley* (1880), 78 Ky. 260. However, a contrary holding is found in *Brown* v. *Beckett* (1867), 6 D. C. 253.

Where the marriage is invalid because one of the parties was insane at the time of its celebration, the general rule is that the marriage may be ratified by the cohabitation of the parties during lucid intervals. See *Prine* v. *Prine,* 36 Fla. 676, 18 So. 781; *Gross* v. *Gross,* 96 Mo. App. 486, 70 S. W. 393; *Cole* v. *Cole,* 37 Tenn. (5 Sneed) 57, 70 Am. Dec. 275. A contrary decision is reached, however, in *Sims* v. *Sims,* 121 N. C. 297, 28 S. E. 407. Where the marriage is void because of fraud or other causes of fear, *Hampstead* v. *Plaistow,* 49 N. H. 84, holds that a voluntary cohabitation, after the fraud is known, and after the force or cause of fear is removed, will not cure the defect. J. E. W.