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Right of Privacy--Civil Rights Law, §§ 50, 51

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another theory which has been adopted in other jurisdictions, namely, where the municipality knowingly permits such nuisance to exist in a park or in any other place where it is likely to cause injury, there should be no exemption from liability to the municipality.[46] This contention is also supported in the case of *Cleveland* v. *Ferrando*,[47] similar to the case at bar on all fours. It was held there "that in failing to remove the explosive that was left on the ground with knowledge of the same and of its dangerous character the municipality should be held liable. The presence of an unguarded, unexploded bomb in a public park where children are invited to come is in itself an intolerable nuisance and so self-evident that any argument can but echo the statement." At any rate, the rule[48] adopted in the other *non-liability* jurisdictions seems to be the more logical and just, as well as the more favorable to public policy.

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RIGHT OF PRIVACY—CIVIL RIGHTS LAW, §§50, 51.

During the last half century, courts of jurisprudence have generally been reluctant to recognize the existence of the so-called right of privacy as an individual and personal right.[1] This behavior on the part of the courts may be attributed, to a large extent, to the apparent infringement of such right upon the rights of freedom of speech and of the press,[2] or to their strict adherence to established precedents

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[46] *Supra* note 32.

[47] *Supra* note 30. It is interesting to note that in New York, if an express license or permit had been given, the plaintiff would have been allowed a recovery, but in this case the court says if an express license had been given, the fireworks exhibition would then have been under the regulation of the police, and in such case the municipality would be exercising a governmental function in which case they were exempt from tort liability.

[48] *Supra* notes 45 and 46.

[1] *Infra* notes 5 and 6. The following cases have rejected the legal right of privacy altogether: Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W. D. Mo. 1912); Atkinson v. Dougherty, 12 Mich. 372, 80 N. W. 285 (1899); Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442 (1902); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1933); Somberg v. Somberg, 263 N. Y. 1, 188 N. E. 152 (1933); Henry v. Cherry, 30 R. I. 13, 73 Atl. 97 (1909); Hillman v. Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911); see Von Thodorovich v. Franz Josef Ben. Assoc., 154 Fed. 911 (E. D. Pa. 1907).

[2] Roberson v. Rochester Folding-Box Co., *supra* note 1. But see Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 at 74, where Justice Cobb said: "Liberty of speech and of the press is and has been a useful instrument to keep the individual within the limits of lawful, decent, and proper conduct; and the right of privacy may well be used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guaranties of such rights; one may be used as a check upon the other; but neither can be lawfully used for the other's destruction."

and principles of jurisprudence.[3] However, from a number of fairly recent decisions in various jurisdictions, wherein the right of privacy has been recognized either outrightly as an individual right[4] or impliedly, upon a supposed right of property,[5] or breach of trust or contract,[6] it may be intimated that the prognosis for the development of the law of privacy is favorable. And this trend appears more significant, in view of the fact that its existence seems to have been first asserted in this country so late as the year 1890.[7] The scope of this article is confined to the development of the law of privacy as affecting the New York Civil Rights Law, §§50, 51.[8]

The right of privacy, assuming its existence, has been defined as the right of an individual to be let alone,[9] or to live without unwarranted invasion by the public in matters of private nature.[10] It has been sustained by legal writers as a natural right, as being included in an individual's inherent right to life, liberty and pursuit of happiness.[11] On that basis, the form of action has been held to be a personal one, and being so, to abate with the death of the person.[12]

To understand the nature and extent of this subject, it is necessarily advantageous to make a cursory glance into the growth of legal and equitable rights. Thus, in the early days, the law gave a remedy only for the physical interference with life and property. Chancery was afterwards established to give relief where justice demanded it, but due to the rigid system of formal actions in the courts of law, it was there denied. Chancery began treating principally with interests in property, and, from this germinal beginning, sprang up the common adage that courts of equity will protect property rights only. In the courts of law, there gradually came a recognition of man's rights in his reputation. As a result, there developed the laws of libel, slander, seduction, malicious prosecution, etc. With the advance of civilization, the press and other means of communication, together with the immense progress of human activities, necessity had arisen to protect a person's feelings, emotions and thoughts. But as formerly said, courts of law had not given recognition to the mental feelings and anguish of an individual caused by the acts of another;

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[3] Roberson v. Rochester Folding-Box Co., *supra* note 1; Henry v. Cherry, *supra* note 1.

[4] Pavesich v. New England Life Ins. Co., *supra* note 2.

[5] Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911).

[6] Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849 (1912).

[7] Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193. The right of privacy, limited as such right must necessarily be, found expression in the laws of France as early as 1868. *Id.* at 214.

[8] N. Y. CIVIL RIGHTS LAW (1903) §§50, 51, amended Laws of 1921, c. 501.

[9] 1 COOLEY, TORTS (3d ed. 1906) 33.

[10] Pavesich v. New England Life Ins. Co., *supra* note 2, 50 S. E. at 78.

[11] *Supra* note 7; Kacedan, *The Right of Privacy* (1932) 12 B. U. L. REV. 353, 600.

[12] Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895).

and, even though they were wanton or malicious, yet if otherwise lawful, the suffering inflicted was *damnum absque injuria.*[13]

Thus, it is that chancery sensed that the law ought to accord some remedy against the use of one's personality as early as 1818.[14] In that case, Lord Eldon restrained the publication of plaintiff's letters by defendant in protection of the defendant's property in them as compositions. It is evident that Lord Eldon used the technical property right to justify equitable intervention in order to protect the plaintiff's feelings or loss of reputation.

In many jurisdictions, the trend of modern decisions is to follow the case of *Gee* v. *Pritchard.* On that basis, in *Edison* v. *Edison Polyform Mfg. Co.,*[15] the defendant was restrained from an unauthorized use of the plaintiff's name in advertising and selling a medicine called "Polyform." As in *Gee* v. *Pritchard,* the court construed the highly technical and fictitious property right as an excuse to protect purely personal rights for no injury to plaintiff's business was involved.

The first of the leading cases to deny the right of a legal right of privacy where no property right was involved is *Roberson* v. *Rochester Folding-Box Co.*[16] In this case, the Court of Appeals refused to restrain the publication of the plaintiff's picture for advertising purposes. A quotation from that opinion will best explain the court's attitude:[17]

> "The so-called right of privacy has not yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided."

This decision created quite a storm of disapproval among the profession and the public as evidenced by articles in law journals[18] and other periodicals[19] condemning it. One of the members of the majority of the court quite unprecedentedly, in view of the harrowing circumstances, offered a plea of justification for the court's conclusion.[20]

Shortly after the *Roberson* decision, the legislature enacted Sections 50, 51[21] to cover the specific case. Thus, one (natural per-

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[13] *Supra* note 11; WALSH, A TREATISE ON EQUITY (1930) c. X.
[14] Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818).
[15] 73 N. J. Eq. 136, 67 Atl. 392 (1907).
[16] *Supra* note 1, decided by a bare majority reversing a unanimous decision of the Appellate Division, 64 App. Div. 30, 71 N. Y. Supp. 876 (4th Dept. 1901).
[17] *Id.* at 556, 64 N. E. 447.
[18] Larremore, *The Law of Privacy* (1912) 12 COL. L. REV. 693.
[19] Editorial, N. Y. Times, Aug. 23d, 1902.
[20] O'Brien, *The Right of Privacy* (1902) 2 COL. L. REV. 437.
[21] *Supra* note 8.

son [22]), whose name, picture or portrait is used within the state for advertising purposes, or purposes of trade, without his written consent first being obtained, may maintain an equitable action to restrain such use and recover damages which may include "smart money." The statute also makes such violation a misdemeanor.

This act of legislature was held constitutional; it deprives a person neither of liberty or property without due process of law nor does it impair the obligation of contract.[23] The right of action under the statute has been held to be a personal one, and, upon the death of the plaintiff, it does not survive to his executor or administrator.[24]

Cases of significance under the statute are: *Almind* v. *Sea Beach R. Co.*,[25] where an injunction was granted restraining a railway from using a picture of the plaintiff and her child, where it is shown that such picture is used to show defendant's passengers how to enter and alight from its cars. The court remarked that although the photograph was not used for trade purposes as no monetary gain was intended from its exhibition, nevertheless, the statute was technically violated, the picture having been used for purposes of advertising.

The injunctive feature of the act was used in the case of *Eliot* v. *Jones*.[26] The plaintiff in this case, president emeritus of Harvard University, was editing a set of books known as the "Harvard Classics" and "Dr. Eliot's Five-Foot Shelf of Books." The defendant without the consent of Dr. Eliot published a similar but inferior edition under the name of "Dr. Eliot's Famous Five-Foot Shelf of the World's Greatest Books." It was held an injunction was proper.

The inadequacy of the statute was fully illustrated by *Moser* v. *Press Pub. Co.*[27] and *Humiston* v. *Universal Mfg. Co.*[28] These cases hold to the effect that the publication of a person's photograph without his consent in a newspaper in connection with news items or such publication in a newsreel of current events, respectively, is not such a trade within the contemplation of the legislature in the passage of Sections 50, 51 of the Civil Rights Law. No doubt the court, in these cases feared to invade the freedom of the press, but in view of the express wording of the statute it appears that these decisions have been wrongly decided.

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[22] Rosenwasser v. Ogoglia, 172 App. Div. 107, 158 N. Y. Supp. 56 (2d Dept. 1916), wherein held that the statute did not apply to a co-partnership.

[23] Rhodes v. Sperry & Hutchinson Co., 120 App. Div. 467, 104 N. Y. Supp. 102 (2d Dept. 1907); Wyatt v. James McCreery Co., 126 App. Div. 650, 111 N. Y. Supp. 86 (1st Dept. 1908).

[24] Wyatt v. Hall's Portrait Studio, 71 Misc. 199, 128 N. Y. Supp. 247 (1911).

[25] 157 App. Div. 230, 141 N. Y. Supp. 842 (2d Dept. 1913).

[26] 66 Misc. 95, 120 N. Y. Supp. 989 (1910).

[27] 59 Misc. 78, 109 N. Y. Supp. 963 (1908).

[28] 189 App. Div. 467, 178 N. Y. Supp. 752 (1919).

In an article titled, *"Right of Privacy,"* [29] the author very vigorously condemns these decisions since the publication of a newspaper or a newsreel is concededly for trade purposes. He states in connection with these cases: [30]

> "As long as they (courts) will continue to interpret this law not according to what it provides, they will run into contradictions, discrepancies, and absurdities, and the public will be left without protection against the scurrilous, tabloid journalism and other similar parasites."

In the recent decision of *Blumenthal* v. *Pictures Classics, Inc.*,[31] it appears, at first glance, that the court reversed its position as far as newsreel publications are concerned. That case holds to the effect that an injunction *pendente lite* is proper where it appears defendant, without consent or knowledge of plaintiff, distributed and displayed "motion picture life" showing plaintiff in the act of selling bread and rolls in a street in New York City. But it is to be noted that the film was styled by the court as being akin to a feature, which it holds is within the statute. Nevertheless, the case is of significance to show the more liberal trend of the court, for it appears that it refused to call the picture a current event newsreel to spare the plaintiff of any feelings of anguish.

Recently, a decision [32] was handed down by the Supreme Court of New York County on a set of facts which it declared violated the statute. The decision is interesting since the Supreme Court of Kings County, on a similar set of facts,[33] dismissed the complaint.

The facts of the *Garden* case are: [34] The plaintiff granted to the predecessor of the defendant perfume company, which grant was given in writing, the right to use her name and portrait for an unlimited time in advertising its wares. The defendant trademarked the articles with which plaintiff's name was associated and spent considerable money to popularize them. After a lapse of a number of years, plaintiff brought action under Sections 50, 51 of the Civil Rights Law to restrain defendant from using her name and portrait in connection with their business.

In the *Wendel* case,[35] the plaintiff, while an employee in the defendant company, posed voluntarily for a portrait to be used in connection with his master's business. At the termination of his employment, he sued defendant under the statute.

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[29] Kacedan, *The Right of Privacy, supra* note 11.
[30] *Id.* at 645.
[31] 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dept. 1932).
[32] Garden v. Parfumerie Rigaud, Inc., 151 Misc. 692 (1934).
[33] Wendell v. Conduit Mach. Co., 74 Misc. 201, 133 N. Y. Supp. 758 (1911).
[34] *Supra* note 31.
[35] *Supra* note 32.

In both cases it is to be noted the consent was given gratuitously; furthermore, in the *Garden* case, the consent was in writing.

In the *Wendel* case, the defendant was estopped from obtaining an injunction, the court therein remarking: [36]

> "The application for an injunction is governed by the use of equitable rules, and the relief will be denied him, even though he shows he has a right and would otherwise be entitled to the remedy, in cases he has himself acted dishonestly, fraudulently or illegally."

But note the words of the court in the *Garden* case: [37]

> "It is the well settled law of this state that a gratuitous license—and that is the best that can be said of the permission granted by plaintiff—to use name and portrait is revocable at any time, even though action has been taken on it. The court cannot lend itself to defendant's claim that having trademarked the article and invested considerable money to popularize it, no revocation is possible.
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> "* * * Even admitting that her (plaintiff's) reason is ulterior and mercenary, it cannot be denied that her name and portrait are her own and during life at her disposal."

Clearly, in the *Garden* case, the court could have considered either waiver [38] or estoppel.[39] Or else, it could have literally construed the statute and found that defendant had adhered to the statutory provisions.

It is the writer's opinion, in view of this decision and that of the *Blumenthal* case,[40] the courts have manifested a desire to preserve an individual's right of privacy wherever it can do so without violating the doctrine of *stare decisis*. It is in furtherance of the major trend to regard the right of privacy in the nature of a natural and inviolable right guaranteed by the Constitution. However, from the *Baumann* [41] and *Somberg* [42] decisions, wherein the right of an individual right of privacy was again denied to the plaintiff, it appears that the New York courts will not for some time follow the case of *Pavesich* v. *New England Life Ins. Co.*[43] This view is to be regretted.

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[36] *Supra* note 33, at 203, 133 N. Y. Supp. at 759.
[37] *Supra* note 31, at 693.
[38] Pavesich v. New England Life Ins. Co., *supra* note 2; Munden v. Harris, *supra* note 5.
[39] *Supra* note 32.
[40] *Supra* note 30.
[41] Baumann v. Baumann, *supra* note 1.
[42] Somberg v. Somberg, *supra* note 1.
[43] *Supra* note 2.

The experience with the Civil Rights Law [44] has taught us that the statutory enactments to protect a person's right of privacy are inadequate in dealing with the innumerable situations which may arise in this field.

It may be argued that legal or equitable acts against immoral conduct will open a wide field of possible litigation with ineffective results.[45] But is it not a truism of jurisprudence that the difficulty of practical administration in certain cases is not a valid objection to the recognition of legal principles? [46] Actually, such actions would be little, if any, more speculative than is the criterion of negligence which is constantly applied to concrete facts by juries.

Messrs. Warren and Brandeis, realizing that the relief, if it is to be given under the right of privacy, must be controlled to be effective, have outlined the limitation. This has received the approval of subsequent articles on the subject.[47] The scope as stated by the authors are: [48]

> "1. The right of privacy does not prohibit any publication of matter which is of public or general interest.
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> 2. The right of privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the laws of libel and slander.
>
> 3. The law would not probably grant any redress for invasion of privacy by oral publication in the absence of special damage.
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> 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.
>
> 5. The truth of the matter does not afford a defense.
>
> 6. The absence of 'malice' in the publisher does not afford a defence."

Three sorts of remedies exist, namely, money damages, equitable injunction and penal liability. No doubt, the principal brunt of the litigation will be borne by the courts of equity. In his dissenting opinion in the *Roberson* case,[49] Judge Gray remarks that the peculiar

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[44] *Supra* note 8.

[45] (1934) 8 ST. JOHN'S L. REV. 359.

[46] Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773 (1896).

[47] Larremore, *The Law of Privacy, supra* note 18; *supra* note 28.

[48] *Supra* note 7, at 214.

[49] Roberson v. Rochester Folding-Box Co., *supra* note 1, at 562, 64 N. E. at 450.

preventive power of a court of equity is a proper remedy for effectuating the rights of privacy. Moreover, equity is capable of granting relief in the average case awarding damages as incidental to an injunction.

In summation, it may be stated that the development of the law of privacy in various jurisdictions is favorable. The right of an individual to be let alone, or to live without unwarranted invasion by the public in matters of private nature has become more increasingly apparent during the last two decades. This view is evidenced by holdings in certain jurisdictions wherein the right of privacy has already received cognizance either as an individual [50] or property right.[51] However, New York courts have been very conservative in the past, holding steadfastly to the common law rule. With the exception of the statute,[52] they deny the legal existence of such right; and in view of the recent holdings of the *Baumann* [53] and *Somberg* [54] cases, it is seemingly evident that they will not for some time give recognition to the right of privacy as a common law right. But it is interesting to note that, of late years, they have more liberally construed the statute. It is some evidence that New York will subsequently follow the Georgian decision [55] either through judicial decision or further legislative enactment.

ALEXANDER A. MERSACK.

RIGHT OF ACTION OF THIRD PARTY BENEFICIARIES UNDER THE N. I. R. A.

In the recently decided case of *Canton* v. *The Palms, Inc.*,[1] decided in the City Court of Buffalo, N. Y., an action involving the construction and application of the President's Reemployment Agreement and the Restaurant Industry Basic Code, approved by the N. R. A., it was held that the plaintiffs were entitled to recover the difference between wages paid under the contract of employment, and the minimum wage clause, as embodied in the Restaurant Industry Basic Code.

In line with the general tendency to effectuate the purposes of the N. I. R. A. this case was decided on the traditional doctrines of contract. In interpreting the President's Reemployment Agreement,

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[50] Pavesich v. New England Life Ins. Co., *supra* note 2.
[51] *Supra* note 5.
[52] *Supra* note 21.
[53] Baumann v. Baumann, *supra* note 1.
[54] Somberg v. Somberg, *supra* note 1.
[55] Pavesich v. New England Life Ins. Co., *supra* note 2.

[1] 152 Misc. 347, 273 N. Y. Supp. 239 (1934).