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THE RIGHT OF PRIVACY IN RELATION TO THE PUBLICATION OF PHOTOGRAPHS

By L. S. Clemons*

VARIOUS newspapers recently carried the story of an action brought in England wherein substantial damages were awarded an English golfer whose photograph had been used without his consent by a sporting goods concern for the purpose of advertising its golf accessories.

This story brings to our attention again the much mooted problem of the so-called right of privacy. This question has been the subject of numerous articles in legal periodicals and has been exhaustively annotated in Lawyers' Reports, Annotated and American Law Reports. The scope of this article is confined solely to the unwarranted use of photographs as a violation of a personal right and consists mainly of a review of the adjudicated cases on the subject with an analysis of the decisions of the various courts.

The right of privacy has been defined in Brents v. Morgan, (Ky.), 299 S.W. 967; 55 A.L.R. 964, 967:

“A new branch of the law has been developed in the last few years which has found place in the textbooks and the opinions of courts which is denominated the right of privacy. It has not been concretely defined, and probably is not subject to a concrete definition, but it is

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Generally recognized as the right to be let alone; that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.

Most, if not all, of the adjudicated cases on the question have been decided since 1890. What appears to be the first discussion on the question in which this personal right is given the appellation of the right of privacy is found in an article in the *Harvard Law Review* by Samuel D. Warren and Louis D. Brandeis. (IV Harvard Law Review, 193 (1890).) This article analyzes various types of cases dealing with personal rights and from these cases concludes that there is a right of privacy, subject to certain well-defined exceptions.

The leading case on the question and the first to deny a legal right of privacy is *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538; 59 L.R.A. 478. In this case the defendant company, without the consent of the plaintiff, had used her picture for advertising purposes and had distributed the same about various places in the city of Rochester. Plaintiff alleged that this act of the defendant had subjected her to great humiliation, causing her to become nervous and ill, etc. The complaint asked for damages and for injunctive relief. The lower court had entered judgment for the plaintiff and by a four to three decision the court of appeals reversed this judgment. The majority opinion concludes that the so-called right of privacy had not then found an abiding place in their law. A very vigorous dissenting opinion was written by Justice Gray in which he attacks the majority opinion upon the ground that lack of precedents should not prevent the court from redressing a manifest wrong.

The majority opinion in the Roberson Case repudiates dicta on the right of privacy found in *Schuyler v. Curtis* (N.Y.), 42 N.E. 22; 31 L.R.A. 286. In the Schuyler Case the court refused to enjoin the erection of a statue as a memorial to a deceased person at the suit of one of her heirs. The Roberson Case limits the decision in the Schuyler Case to a holding that any such action could not be maintained by a relative of the deceased.

Prior to the decision in the Roberson case the New York court, on the authority of Schuyler v. Curtis, supra, in *Marks v. Jaffa*, 26 N.Y.S. 908, had granted an injunction restraining the defendant from publishing, in his newspaper, the picture of the plaintiff without his consent, with an invitation to readers to vote on the popularity of the plaintiff, an actor, as compared with another person whose picture was also published.

In *Murray v. Gast Lithographic & Engraving Co.*, 28 N.Y.S. 271, likewise decided prior to the Roberson Case, the court had held that
a parent could not recover damages or secure injunctive relief against the unauthorized publication of a portrait of his infant child. The decision is based upon the theory that plaintiff had no right of action for a wrong committed to his child but had solely the right to recover for any loss of services.

Upon the authority of the Roberson Case the New York court in Owen v. Partridge, 82 N.Y.S. 248 refused to grant a mandatory injunction to destroy a photograph and Bertillon measurements of the plaintiff taken after his arrest on suspicion of having committed a crime.

Subsequent to the Roberson Case the New York legislature enacted Chapter 132 of the laws of 1903 entitled “An Act to Prevent the Unauthorized Use of the Name or Picture of Any Person for the Purposes of Trade.” This act of legislature was held constitutional in Wyatt v. James M’Creery Co., 111 N.Y.S. 86 and in Rhodes v. Sperry & Hutchinson Co., 85 N.E. 1097.

Under Chapter 132, Laws of 1903, the New York court in Humiston v. Universal Film Mfg. Co., 167 N.Y.S. 98, enjoined the use of a moving picture film purporting to represent the plaintiff as a woman lawyer who had solved a murder mystery, and in Loftus v. Greenwich Lithographing Co., 182 N.Y.S. 428, enjoined the use of a portrait of the plaintiff for advertising purposes.

The Rhode Island court in Henry v. Cherry, 73 Atl. 97; 24 L.R.A. (N.S.) 991, denied the existence of a right of privacy. In this case the defendant had published a picture of the plaintiff in an advertisement for his auto coats. After an exhaustive discussion of the cases on the question and on analogous personal rights the court concludes that there is no such thing as a right of privacy under its jurisprudence and that under its constitution the power to make the law was vested in the legislature. At the conclusion of its opinion the court says (page 1005, L.R.A.):

“It has been shown that natural justice is not law.”

In so reaching its conclusion the court holds that the gist of the action for breach of right of privacy is the violation of the right of personal seclusion and not the subsequent publication.

In the Michigan case of Atkinson v. John E. Doherty & Co., 80 N.W. 285, the court refused to grant an injunction at the suit of the widow to prevent the defendant company from using the name and likeness of her deceased husband in connection with the defendant's cigars. Other courts have said that this decision goes no farther than
to hold that if there be a right of privacy it is a personal one which does not survive.

In *Hillman v. Starr Publishing Co. (Wash.)*, 117 Pac. 594; 35 L.R. A. (N.S.) 595, an action was dismissed wherein the plaintiff sought to recover damages from the publishing company for publishing her picture in connection with a news item relating to an arrest and indictment of her father. It appeared that nothing libelous was said of the plaintiff and the only reference was that she was the daughter of the accused. The court, without any extensive discussion, follows the doctrine of the *Roberson Case*.

The line of authority contra to the *Roberson Case* is headed by *Pavesich v. New England Life Ins. Co. (Ga.)*, 50 S.E. 68, where the court overruled a demurrer to a complaint for damages, alleging that plaintiff's picture had been published in a newspaper advertisement by the defendant company, underneath which appeared a statement that plaintiff had purchased insurance with the insurance company and was then drawing an annual dividend thereon. The court, after an exhaustive analysis of the law on the question wherein it goes back to the Roman law to find precedents, holds that there is a right of privacy.

The *Pavesich Case* was followed in *Kunz v. Allen (Kans.)*, 172 Pac. 532; L.R.A. 1918D 1151, the court holding that the exhibition in a moving picture theatre of the photograph of the plaintiff taken without her consent and for the purpose of exploiting the defendant's business was a violation of the right of privacy which entitled plaintiff to recover without proof of special damages.

In an action brought by Thomas A. Edison, the New Jersey court in *Edison v. Edison Polyform Mfg. Co.*, 67 Atl. 392, granted an injunction restraining the defendant from using plaintiff's name and picture in advertising its business. The court bases its decision upon the ground that the cast of one's feature is as much one's property as is his name, and further states that the *Roberson Case* cannot be sustained on principle. In so doing, the court brings its decision within the line of cases holding that equity will act to protect a property right as distinguished from a personal right.

The Missouri court in *Munden v. Harris*, 134 S.W. 1076 overruled a demurrer to the complaint of the infant plaintiff seeking damages for the unauthorized use of his picture in connection with a jewelry advertisement, basing its decision upon the theory that one has an exclusive right to his picture on the score of its being a property right of material profit.

An action for damages for the unauthorized use of a photograph for advertising purposes was likewise sustained in *Foster-Milburn*
Company v. Chinn (Ky.), 120 S.W. 364; 34 L.R.A. (N.S.) 1137.

Although holding that no right of privacy was involved the Louisiana court in Itzkovitch v. Whitaker, 1 L.R.A. (N.S.) 1147, granted an injunction restraining the placing of plaintiff’s photograph in the Rogue’s Gallery.

In some of the cases set forth above the complaint, in addition to alleging violation of the right of privacy, also contained a count alleging libel. It seems well-established that the publication of a photograph in connection with libelous statements may be made the basis of an action for libel. In such cases the photograph is proof that the statements were made concerning the plaintiff. See:

Morrison v. Smith (N.Y.), 69 N.E. 725.
Hart v. Woodbury Institute, 98 N.Y.S. 1000.
Wandt v. Hearst Chicago American, 129 Wis. 419.

Where a person’s picture is taken by a photographer, the courts have held that there is a breach of an implied contract or relationship of trust when the photographer makes additional pictures and uses them for commercial purposes.

The Wisconsin case of Klug v. Sheriffs, 129 Wis. 468 falls in this category. In this case the defendant had engaged the plaintiff to paint his wife’s picture. Later the plaintiff informed the defendant that he had painted an additional picture which he submitted to the defendant for examination. Defendant refused to return the additional picture, but tendered the return of the frame and offered to destroy the portrait which plaintiff refused and brought an action for quantum meruit. The court bases its decision upon the above stated rule of law that there was a breach of an implied contract and of a relationship of trust. In its opinion the court discusses the Roberson and Pavesich cases and holds that they are not applicable to the situation at bar. It is interesting to note that in his dissenting opinion Justice Dodge says, page 476:

“I fear that the marked prominence given to quotation from the dissenting opinion in Roberson v. Rochester F. B. Co., 171 N.Y. 538, 64 N.E. 442, may suggest approval of the views quoted as to existence of any legal right of privacy. I certainly am not prepared to yield concurrence therewith, nor did I understand that the court in any degree adopted them, but, on the contrary, decided to express no opinion on that important and vexed subject.”

Aside from the Klug Case the Wisconsin court has not passed upon the question of right of privacy.
Other cases dealing with this question of violation of contract and breach of trust are:

Douglas v. Stokes (Ky.), 149 S.W. 849.

The question is annotated in 7 L.R.A. (N.S.) 362.

It seems somewhat anomalous that under the decisions of such cases as the Klug Case there is a violation of a legal right when a person has his photograph taken for certain purposes but that there is no such violation when his photograph is surreptitiously taken and used without his consent for advertising and other similar purposes.

The opinions in Roberson v. Rochester Folding Box Co., supra, and Pavesich v. New England Life Ins. Co., supra, are concerned mainly with a search for precedents on the question of right of privacy, the Roberson Case concluding that there were no precedents and the Pavesich Case finding precedents in legal reasoning.

It is true as was said in Henry v. Cherry, supra, that under our constitution the law-making functions are exclusively vested in the legislature. However, the absence of legal precedents squarely in point is not usually considered an insurmountable obstacle to the decision of the court.

Edison v. Edison Polyform Mfg. Co., supra, classifies the right as a property right which will be protected, not only in a court of law but also in a court of equity.

It is believed that the trend of modern decisions is toward the holding that a person has a right of privacy, whether it be a personal or property right, which will be protected so far at least as against the unauthorized use of a photograph for commercial purposes. This development does not necessarily do violence to such cases as Hillman v. Starr Publishing Company, supra, which can be sustained upon the ground that it is an exercise of the freedom of the press, as the photograph in that case was not used for commercial purposes nor was there anything libelous in its use.