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# Right of Privacy of Public Characters

## RIGHT OF PRIVACY OF PUBLIC CHARACTERS

The defendant published and advertised a biographical sketch of the plaintiff, a much publicized child prodigy of 30 years ago, under the title of "Where Are They Now?" showing the present poverty-stricken position of plaintiff. Plaintiff sued for damages for violation of his common law right of privacy in states where publication occurred. Held, for defendant. The invasion of the plaintiff's common law right of privacy was privileged because he is still a subject of public interest.[1]

Where the common law right of privacy is recognized,[2] it is agreed

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[21] Downie v. Buennagel, 94 Ind. 228 (1884); South v. South, 91 Ind. 221 (1883); Rinkenberger v. Meyer, 155 Ind. 152, 56 N.E. 913 (1900).

[22] Fraizer v. Hassey, 43 Ind. 310 (1873); Meister v. Francisco, 229 N.W. 643, 127 A.L.R. 242, 248 (Wis. 1940).

[23] O'Brien v. Flint, 74 Conn. 502, 51 Atl. 547 (1902). Note (1940) 127 A.L.R. 248.

[1] Sidis v. F-R Pub. Corporation, 113 F. (2d) 806 (C.C.A. 2d, 1940). The court also denied recovery under the NEW YORK CIVIL RIGHTS LAW, Secs. 50, 51, (Consol. Laws, C. 6) on the ground that neither defendant's article nor the picture of plaintiff was published for purposes of trade within the meaning of the statute. The court admitted that defendant's article was forecast 'for advertising purposes' but held that the advertisement shared the same privilege as the article. *Cf.* Almind v. Sea Beach Railway Co., 157 App. Div. 230, 141 N.Y. Supp. 842 (2d Dep't 1913). The fact that plaintiff's name and picture, as required for recovery under the statute, was not used in the advertisement was stressed. But that situation is analogous to the principle in libel that reference to plaintiff need not be direct in publication to constitute libel. Shaw Cleaners and Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932).

[2] The right of privacy, usually defined as a personal right "to be let alone," did not exist at early common law, but was afforded inarticulate protection in equity when its violation involved: a property right, Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. R. 670 (ch. 1818); an implied contract, Abernethy v. Hutchinson, 1 H. & Tw. 28, 47 Eng. Rep. R. 1313 (ch. 1825); or a breach of faith, Yovatt v. Winyard, 1 J. & W. 394, 37 Eng. Rep. R. 425 (ch. 1820). The first advocation of an explicitly recognized right of privacy was presented by Warren and Brandeis, *The Right To Privacy* (1890) 4 Harv. L. Rev. 193. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) was the first unequivocal

that public interest in obtaining information may become dominant over the individual's desire for privacy.[3] Whether there is a public interest in certain matters, and when that interest becomes dominant over private interests, are both questions of law[4] and must be decided in view of the facts in each case.[5]

Judicial definitions of 'public interest' as applied to a privacy case are lacking. But the term seems to mean well-founded, widespread concern amounting to more than mere curiosity, in matters of public consequence.[6] In setting up limits to the right of privacy,[7] the parallel limitation in libel of the qualified privilege on matters of public interest was adopted.[8] Matters of public interest in libel and slander have been grouped as affairs of state, administration of justice, public institutions, and local authorities, ecclesiastical affairs, artistic matters, and matters relating to appeals for public patronage.[9]

It was not denied in the principal case that the plaintiff had at one time been a public figure. But under the law of libel it has many times been held that public interest exists only in such things as invite public attention or call for public comment and does not follow a public man into his private life[10] except insofar as his private life may affect performance of his public calling.[11] It would seem, there-

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judicial acceptance of the doctrine. Recognition as a common law right is also given in Kentucky, Kansas, Louisiana, Missouri, New Jersey, and North Carolina. Note (1940) 38 Mich. L. Rev. 748.

[3] Invasion of right of privacy has been held privileged in Corliss v. E. W. Walker Co., 64 Fed. 280 (D. Mass. 1894) (Plaintiff a public figure); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931) (a criminal); Jones v. Harold Post Co., 230 Ky. 227, 18 S..W. (2d) 972 (1929) and Smith v. Suratt, 7 Alaska 416 (1926) (a participant in a recent event of public interest). For a general discussion of limitation of right of privacy, see Ragland, *The Right of Privacy* (1929) 17 Ky. L. J. 85, 110.

[4] BUTTON, LIBEL AND SLANDER (1935) 107.

[5] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905).

[6] Though not defining 'public interest,' a distinction is made between it and mere curiosity. Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Adams, *The Right of Privacy and Its Relation to the Law of Libel* (1905) 39 Am. L. Rev. 37, 51.

[7] Warren and Brandeis, *The Right To Privacy* (1890) 4 Harv. L. Rev. 193. These limitations received judicial recognition *in toto* in Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927).

[8] Ragland, *The Right of Privacy* (1929 17 Ky. L. J. 85, 111.

[9] NEWELL, LIBEL AND SLANDER (4th ed. 1924) 535; ODGERS, LIBEL AND SLANDER (6th ed. 1929) 169.

[10] Hills v. Press Co., 122 Misc. 212, 202 N.Y. Supp. 678 (1924), *affirmed without opinion*, 214 App. Div. 752, 209 N. Y. Supp. 848 (1925); Duncombe v. Daniell, 8 Car. and P. 222 (C. P. 1837), 173 Eng. Rep. R. 470.

[11] Epps v: Duckett, 284 Mo. 132, 223 S.W. 572 (1920); see in general: Ragland, *The Right of Privacy* (1929) 17 Ky. L. J. 85, 113. This theory has been judicially recognized. Pavesiich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905); Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (1929). *Contra*: Corliss v. Walher Co.,

fore, that the article, involved in the principal case, dealing with the *private life* of plaintiff should not have been privileged even had it been published at the time plaintiff was offering his talents to the public. Why, then, should the article be privileged, when published almost three decades later?

The court justifies its decision by saying that " . . . The misfortunes and frailities of neighbors and public figures are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers and magazines of the day."[12] But only reasonable custom and usage will justify an act.[13] Thirty years' retirement from public life should end the general public's interest in the plaintiff.[14] But the instant case indicates that the plaintiff cannot regain his privacy. The public will always have such an interest in his life. To deprive a person desiring seclusion of protection from public comment because of events long since past seems to be an undesirable limitation upon his right of privacy.[15]

P.C.M.

## MUTUAL VITUPERATION IN LIBEL

The plaintiff published in a newspaper a letter which libeled the defendant. A week later the defendant published in the same newspaper a letter which libeled plaintiff. The plaintiff sued and the

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64 Fed. 280 (D. Mass. 1894). The court in Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285 (1899) denied the existence of the right of privacy, but in commenting upon the *Corliss* case said, "We are loathe to believe that the man who makes himself useful to mankind surrenders any right of privacy thereby."

[12] Sides v. F-R. Pub. Corporation, 113 F. (2d) 806, 809 (C.C.A. 2d, 1940).

[13] 6 THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE (1905) 776. An exception to this rule seems to be found, however, in the case of acts done by physicians and surgeons in practice. *Supra* vol. 5 at p. 1083.

[14] The court in the principal case did not mention the case of Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N. D. Cal. 1939) in which recovery for invasion of plaintiff's right of privacy was allowed against defendant, who broadcast a reproduction of a holdup in which plaintiff had been the victim. In that case less than two years had elapsed between time of hold-up and tortious publication, but yet invasion was not privileged—a fact which would seem to indicate that the court felt there was no public interest remaining.

[15] No Indiana cases have been found discussing right of privacy by that name, but the Indiana Supreme Court has held that in an action for slander the defendant is not entitled, under a plea of justification, to an order requiring plaintiff to submit to a medical examination. Kern v. Bridwell, 119 Ind. 226, 21 N. E. 664 (1889). *But cf.* South Bend v. Turner, 156 Ind. 418, 60 N. E. 271 (1901) (Upheld order for examination in personal injury suit). The former decision, since it resulted in the preservation of the plaintiff's dignity, may tend to show the position Indiana courts will take when the question of right of privacy comes clearly before them.