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Right of Privacy Limited

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equivalent to ownership of it."15 Earned incomes are taxed to and must be paid
by those who earn them.16 In applying the distinction between assignments of
income-producing property and assignments of income it is "uniformly held that
they are not so much concerned with the refinements of title as with the actual
command over the income which is taxed and the actual benefit for which the tax
is paid."17

It would seem that this question could be more satisfactorily answered by
legislation than by judicial interpretation. Deductions for worthless debts for
income tax purposes is in the nature of a privilege rather than a right.18 It has
been held that when a taxpayer claims and is allowed an income deduction for a
bad debt, he impliedly consents to be taxed in respect to future recoveries, whether
or not it is actually income he is estopped to object.19 This implied consent should
be made an express consent by amendment to the code and made to apply to all
charged off debts, no matter whose hands they are in at the time of collection. The
closing of this loophole by legislative enactment would prevent strained reasoning,
as in this case, that notes are not property. The case should be given a narrow
interpretation and not applied to other choses in action.20

J. R. Plumb

RIGHT OF PRIVACY LIMITED

The Saturday Evening Post published an article entitled "Never Give a
Passenger a Break", a satire on taxicab drivers in Washington, D. C. The article
indicated that the drivers cheated their passengers by use of the complicated zone
fare system and failed to give satisfactory service. The article was illustrated by a
picture of plaintiff, a woman who operates a taxicab in Washington, D. C.
Plaintiff sued for libel and breach of privacy. Held, that (1) plaintiff's complaint
stated a good cause of action in libel, and that (2) the publication of a photograph
of a private person without his consent, unless by reason of his position or achieve-
ments he has become a public character, constitutes a violation of the right of pri-
vacy for which an action for damages will lie. Peay v. Curtis Publishing Company,
78 F. Supp. 305 (D. C., 1948)

The right of privacy was first recognized as a distinct and separate right in
1890, in an article by Samuel D. Warren and Louis D. Brandeis.1 The courts of
New York were the first to consider the right and rejected it upon the grounds of

A. L. R. 655, 658 (1940). However, by way of dictum the court also said
that rent from a lease,—or a crop raised on a farm after the leasehold or
the farm had been given away, would not be income to the donor.
1065 (1941).
18. Sec. 23(k) (1) Internal Revenue Code, 26 U. S. C. A. Sec. 23(k) (1), pro-
vides that reasonable reserves may be set up and deductions taken.
20. Although the court didn't point up the fact, it appeared that the Commiss-
ioner's deficiency determination did not include recoveries for which no tax
benefit had been obtained.
lack of precedent in a case in which the picture of a girl had been used to advertise the defendant's flour. The result was that the New York Legislature passed a statute allowing persons to recover under facts similar to those of that case. Three years later the Supreme Court of Georgia, considering essentially the same facts, specifically affirmed the right of privacy, holding that it comes from the natural law and is embraced within the rights of personal liberty and security.

The right is denied in New York except to the limited extent provided by statute. In Rhode Island the right has been denied in a case in which the plaintiff's picture was used in connection with the advertisement of the defendant's products. Wisconsin has refused to recognize the right unless created by the Legislature in a case which involved the use of objectionable methods of collecting an unpaid account. In a case in which the plaintiff's picture was printed in connection with an article concerning a charge against her father of using the mails to defraud, the Supreme Court of Washington also held, that the right, to be enforceable, should be created by the Legislature.

The right has been recognized in Alabama in a case which denied recovery for the use of the plaintiff's name in a radio story concerning the disappearance of her father and the imprisonment of a man for his murder and the later discovery of her father in California through his will. Georgia, Kansas, Kentucky, Missouri, and North Carolina have recognized the right in cases in which the plaintiffs' pictures were used, without authorization, to advertise the defendants' products. California has recognized the right in a case in which the plaintiff's maiden name was used in a movie and in advertising the movie which was based upon plaintiff's former life as a prostitute and her part in a murder which was of great public interest. The right has been recognized in Florida in a case concerning the portrayal of the plaintiff in a book; in Arizona in a suit for the publication of the plaintiff's picture in connection with a murder story; in Kentucky in suits for causing a copyright to issue to defendant on a picture of plain-

11. Melvin v. Reed, 112 Cal. App. 256, 297 Pac. 91 (1931) (based on a constitutional guaranty of the right to pursue and obtain the happiness and contentment of life).
The right of privacy has been defined as the right to be left alone,20 the right to be free from unwarranted publicity,21 and as a phase of the right of security in the person.22 The essence of the right is the person's peace of mind.23 In all the cases, involving the right of privacy, the common element is outraged feelings.24 Some courts base the right of recovery upon a contract right,25 and others upon a property right,26 rather than upon a purely mental right.27

The right of privacy is limited, but it is not clear what its limitations are. It has been held that a cause of action for the violation of the right does not survive the death of one of the parties,28 but, in a case decided recently in Arizona,29 it was held that a cause of action for the breach of the right does survive the death of defendant. The right may be waived.30 It is apparent that the right of privacy is limited by the right to publish matter which is of public or general

21. See note 20 supra.
What constitutes matter of public or general concern is difficult to determine and is, apparently, a question for judicial determination upon the facts of the case presented. It is indicated that the following would come within that classification: an athlete or actor soliciting publicity, an unusual ailment, a person in public life, a magician, an infant prodigy’s later life, a suicide, and association with crime. Leon Green, writing in the Illinois Law Review, concludes that “... insofar as the so-called ‘right to be let alone’ is concerned, it does not exist with reference to the taking and use of a person’s photograph, except that use be a commercial one.” The use must be commercial in that it is used to advertise defendant’s product or business.

The principal case presents the question as to whether or not the picture of plaintiff is newsworthy. As indicated before, it is difficult to determine what is of public concern. One test used to determine the newsworthiness of an unauthorized picture is whether or not it has a genuine connection with an article of public or general concern. If the picture has such a connection it is not actionable as a violation of the right of privacy. It must be conceded that the article complained of was matter of public or general concern because of its expose’ of the fraud being practiced upon the public by the taxi-cab drivers of Washington, D. C. It is submitted that the picture of a taxi-cab driver has a genuine connection with an article concerning the methods used by the drivers to cheat their passengers. Thus, if a genuine connection with the article does exist, the publication of plaintiff’s picture

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33. “While plaintiff’s ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not.” Barber v. Time, Inc., 348 Mo. 1199, 159 S. W. (2d) 291 (1942).


42. Ibid.
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is not actionable as a violation of her right of privacy. The plaintiff's remedy, if any, is solely for libel. The use of her picture in conjunction with the article implies that she is one indulging in the practices complained of. The court has apparently mistaken plaintiff's remedy, insofar as the right of privacy is concerned, and, in so doing, have unfortunately extended the right of privacy to the detriment of those gathering and publishing matter of public interest and concern.

Jack Jones

STATUTORY PROHIBITIONS AGAINST INTERRACIAL MARRIAGES

Petitioners Andrea Perez, a white person, and Sylvester Davis, a Negro, sought to compel the County Clerk of Los Angeles County to issue them a marriage license. The respondent had refused to issue the license by invoking a California statute which prohibited the issuance of a license authorizing a miscegenous marriage and implemented the California miscegenation statute which provides that "All marriage of white persons with negroes, Mongolians, members of the Malay Race, or mulattoes are illegal and void." In issuing the peremptory writ the California Supreme Court held, three justices dissenting, that not only is the miscegenation statute too vague and uncertain to be an enforceable regulation, but it violates the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against racial groups. Perez v. Lippold, 198 P. (2d) 17, (Cal., 1948).

At common law there was apparently no prohibition against miscegenous marriages. However, beginning early in our history, the states began to enact legislation directed towards that end. Whatever the reason for this turn to statutory bans on inter-racial marriages, a survey of present codes reveals that some thirty states have laws which in some way restrict the right of a Caucasian to marry a person of another race. All thirty states with this statutory law of miscegenaion bar white and Negro unions. Again, about half of these states also

43. Ibid.
4. For a note on this development see Reuter, Race Mixture-Studies in Inter-marriage and Miscegenation (1931).