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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 achievements he has become a public character, constitutes a violation of the right of privacy 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

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15. *Helvering v. Horst*, 311 U. S. 112, 118, 61 Sup. Ct. 144, 147, 85 L. Ed. 75, 131 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.
 16. *Lucas v. Earl*, 281 U. S. 111, 50 Sup. Ct. 241, 74 L. Ed. 731 (1930).
 17. *Harrison v. Schaffner*, 312 U. S. 579, 581, 61 Sup. Ct. 759, 761, 85 L. Ed. 1055 (1941).
 18. Sec. 23(k) (1) Internal Revenue Code, 26 U. S. C. A. Sec. 23(k) (1), provides that reasonable reserves may be set up and deductions taken.
 19. *Philadelphia National Bank v. Rothensies*, 43 F. Supp. 923 (E. D. Pa. 1942).
 20. Although the court didn't point out the fact, it appeared that the Commissioner's deficiency determination did not include recoveries for which no tax benefit had been obtained.
1. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

lack of precedent in a case in which the picture of a girl had been used to advertise the defendant's flour.² The result was that the New York Legislature passed a statute³ 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.⁴

The right is denied in New York except to the limited extent provided by statute.⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ 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.¹¹ The right has been recognized in Florida in a case concerning the portrayal of the plaintiff in a book;¹² in Arizona in a suit for the publication of the plaintiff's picture in connection with a murder story;¹³ in Kentucky in suits for causing a copyright to issue to defendant on a picture of plain-

2. *Roberson v. Rochester Folding-Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902).
3. *New York Laws 1903*, c. 132, sec. 2. Now Civil Rights Law, sec. 51. Statute constitutional: *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097, 34 L. R. A. (N. S.) 1143, 127 Am. St. Rep. 945 (1908). Affirmed: 220 U. S. 502, 31 Sup. Ct. 490, 55 L. Ed. 561 (1910).
4. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905).
5. *Kimmerle v. New York Evening Journal, Inc.*, 262 N. Y. 99, 186 N. E. 217 (1933). See note 3, *supra*.
6. *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909).
7. *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wisc. 512, 269 N. W. 295 (1936).
8. *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911).
9. *Smith et al. v. Doss*, 37 So. (2d) 118 (Ala. 1948).
10. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918 D. 1151 (1918); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417 (1909); *Munden v. Harris, et al.*, 153 Mo. App. 652, 134 S. W. 1076 (1911); *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938).
11. *Melvin v. Reed*, 112 Cal. App. 285, 297 Pac. 91 (1931) (based on a constitutional guaranty of the right to pursue and obtain safety and happiness).
12. *Cason v. Baskin*, 155 Fla. 198, 30 So. (2d) 635, 163 A. L. R. 430 (1947).
13. *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945).

tiffs' sons born joined from the shoulder,¹⁴ for printing and displaying a sign that plaintiff owed an unpaid bill to defendant,¹⁵ and in a case finding no violation of the right where the defendant printed the plaintiff's picture in conjunction with an article concerning her struggle, on a city street, with the murderers of her husband.¹⁶ Louisiana has recognized the right in a case in which the plaintiff's picture was printed in the rogue's gallery by defendant¹⁷ and Oregon has recognized the right where the plaintiff's name was signed, without authorization, by the defendant to a telegram urging the governor to veto a certain bill.¹⁸ South Carolina has recognized the right of privacy in a case finding no violation of the right for issuing an insurance policy in which the plaintiff was beneficiary.¹⁹

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

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14. *Douglas v. Stokes et ux.*, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, Ann. Cas. 1914 B, 374 (1912).
 15. *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964 (1927).
 16. *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929).
 17. *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905).
 18. *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P. (2d) 438, 138 A. L. R. 1 (1941).
 19. *Holloman v. Life Ins. Co. of Va.*, 192 S. C. 454, 7 S. E. (2d) 169 (1940).
 20. *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964 (1927).
 21. See note 20 *supra*.
 22. *Warren and Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193, 205 (1890).
 23. See *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N. E. (2d) 753 (1940).
 24. See, 138 A. L. R. 23, 25.
 25. *Moore v. Rugg*, 44 Minn. 28, 46 N. W. 141 (1890); *Bennett v. Gusdorf*, 101 Mont. 39, 53 P. (2d) 91 (1935).
 26. *Edison v. Edison Polyform Mfg. Co.*, 73 N. J. Eq. 251, 67 Atl. 392 (Ch. 1907) (picture); *Munden v. Harris et al.*, 153 Mo. App. 469, 134 S. W. 1076 (1911) (picture); *King v. King*, 25 Wyo. 275, 168 Pac. 730 (1917) (letters).
 27. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P. (2d) 438, 138 A. L. R. 1 (1941); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N. E. (2d) 753 (1940).
 28. *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939).
 29. *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945).
 30. *O'Brien v. Pabst Sales Co.*, 124 F. (2d) 167 (C. C. A. 5th 1941), certiorari denied, 315 U. S. 823; *Reed v. Real Detective Publishing Co.*, *supra* note 29.
 31. *Warren and Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945); *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); *Cason v. Baskin*

concern.³¹ 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,³² an unusual ailment,³³ a person in public life,³⁴ a magician,³⁵ an infant prodigy's later life,³⁶ a suicide,³⁷ and association with crime.³⁸ 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."³⁹ The use must be commercial in that it is used to advertise defendant's product or business.⁴⁰

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.⁴¹ If the picture has such a connection it is not actionable as a violation of the right of privacy.⁴² 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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- et al., 155 Fla. 198, 30 S. (2d) 635, 168 A. L. R. 430 (1947); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929); *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N. E. (2d) 753 (1940); *Sarat Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937); *Elmhurst v. Pearson*, 153 F. (2d) 467 (App. D. C. 1946).
32. *O'Brien v. Pabst Sales Co.*, 124 F. (2d) 167 (C. C. A. 5th 1941), certiorari denied, 315 U. S. 823.
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).
34. See, *Pavesich v. New England LifeIns. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905).
35. *Sarat Lahiri v. Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).
36. *Sidis v. F-R Pub. Corp.*, 34 F. Supp. 19 (S. D. N. Y. 1938), *aff'd* 113 F. (2d) (C. C. A. 2nd 1940).
37. *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939).
38. *Elmhurst v. Pearson*, 153 F. (2d) 467 (App. D. C. 1946); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945); *Melvin v. Reed*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929); *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911).
39. Green, *The Right of Privacy*, 27 Ill. Law Rev. 237, 246 (1932).
40. *Edison v. Edison Polyform Mfg. Co.*, 73 N. J. Eq. 251, 67 Atl. 392 (Ch. 1907); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918 D. 1151 (1918); *Munden v. Harris, et al.*, 153 Mo. A. 652, 134 S. W. 1076 (1911); *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938); *contra*: *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S. W. (2d) 291 (1942), see note 33 *supra*.
41. *Sarat Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).
42. *Ibid.*

is not actionable as a violation of her right of privacy.⁴³ 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 statute¹ 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."² 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.³ However, beginning early in our history, the states began to enact legislation directed towards that end.⁴ 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.⁵ All thirty states with this statutory law of miscegenation bar white and Negro unions.⁶ Again, about half of these states also

43. *Ibid.*

1. Cal. Civ. Code 1941 sec. 69.

2. Cal. Civ. Code 1941 sec. 60.

3. 35 Am. Jur. 268, 55C. J. S. 828.

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

5. By the most recent codes and supplements available these are Ala., Ariz., Ark., Col., Colo., Del., Fla., Ga., Idaho, Ind., Ky., La., Md., Miss., Mo., Mont., Neb., Nev., N. C., N. D., Okla., Ore., S. C., S. D., Tenn., Tex., Utah, Va., W. Va., and Wyo. Those states without miscegenation statutes are Conn., Ill., Ia., Kan., Me., Mass., Mich., Minn., N. H., N. J., N. M., N. Y., O., Pa., R. I., Vt., Wash., and Wis. In addition there is no such statutory restraint on marriage in Alaska, Canal Zone, District of Columbia, Hawaii, or Puerto Rico.

6. Ala. Code 1940 sec. 14-360, Ariz. Code Ann. 1939 sec. 63-107, Pope's Dig. of Ark Stat. 1937 sec. 9018-19, Cal. Civ. Code 1941 sec. 60, Colo. Stat. Ann. 1935 sec. 107-2, Del. Rev. Code 1935 sec. 3485, Fla. Stat. 1941 secs. 1.01 and 741.11, Ga. Code 1933 sec. 53-106 (unlawful for a white to marry anyone except a white), Idaho Code Ann. 1932 sec. 31-206, Burn's Ind. Stat. Ann. 1933 sec. 44-205 to 44-208, Ky. Rev. Stat. (Baldwin, 1942) sec. 402.020, La. Rev. Civ. Code 1870 secs. 94 and 95 (void marriage between white person and person of color), (Md.) Flack's Code 1939 Art. 27 sec. 445, Miss. Code