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## IF YOUR PHOTOGRAPH WERE NEWS

By DONALD S. BALDWIN

As time goes on we notice an increasing tendency on the part of the newspapers of the country to illustrate their stories, shady and otherwise, with photographs of the principal characters. This, coupled with the growth of the tabloids, has unloosed upon the populace of our country a great army of men armed with the latest inventions for taking the photograph of willing or unwilling subjects, whose battle cry seems to be, "get your photograph". This great army respects neither commands nor requests for immunity from the clicking of their artillery but proceeds ruthlessly on its way "shooting" anyone whose likeness might be "news".

After successfully repulsing this main army, the prominent man finds himself left open to a flank attack by another group of photograph hounds; namely, the manufacturers of nationally advertised products, who stand ready to pounce upon any prominent member of society whom they think might serve as a "bell sheep" for a horde of users of their product. In this role a man's photograph is spread over newspapers, billboards, and other mediums of advertising, and he is represented as a user of this or that product.

It becomes evident that it will be necessary for those more or less notable (or notorious as the case may be) members of our society to throw up some sort of barricade between themselves and this onrushing horde and, of necessity, the only logical and reasonable source to which they can turn for this protection is the great and all protecting arm of the law. Let us look then and see whether it will be in vain that they seek aid from this quarter .

At the outset let us concede that any man may, by his own acts or by the public nature of the line of endeavor which he chooses to follow, forfeit any claim which he might have to immunity from the prying eyes of the public press. The man who chooses to run for a public office, let us say, lays himself open to any and all scrutiny into his life and affairs for the purpose of de-

termining his fitness for the office which he seeks. But we will deal with those men who by their own efforts have attained a position of prominence and success and who do not wish the notoriety of a place in the days news, and those who have unwittingly and innocently become involved in an affair which the press deems worthy of note.

A discussion such as this will inevitably, in the final analysis, boil down to the question of whether or not a man has a right to privacy, or as Cooley in his work on Torts chooses to put it "the right to be let alone", and then we have the bone of contention between the courts.

What is probably the pioneering article on this much discussed right to privacy is found in 4 Harvard Law Review 195. There the authors recognized the menace of the prying tactics of the press and contended vigorously that there was such a thing as a right to privacy but at that time there was little authority one way or the other on the proposition.

Since that time the question has been before the courts in one form or another a very few times. The case of *Roberson v. Rochester Folding Box Co.* (N. Y. 538) is one of the first cases in which this problem received careful consideration and is the leading case of those opponents to the doctrine of a right to privacy. That was a case of the unauthorized publication of a woman's picture for advertising purposes. The court in passing on the question refused to recognize any such thing as a right to privacy. In an opinion concurred in by a bare majority of the court, the conclusion was based principally upon the contention that there is no precedent in the law for any such thing as a right of privacy. In passing the court takes cognizance of the fact that there was no precedent for the common law but states that the time has passed when the courts will recognize any doctrine. For which there is no precedent. Whence the authority or the precedent for that statement?

Aligned with the New York rule is a Washington case reported in 117 Pac. 594 (*Hillman v. Star Publishing Co.*) in which the father of the plaintiff was accused of a crime. In their account of the affair the defendant publication published pictures of the family of the accused. The photograph of the plaintiff, a young daughter of the accused, appeared in connection with

the story. The action was brought for damages for this unauthorized publication and the unwarranted invasion of the rights of the plaintiff. The court, in passing on the case, bitterly criticized the defendant for this unscrupulous practise and sympathized with the plaintiff for the wrong which had been done her, but in the final analysis, said that there had been no invasion of any right of the plaintiff which would give her a right to recovery in a court of law. This coming from a tribunal, the very fundamental reason for the founding of which being the dispensation of justice to all who may appear before it. This in the face of numberless attempts to absolutely prohibit any act or law which would tend to attain the blood of innocent descendants of men who have been guilty of crime. The legislative bodies of the country are prohibited by the constitutions from passing bills of attainder but it would seem that it is a different proposition when the great and powerful press, in the interest of "news", undertakes to visit the crimes of the father upon the children.

A Michigan case reported in 80 N. W. 285 is cited in support of this doctrine but on closer examination of that case it will be seen that, although the court shows a strong tendency in favor of this rule, the precise question was not before the court. In that case the subject of the photograph in question was dead and the action was brought by his survivors, which presents a altogether different question from the one with which we are now dealing.

Rhode Island is in accord with the New York rule (73 Atl. 97) following the doctrine of no precedent.

Therefore if I have been so fortunate as to attain success and prominence in my chosen line of endeavor these authorities would make me a slave to the insatiable desire of the morbidly curious to be constantly prying into the affairs of their fellow men. I have not the right to choose, if it be my will, to live a life of retirement free from the notoriety attached to a place in the days news.

This arrangement is patently repugnant to the fundamental principals of American freedom and liberty. Is liberty to mean the right merely to walk about the streets and breathe the air? If this is all that it includes then this hallowed right to liberty, of which Americans are so proud, does not mean so much after all.

Fortunately, however, the courts have gone a bit farther in the construction of the extent of this mysterious right to liberty.

The supreme court of Georgia has rendered a decision which has come to be the leading case on this question (*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190). There, under a statement of facts substantially the same as the New York case, the court, in a lengthy and excellently reasoned opinion, took a decided stand in favor of the existence of a right to privacy. There the court construes "liberty" to mean the right of a man to eke out a livelihood in any lawful manner which he may choose. The right to "live his own life", if you will, according to the dictates of his own will. If a man chose to live a life of seclusion and freedom from the prying eyes of the public that is his right under the right to liberty and any invasion of this right is a deprivation of one of the most valuable benefits to be derived from our form of government.

The Georgia court points out that this right to privacy is derived from natural law. "The right of privacy or the right to be let alone, is a personal right which is not without judicial recognition. It is the compliment of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person as inviolate, and he has the absolute right to be let alone". (Cooley, Torts, p. 29). It is but reasonable to believe that, while surrendering innumerable rights in favor of the "public weal" man has retained his interest in those sacred private matters which concern him and him alone and "the law consists not in particular instances and precedents but in the reason of the law for reason is the life of the law, nay the common law itself is nothing else but reason". (Broome's Legal Maxims). Cobb J. in the Georgia case *supra* says "the right of privacy has its foundation in the instincts of nature, consciousness being the witness that can be called to establish its existence".

Aligned with Georgia are the courts of Missouri (134 S. W. 1076), Kansas (172 Pac. 532), allowing damages for the unauthorized exhibition of motion pictures of the plaintiff for advertising purposes, Kentucky 120 S. W. 364) and New Jersey (67 Atl. 392).

The Missouri court in passing on the question says "the unauthorized publication of a portrait is an invasion of both the intangible legal right to privacy and of a valuable property right and such invasion is proper matter for injunction and for damages". Many of the courts, after upholding the existence of a right to privacy, seek to bolster up their decision by attempting to show an invasion of some property right. It would seem that it was a grievous sin to advocate any doctrine which has for its basis the liberty of man and it therefore becomes necessary to purge this sin by showing the invasion of a property right. If our government is to become an institution for the protection of property rights solely then we may as well discard as obsolete all those provisions for the protection of those inalienable personal rights for the protection of which our forefathers shed the last drop of their lives blood.

Even the legislative bodies are coming to realize the atrocity of this invasion of man's private domain and statutes have been passed regulating this pernicious habit on the part of the press. One year after the decision in the case of *Roberson v. Box Co. supra*, the New York legislature passed an act making the unauthorized publication of a photograph for advertising purposes a misdemeanor and giving the aggrieved party a right to damages in law and restraint in equity. (N. Y. Civil Rights Law 50, 51.) California has a similar statute, applying however to any publication, and requiring the written consent of the person whose photograph is sought to be published. (Cal. Pen. Code 258.)

True it is that most of these cases apply to publication for advertising purposes but if there is such thing as the right to privacy where is the difference in principal whether this right is invaded for mercenary purposes or to satisfy the craving of some few busybodies to pry into my private affairs. Immediately we are met by those who will throw up their hands in holy horror and speak in hushed and reverent tones of "the freedom of the press" and there we have the colored gentleman in the kindling. It is deplorable but seems none the less true that the great courts of this land are reluctant to give rise to any doctrine which will tread on the toes of the mighty and powerful press. The press must not be restrained. Does "freedom of the press" mean that as long as they do not print untrue or libelous matter all personal

rights are subjected to this great and unlimited power? Most assuredly not. The freedom of the press, as one judge has put it, extends to the right to print matter of general public interest without interference by the government. By no manner of construction can this be construed to mean that the public has a right to have its curiosity appeased by the unrestricted broadcasting of a mans personal and private affairs.

As the quest for news becomes more intense the courts will, of necessity be compelled to adopt some manner of restraint to check this ruthless invasion of personal liberty. If such restraint is not effectively accomplished then truly, as it has been said, "that which is whispered in the closet will be shouted from the housetops".