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TORTS - LIBEL - PHOTOGRAPHS - RIGHT OF PRIVACY

TORTS — LIBEL — PHOTOGRAPHS — RIGHT OF PRIVACY — Defendant in its newspaper published a photograph of plaintiff and her husband's chauffeur standing in front of an airplane at an airport. The picture was captioned "Principals in Local Divorce Scandal," and the accompanying news story stated that plaintiff had sued her husband for divorce, the husband had filed a cross bill, and he had sued the chauffeur for alienation of affections. Plaintiff's declaration alleged that the picture had been cut from a larger one in which her husband had appeared, that the airplane was her husband's, and that the picture was believed to have been taken under a contract with the husband. The declaration was in six counts, four sounding in libel, and two setting up invasion of plaintiff's right of privacy. Defendant demurred. *Held*, demurrers to counts in libel should be overruled, and those to counts alleging invasion of the right of privacy should be sustained, for, regardless of the existence of the right of privacy, plaintiff here had waived it by posing for the picture in a public place and she had no property in the photograph. *Thayer v. Worcester Post Co.*, (Mass. 1933) 187 N. E. 292.

The general rule is that a picture, statute, or effigy may be libellous, as may any sign conveying a defamatory meaning.[1] The declaration in the principal case thus seems to set forth a cause of action in libel, for although, as pointed out by Bower in his work on Actionable Defamation,[2] it might be supposed that the truth of matter contained in an action photograph of the plaintiff is self-evident, yet the possibilities of composite photography or the cutting out of explanatory portions of pictures, as here, make it easy to libel one by photograph today. Even if the photograph under consideration here were not libellous in itself, yet since the whole publication is to be read in connection with the picture, if readers generally would understand the whole article, in the ordinary meaning of the words and signs, to convey a defamatory meaning, it is a libel.[3] Certainly it must be said that the jury would be justified in finding that the ordinary reader would understand the whole story to convey the meaning that the plaintiff had been indulging in improprieties with the chauffeur. The court's decision upon the right of privacy, however, cannot so easily be justified. The right of privacy, which was first discussed in an article in the Harvard Law Review in 1890,[4] has been recognized in six States,[5] and it has been denied in four

[1] ODGERS, DIGEST OF THE LAW OF LIBEL AND SLANDER, 6th ed., 7 (1929); Monson v. Tussauds, Ltd., [1894] 1 Q. B. 671, 63 L. J. Rep. (N. S.) (Q. B. Div.) 454 (wax statue); Tolley v. Fry & Sons, Ltd., [1931] A. C. 333 at 338, 339 (cartoon of prominent golfer used as advertisement — a case also apparently recognizing the right of privacy in England); Snively v. Record Pub. Co., 185 Cal. 565 at 580, 198 Pac. 1 at 7 (1921) (cartoon); Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L. ed. 960 (1909) (picture of nurse used in liquor advertisement); Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725 (1904) (picture used to advertise book with racy title).

[2] 2d ed., p. 19 n. (y) (1923).

[3] See cases cited in note 1, supra, and cases cited in 59 A. L. R. 1061 (1929) and 40 A. L. R. 583 (1926) (headlines and articles to be construed together).

[4] Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890).

[5] *Georgia*, 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). *Louisiana*, Itzko-

others.[6] One of the leading arguments advanced for its recognition was the increasing activities of the tabloid and yellow newspapers in playing up sex stories, and their tendencies to stop at nothing to secure a picture.[7] Most of the cases dealing with the right, however, have involved the use of the plaintiff's picture for advertising purposes without his permission.[8] The result has been that the courts have been chary of extending the right beyond this one set of facts. Where it has been recognized, though, the remedy for its invasion may be either damages at law for tort,[9] or an injunction in equity.[10] The court in the principal case avoids the question of whether the right of privacy exists in Massachusetts, a point on which a decision has been eagerly awaited in view of the fact that the previous tendency of the Massachusetts cases has been towards its recognition.[11] As to the court's reasoning, the mere fact that the photographer here was not under contract with the plaintiff should make no difference, for although one State today apparently holds

vitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147, 112 Am. St. Rep. 272 (1905). *New Jersey*, Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907). *Kentucky*, Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909), 34 L. R. A. (N. S.) 1137n. (1911). *Missouri*, Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911). *Kansas*, Kunz v. Allen, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D 1151 (1918). There is also language seemingly recognizing the right of privacy in England in the decision of the House of Lords in Tolley v. Fry & Sons, Ltd., [1931] A. C. 333.

[6] *New York*, 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) (subsequently modified by statute — see N. Y. Ann. Cons. Laws (Cumming & Gilbert, 2d ed., 1927), p. 1091); Cum. Supp. (1921 to 1923), p. 143. *Rhode Island*, Henry v. Cherry & Webb, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928 (1909). *Michigan*, Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507 (1899) (dictum). *Washington*, Hillman v. Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911); 35 L. R. A. (N. S.) 595 n. (1912).

[7] Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 195 (1890). For a recent and complete survey of the theory and development of the right of privacy, see Kacedan, "The Right of Privacy," 12 BOSTON UNIV. L. REV. 353, 600 (1932).

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

[9] 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. 1918D 1151 (1918); Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, Ann. Cas. 1914B 374 (1912); Byfield v. Candler, 160 Ga. 732, 129 S. E. 57 (1929).

[10] Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147, 112 Am. St. Rep. 272 (1905).

[11] See Kacedan, "The Right of Privacy," 12 BOSTON UNIV. L. REV. 353 at 392-393 (1932), citing language in Burney v. Children's Hospital, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273 (1897) (autopsy on dead body); Levyeau v. Clements, 175 Mass. 376, 56 N. E. 735 (1900); 50 L. R. A. 397 n. (1901) (unauthorized copies of etchings by engraver); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944 (1912), Ann. Cas. 1912D 551 (publication of private letters of deceased).

that the right of privacy is a property right,[12] the view usually taken by most of the courts and writers on the subject is that it is a personal right,[13] the property theory being an artificial one springing from the language in the famous cases of *Gee v. Pritchard* [14] and *Pollard v. Photographic Co.*[15] But if the right of privacy is a personal right, has it been waived in this case under the fourth limitation upon it laid down in the original article by Warren and Brandeis? [16] A waiver of the right operates only to such extent as may be necessary and proper in dealing with the matter causing the waiver — that is, the right may be waived for some purposes and retained for others.[17] Perhaps, in the principal case, the plaintiff only consented that the picture be taken for use as a souvenir by her husband. It is not likely that she consented to its use in newspapers, especially with explanatory portions cut off. Since the plaintiff did not clearly allege who took the picture and for what purposes she had waived her right of privacy, the decision might be justified under the rule that, on demurrer, pleadings will be construed most strongly against the pleader, though the court does not proceed on these grounds.

W. W. K.

[12] Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911).

[13] 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); Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890); Kacedan, "The Right of Privacy," 12 BOSTON UNIV. L. REV. 353, 600 (1932); Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 (1916).

[14] 2 Swans. 402, 36 Eng. Repr. 670 (1818).

[15] 40 Ch. D. 345, 58 L. J. Rep. (N. S.) (Ch. Div.) 251 (1888).

[16] "The Right to Privacy," 4 HARV. L. REV. 193 at 218 (1890). This limitation has been recognized either directly or by dictum by most of the courts recognizing the right: 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); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Tanner-Brice Co. v. Sims, 174 Ga. 13, 161 S. E. 819 (1931).

[17] 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); Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907); Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L. R. A. (N. S.) 921, Ann. Cas. 1915B 1180 (1913).