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the goods, and since he would be irreparably damaged if the restriction were not enforced. It is difficult to define plaintiff's interest in the Kraft goods in terms of "good will." Certainly it is not the same interest that Kraft itself had. Since the damaged goods may have been of inferior quality, Kraft could have lost prestige or "good will" because of the defendant's disregard of the restriction. This kind of loss is usually described in terms of "good will." This, however, was not the loss the plaintiff feared. Nadell's sole basis for placing the restriction upon the goods was to retain good business relations with Southern Pacific; its interest was strictly private between it and one of its best sources of business. The court is not really protecting plaintiff's "good will" as the term is generally understood, but it is protecting the plaintiff against a breach of contract induced by the defendant. It is submitted that the court could have decided this question, and possibly the entire case, by a logical extension of *Lumley v. Gye*,²⁰ which held that a stranger to a contract may be liable in tort for inducing its breach. Thus, it is not necessary to create an equitable servitude on the goods in order to hold the defendant. Unless this decision is explained on these grounds, it is submitted that the court may well have extended the concept of "good will" beyond the traditional meaning of the term, which is usually associated with the general public's attitude toward a certain business or its product, to include relationships between private parties.

The cases dealing with equitable servitudes on chattels are still in conflict, and the courts have failed to provide definite rules to determine their validity. Certainly, the weight of authority is against the enforceability of such restrictions, most of this having been decided over three decades ago. It is hoped that the next court which has to pass upon this problem will deal with the question at hand, look at the policy for and against such restrictions, and make its decision upon that basis.

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PRIVACY INVADED BY WRONGFUL PRESENTATION OF PRIVILEGED NEWS

Several problems remain unresolved in the growing but still hazy area of the law known as the right of privacy. Today, because of the rapid dissemination of printed material which advances modern means

²⁰2 E.&B. 216 (1853).

for inquiring into man's private affairs and lowers esteem for individual rights, the need for a thorough understanding of the right of privacy is imperative.¹ A current question in the field is whether an otherwise privileged newspaper article can be made so sensational as to constitute an unwarranted invasion of privacy by going beyond the recognized limits of decency.

The Supreme Court of Pennsylvania was recently confronted with this very problem in *Aquino v. Bulletin Co.*² The plaintiffs were the parents of Theresa Aquino, who after a clandestine courtship, married against her parents' wishes. Shortly after the marriage, Theresa was informed by her husband that his only purpose in marrying her was to spite the plaintiffs; thereupon she obtained a divorce.³ Subsequently, the defendant, Bulletin Company, published in its Sunday supplement an illustrated article concerning the affair entitled "Marriage for Spite." Although the article was based upon the lower court's record of the divorce action, it was written in a fictionalized story form rather than in conventional newspaper style.⁴ The accompanying illustration, although not resembling the parties,⁵ was extremely dramatic and contributed to the objectionable nature of the article.

In affirming the existence of a right of privacy in Pennsylvania, the supreme court ruled that the subject matter of the article was privileged as current news.⁶ Therefore, the plaintiffs, as unwilling partici-

¹"We are living in an age of ruthless standardization which has resulted in the suppression of human individuality. Coupled with this is the exploitation by the press and advertising agencies of all 'human interest' materials available. The timely recognition by the courts of the right of privacy may aid in preserving the 'self' as an institution of modern life." Moreland, *The Right of Privacy To-day*, 19 Ky. L.J. 101, 136 (1931).

²154 A.2d 422 (Pa. 1959).

³It is interesting to note that although the court reported that the marriage was never consummated, Theresa's original suit for annulment was denied but her subsequent suit for divorce was granted. *Id.* at 426.

⁴"Only by reading the article can one appreciate how the author permitted his imagination to roam through the facts, and how newsworthy events were presented in a style used almost exclusively by writers of fiction." 154 A.2d at 428.

⁵154 A.2d at 428. In *Young v. Greneker Studios Inc.*, 175 Misc. 1027, 26 N.Y.S.2d 357 (Sup. Ct. 1941), a "manikin" was held to be a "portrait or picture" under the N.Y. Civ. Rights Law § 51. In *Monson v. Tussauds, Ltd.* [1894] 1 Q.B. 571 (C.A.) a "wax figure dummy" was held to be a "portrait."

⁶154 A.2d at 427. The court decided that because the article was published only eighteen days after the lower court's opinion, it was current. Some courts have emphasized the passage of a considerable span of time from the act to the publication as a factor in holding a story violative of an individual's privacy, e.g., *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931) (seven years). However, other courts have failed to consider such time intervals in reaching their decisions, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940) (thirty years), and *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 186 N.E. 217 (1933) (twenty-five years).

pants in a newsworthy event, ordinarily could not complain.⁷ However, the court found that the parents' right of privacy was violated by the method of presentation and awarded damages entirely upon the injury to their own feelings, as distinguished from injury to their public reputation or their daughter's injured reputation or feelings.⁸

The right of privacy has been defined in a majority of jurisdictions⁹ as the right to live one's life in seclusion without being subjected to unwarranted and undesirable publicity—the right to be let alone.¹⁰ This right has received increasing recognition through legislative enactment and court decision¹¹ since it was first propounded by Samuel D. Warren and Louis D. Brandeis in an 1890 law review article.¹²

⁷The court felt that even though the plaintiffs were not mentioned by name in the lower court's record, the defendant could fill in such names in their story without violating the plaintiff's right of privacy. 154 A.2d at 427.

⁸Although the authorities say that the right of privacy is a purely personal right—*Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939); *Kelley v. Post Publishing Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951); *Prosser, Torts* § 97 (2d ed. 1955); 41 Am. Jur. Privacy §§ 15-16 (1942); 77 C.J.S. Right of Privacy § 1 (1952)—there is a growing tendency to recognize, as in *Aquino*, a "relational" right of privacy. *Abernathy v. Thornton*, 83 So. 2d 235 (Ala. 1955); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1939); *Nizer, The Right of Privacy: A Half Century's Developments*, 39 Mich. L. Rev. 526 (1941); *Comment*, 1953 Wash. U. L. Q. 109.

⁹It now appears that more than twenty states recognize a right of privacy in one form or another. *Gregory and Kalven, Cases on Torts* 888 (1959); 1 *Harper and James, Torts* § 9.6 (1956); *Prosser, Torts* § 97 (2d ed. 1955); *Annot.*, 138 A.L.R. 22 (1942). The right of privacy was recently held to exist in West Virginia. *Roach v. Harper*, 105 S.E.2d 564 (W.Va. 1958).

¹⁰*Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Banks v. King Features Syndicate, Inc.*, 30 F. Supp. 352 (S.D.N.Y. 1939); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). See also *Prosser, Torts* § 97 (2d ed. 1955); *Restatement, Torts* § 867 (1939); 41 Am. Jur. Privacy § 2 (1942); 77 C.J.S. Right of Privacy § 1 (1952).

¹¹*Gregory and Kalven, Cases on Torts* 888 (1959); 1 *Harper and James, Torts* § 9 (1956); *Prosser, Torts* § 97 (2d ed. 1955); *Am. Jur. Privacy* § 4 (1942); 77 C.J.S. Right of Privacy § 1 (1952); *Annot.*, 138 A.L.R. 22 (1942). Three states, New York, Utah, and Virginia, have a right of privacy by statute. These statutes provide a limited right only and New York has held that it has no common law right of privacy and that the cause is limited to the statute. *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 186 N.E. 217 (1933); *Myers v. U.S. Camera Pub. Corp.*, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957). See also *Yanwich, The Right of Privacy*, 27 *Notre Dame Law*. 499 (1952). The Virginia statute, Va. Code Ann. § 8-650 (1957), is based on the New York Act and follows a limited right theory. However, it appears no Virginia cases have interpreted the act. *Note*, 38 Va. L. Rev. 117 (1952).

¹²*Warren and Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890). For an excellent historical development of the right of privacy see *Nizer, The Right of Privacy: A Half Century's Developments*, 39 Mich. L. Rev. 526 (1941).

While the right is related to several fields of law¹³ and may be violated by diverse wrongs,¹⁴ the gravamen of the cause of action is either (1) a business tort—the use of a famous individual's personal goodwill without compensation, or (2) an emotional injury tort—the use of an unknown individual's personality so as to disturb his solitude and emotional tranquility.¹⁵ A loss or waiver of the right occurs when one becomes involved either by choice or by chance in a matter of public interest.¹⁶ *Aquino* is an example of an emotional-injury tort involving "chance" public figures.

Although several reasons have been advanced for denying or limiting the right of privacy,¹⁷ the only substantial one is that it conflicts with freedom of speech and press.¹⁸ Because these freedoms are not

¹³Constitutional, Tort, and Equity. Moreland, *The Right of Privacy To-day*, 19 Ky. L.J. 101 (1931); Note, 15 U. Chi. L. Rev. 926 (1948).

¹⁴Wiretapping, shadowing or trailing, eavesdropping, publication of letters, debt collection, invasion of private rooms, and unfair competition by commercial use of name. 41 Am. Jur. Privacy § 27-31 (1942); 77 C.J.S. Right of Privacy (1952); Annot., 138 A.L.R. 22 (1942).

¹⁵Gregory and Kalven, *Cases on Torts* 888 (1959). Privacy is related to, but differs from, the tort action for defamation. In privacy the injury is to be plaintiff's personal feelings, whereas in defamation the injury is to the the plaintiff's public reputation. *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940). Also, in privacy, truth is no defense. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). Proof of specific damage is unnecessary. *Reed v. Real Detective Publishing Co.*, supra at 139; *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953). For additional material see Prosser, *Torts* § 97 (2d ed. 1955); 77 C.J.S. Right of Privacy §§ 4-5 (1952); Annot., 138 A.L.R. 22 (1942).

¹⁶*Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 857 (D. Minn. 1948); *Abernathy v. Thornton*, 83 So. 2d 235 (Ala. 1955); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). See also Restatement, *Torts* § 867 (1939); Prosser, *Torts* § 97 (2d ed. 1955); Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526 (1941); Note, 28 Ind. L.J. 179 (1953); 41 Am. Jur. Privacy §§ 19-23 (1942); 77 C.J.S. Right of Privacy §§ 2-3,6 (1952); Annot., 138 A.L.R. 22 (1942).

¹⁷Six reasons for denying the existence of the right of privacy are: (1) that it was never recognized as a common law substantive right; (2) that there was a lack of precedent; (3) that its recognition would bring about a vast amount of litigation; (4) that the recovery is for mental suffering alone which the law is hesitant to recognize; (5) that the determination of damages would be difficult; (6) the difficulty in determining the difference between public and private characters. Moreland, *The Right of Privacy To-day*, 19 Ky. L.J. 101 (1931). But see Lisle, *The Right of Privacy (A Contra View)*, 19 Ky. L.J. 137 (1931).

¹⁸*Barber v. Time, Inc.*, 348 Mo. 1199, 150 S.W.2d 291 (1942); Prosser, *Torts* § 97 (2d ed. 1955); Annot., 138 A.L.R. 22 (1942). Nizer said that the right of privacy is essentially "anti-social" and "is a recognition of the dignity of solitude, of the majesty of man's free will and the power to mold his own destiny. . . ." He further described the conflict between these freedoms as a battle between anarchy and fascism in their

absolute, they do not wholly deny the right of privacy; however, most courts recognize that the freedoms of speech and press are limitations on the right.¹⁰ These limitations led to the development of the privilege for news material, but this very privilege has caused a conflict between the interests of individual freedom and group freedom. In weighing these conflicting interests, the courts have invented various theories of liability, *i.e.*, tests to balance the news privilege against the extent of the invasion of privacy.

The earliest test of privileged news material has been called the *public figure test*.²⁰ The privilege under this test originally encompassed almost any material concerning a person who had chosen a public calling, *e.g.*, a public official, an actor, or an inventor; but the privilege was later extended to include unwilling participants in events of public interest. Apparently the public figure test was an oversimplified solution to the problem, and, therefore, it evolved into the *public interest test*.²¹ By use of this test, courts considered the effect of the challenged material upon the public rather than finding, almost automatically, a waiver by a public figure. This test was one-sided, for the public is frequently interested in what is most injurious to the individual's feelings. Consequently, the public interest test evolved into the *public decency test*.²²

Although Warren and Brandeis alluded to this test in their now famous article,²³ it was not fully developed until recently.²⁴ The

extremes. Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526, 528-29 (1941).

¹⁰*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); Prosser, *Torts* § 97 (2d ed. 1955); Nizer, *The Right of Privacy: A Half Century's Developments*, 39 Mich. L. Rev. 526, 529 (1941); Note, 28 Ind. L.J. 179 (1953); 41 Am. Jur. Privacy § 9 (1942); Annot., 138 A.L.R. 22 (1942). Freedom of speech and press have consistently been held not to be absolute freedoms. Note, 28 Ind. L.J. 179 (1953); 41 Am. Jur. Privacy § 9 (1942); Annot., 138 A.L.R. 22 (1942). California bases its right of privacy on the constitutional guarantees of life, liberty, and the pursuit of happiness. *Kenby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 304, 127 P.2d 577 (Dist. Ct. App. 1942); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931); Annot., 138 A.L.R. 22, 30 (1942).

²⁰Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526, 540 (1941); Comment, 13 Wash. & Lee L. Rev. 255, 259 (1956); Note, 28 Ind. L.J. 179, 182 (1953).

²¹Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526, 540 (1941); Comment, 13 Wash. & Lee L. Rev. 255, 260 (1956); Note, 28 Ind. L.J. 179, 183 (1953).

²²Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526, 540 (1941); Comment, 13 Wash. & Lee L. Rev. 255, 262 (1956); Note, 28 Ind. L.J. 179, 183 (1953). This test is frequently called the "mores" test.

²³Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

²⁴See note 22 *supra*.

public decency test is a combination of the best aspects of both the public figure and public interest tests. It attempts to balance the character and nature of the invasion of individual rights against the benefit to the public of the material published. In applying the test, the courts usually require the article to be of news, educational or informational value,²⁵ and not indecent or repugnant to the social conscience of the time and place.²⁶ This test recognizes that even the most renowned public figures have a right to privacy in certain areas of life;²⁷ however, it does require the determination of a moral issue, something courts have traditionally been loathe to do. In the final analysis, the public decency test is a *good versus bad test*. Under this test the courts frequently consider the plaintiff's cause in terms of recognized community standards of morality and on this basis decide whether the defendant's conduct is decent or indecent, *i.e.*, good or bad.²⁸

²⁵Donahue v. Warner Bros. Pictures Inc., 194 F.2d 6 (10th Cir. 1952); Gill v. Curtis Publishing Co., 239 P.2d 630 (Calif. 1952). See also Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958) (entertainment).

²⁶Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958); Garner v. Triangle Publications Inc., 97 F. Supp. 546 (S.D.N.Y. 1951); Abernathy v. Thornton, 83 So. 2d 235 (Ala. 1955); Restatement Torts § 867, comment c (1939); Note, 28 Ind. L.J. 179 (1953).

²⁷Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940); Garner v. Triangle Publications Inc., 97 F. Supp. 546 (S.D.N.Y. 1951); Carson v. Baskin, 30 So. 2d 635 (Fla. 1947); Restatement, Torts § 867 (1939); Nizer, The Right of Privacy—A Half Century's Developments, 39 Mich. L. Rev. 526 (1941). One paradox under the old tests was that the persons most likely to need the cause of action (public figures) because of the publicity surrounding them seemed to be the ones who could not claim any protection. Note, 15 U. Chi. L. Rev. 926 (1948).

²⁸In Jones v. Hearold Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929), the court felt that the statements printed in a newspaper attributing to the plaintiff an attack on her husband's assassins were morally decent, because they made her appear as a heroine and should have pleased her. For additional cases where the court discussed the moral decency concept and felt the articles were complimentary to the plaintiffs, see Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P.2d 808 (1953); Kemmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 186 N.E. 217 (1933); Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594 (1911).

In Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 304, 127 P.2d 577 (Dist. Ct. App. 1942), the court felt that the statements attributed to someone with the same name as the plaintiff were printed in such a way as to appear to have been personally written by the plaintiff. The statements distributed by defendant to over 1,000 men to advertise a movie were suggestive and imputed immoral acts to the plaintiff and hence were so indecent as to invade the plaintiff's right of privacy. For additional cases in which courts have felt the publications were indecent enough to injure plaintiff's feelings, see Banks v. King Features Syndicate, Inc., 30 F. Supp. 352 (S.D.N.Y. 1939); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Thompson v. Close-up, Inc., 277 App. Div. 848, 98 N.Y.S.2d 301 (Sup. Ct. 1950); Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1920). See also Myers v. U. S. Camera Pub-

Although many courts have either expressly or impliedly used a decency test, some have refused to accept it. In the Massachusetts case of *Thayer v. Worcester Post Co.*,²⁹ the plaintiff had consented to be photographed with four others, including her husband and his chauffeur at a public airport. In a subsequent divorce action her husband accused her of participating in an amorous affair with the chauffeur. The defendant newspaper, in an account of the divorce scandal, as it was called, published the photograph deleting all the parties except the plaintiff and the chauffeur. The court, in rejecting the plaintiff's privacy action, said that she consented to being photographed in a public place. However, it is submitted that the plaintiff did not consent to being photographed with the chauffeur alone. Publication of the picture as taken would not have been as offensive to the plaintiff's feelings as the retouched picture, which tended to over emphasize the familiarity between the plaintiff and the chauffeur. The photograph was a fictional presentation of the facts and tended to make the actual story more sensational.

In *Aquino* the court, facing the same basic problem, applied the decency test and held that even though news of the marriage and subsequent divorce was privileged, the method of presentation was not; it had turned an otherwise morally acceptable news item into one that was morally unacceptable.³⁰ The court indicated that the use of a *completely sensational* method of presentation of the *whole article* had been the factor which made the otherwise innocent material unacceptable.³¹

In particular, the court stressed the fictional style of writing—a style usually reserved for "stories."³² While some authorities deplore the judicial tendency to hold otherwise privileged material indecent solely because it is presented in a fictional style,³³ even they admit

lishing Corp., 167 N.Y.S.2d 771 (N.Y. City Ct. 1957), wherein the court felt that the unauthorized publication of a nude photograph in a magazine was indecent.

²⁹248 Mass. 160, 187 N.E. 292 (1933).

³⁰The court in *Aquino* felt that they could not say as a matter of law that the article did not invade the plaintiff's privacy and felt that the question was one for the jury. 154 A.2d 422, 429 (1959).

³¹Several writers have indicated that the courts have frequently operated under a "newspaper bias" in that they have tended to hold any article found in a newspaper privileged no matter how worded. Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526 (1941); Note, 28 Ind. L.J. 179 (1953). It is submitted that *Aquino* certainly overcame any possible "newspaper bias."

³²Other factors stressed by the court were (1) that the article was in the Sunday Supplement and not the news section, (2) that the title was in "story style," (3) that the article was accompanied by a dramatic half page illustration. 154 A.2d at 427.

³³Nizer, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526 (1941); Note, 28 Ind. L.J. 179 (1953).