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Torts--Right of Privacy--Violation by Unauthorized Publication of Picture for Commercial Use

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Other courts read an exception into this type of statue so that the owner, lacking knowledge, will not be affected in his property rights because of the nuisance.[7] Although statutes are general in terms, and state no exceptions as to owners without knowledge of the use of these premises, exceptions are judicially created so that only owners having knowledge are deemed within the purview of these statutes.[8]

Our court in the instant case adopted the view more consistent with preservation of public decency and morals. The uncontradicted proof showed that these buildings were havens of prostitution for several years, which would suffice to impute knowledge to the owner.[9] Under our equity practice an innocent owner will rarely be penalized without justification, in the light of the trial chancellor's broad discretion in all matters affecting temporary injunctions.

H. P. S.

TORTS — RIGHT OF PRIVACY — VIOLATION BY UNAUTHORIZED PUBLICATION OF PICTURE FOR COMMERCIAL USE. — *P*, a famous and widely publicized football player, sued *D*, a beer distributing company, for violating *P's* right of privacy by placing *P's* picture on a football calendar published by *D* for the purpose of advertising its beer. *Held*, first, that *P*, by becoming the object of public interest, had given up his right of privacy; second, that the publication had been authorized by the athletic department of his college; and further, that he had shown no injury to person, property, or reputation on which a recovery could be based. *O'Brien v. Pabst Sales Co.*[1]

That interest of personality to which the term "privacy" is commonly applied, has received considerable recognition, but the extent of the protection which it is to receive remains indefinite.[2] The interest is essentially mental. The most concrete recognition accorded it by courts is the acknowledgment that the individual has

[7] United States v. Boynton, 297 Fed. 261 (E. D. Mich. 1924); Nies v. Anderson, 179 Iowa 326, 161 N. W. 316 (1917); State v. Massey, 72 Vt. 210, 47 Atl. 834 (1900).

[8] Gregg v. People, 65 Colo. 390, 176 Pac. 483 (1918); Holmes v. United States, 269 Fed. 427 (App. D. C. 1920).

[9] State v. Pickett, 202 Iowa 1321, 210 N. W. 782 (1927); State v. Longpre, 35 Wyo. 482, 251 Pac. 468 (1926).

[1] 124 F. (2d) 167 (C. C. A. 5th, 1942).

[2] Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193. This is acknowledged to be the leading article on this subject.

a right to live his life reasonably free from publicity involving his name, likeness, or history.[3] Fundamentally, the right of privacy is simply the right of the individual to be let alone.[4] The right is personal in nature, and an action for its invasion may be maintained only by the person whose privacy has been violated.[5] A common invasion of the right of privacy for which the courts have given redress is the publication of a person's picture for commercial purposes without his consent.[6] The courts have also protected this right from publications which violate the common decencies and cause humiliation to the person whose privacy is invaded.[7]

The right is subject to the limitation that persons in whom the public has a legitimate interest cannot object to publicity concerning their activities in newspapers and magazines.[8] Such persons are deemed to have waived their right of privacy by becoming the subject of public attention, regardless of whether they voluntarily[9] or involuntarily[10] attracted such attention. The instant case extends this limitation by denying protection to a public figure even against invasions of his right of privacy for commercial advertising purposes. This extension would seem to deprive public figures of all protection except such as may be found in the law of defamation. In view of the court's holding in the instant case that *P* suffered no injury to his reputation from the placing of his picture on a beer advertisement, even this protection becomes doubtful. A communication, to be prejudicial, need not lower the per-

[3] Harper and McNeely, *A Re-examination of the Basis for Liability for Emotional Distress* (1938) 13 WIS. L. REV. 426, 458.

[4] Warren and Brandeis, *supra* n. 2, at 195, state this definition, citing COOLEY ON TORTS (2d ed. 1888) 29.

[5] Murray v. Gast Lithographic & Engraving Co., 8 Misc. 36, 28 N. Y. Supp. 271 (1894) (parent cannot sue for invasion of privacy of infant child); *cf.* Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930); Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895) (right of privacy does not survive death).

[6] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101 (1905); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137 (1909); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911). *Contra*: Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478 (1902) [this case resulted in a statute protecting the right of privacy from invasions for commercial use, 8 N. Y. CONSOL. LAWS (McKinney, 1916) §§ 50, 51]; Henry v. Cherry & Webb, 31 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991 (1909).

[7] Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386 (1912).

[8] Corliss v. Walker Co., 64 Fed. 280 (C. C. D. Mass. 1894).

[9] Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004 (D. C. Okla. 1938).

[10] Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 (1929).

son's reputation in the eyes of a majority of people, but it is sufficient if he would be prejudiced in the opinion of a substantial minority.[11] There can be little question but that *P's* reputation would be prejudiced among a substantial minority of people who disapprove of beer.

In further limiting the protection of public characters against the use of their likenesses for commercial purposes, and in its conclusion that no injury was suffered by *P*, the decision is certainly open to question.

E. I. E.

TRUSTS — NECESSITY OF A TRUST *Res.* — Plaintiff contracted with defendant to insure defendant's employees. Premiums were to be collected pursuant to an arrangement whereby defendant by bookkeeping entries was to deduct the premiums from each employee's wage, to credit the amount collected to the plaintiff's account, and subsequently to pay over this amount to plaintiff. Defendant became insolvent before it had paid over all sums which had been credited to the plaintiff's account. Plaintiff claims priority on the theory of a constructive trust. Judgment for defendant. *Held,* that plaintiff was not entitled to priority because a trust *res* is necessary for the creation of a trust. *Inter-Ocean Casualty Co. v. Leccony Smokeless Fuel Co.*[1]

Prior to the instant case there was some doubt in West Virginia as to the requirement of a *res* in the creation of a trust.[2] In *Sullivan v. Madeleine Coal Co.*,[3] defendant maintained a burial fund for its employees, and deducted a certain amount each month from their wages to be paid into this fund. For a time these amounts were deducted from the employees' wages and credited to the fund, but not paid into the burial fund. In insolvency proceedings the court, in allowing priority as to the amount credited to the fund, limited its discussion to whether the trust fund could be *traced.* The court, in attempting to distinguish the *Sullivan* case from the principal case, declares that in the former it was not concerned with the problem of whether a *res* existed, but decided merely that the trust fund could be *traced.* The validity of this dis-

[11] 3 RESTATEMENT, TORTS (1939) § 559, comment *e.*

[1] 17 S. E. (2d) 51 (W. Va. 1941).

[2] See Note (1931) 31 COL. L. REV. 800, 812, where it is said that "West Virginia does not strictly adhere to the doctrine that there must be a trust *res.*"

[3] 115 W. Va. 115, 175 S. E. 521 (1934).