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The Right of Privacy in Illinois: Its Growth and Probable Development

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CONCLUSION

The eight year history of the federal gambling tax had a shaky start but was bolstered firmly by *Kahriger*, upholding its constitutionality. Then a few states passed statutes providing that the mere possession of such a stamp was prima facie evidence of gambling sufficient for a conviction. After Florida's prima facie statute was declared unconstitutional by the Florida Supreme Court the cases thereafter, both in Florida and in other states, used the wagering tax stamp to support other evidence of gambling. However, at least one city ordinance has been upheld where mere possession of the tax stamp was a violation.[28] Even though the tax stamp and prosecutions relating to its possession still extract venomous dissenting opinions on constitutional grounds, it is firmly entrenched in our tax law. Certainly, drastic changes are not imminent from court interpretation, so any change will have to come from Congress.

Right or wrong, both the Congress and the courts have applied a Machiavellian principle to suppress gambling under the guise of a revenue measure. This method recalls the thoughts of Alexander Hamilton in Federalist #12 where, after pointing out the revenues which could be derived from a national tax on liquor, he added:

> That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals and to the health of society.

[28] Deitch v. Chattanooga, 195 Tenn. 245, 258 S.W.2d 776 (1953).

THE RIGHT OF PRIVACY IN ILLINOIS: ITS GROWTH AND PROBABLE DEVELOPMENT

Since the recognition of the right of privacy[1] is very recent in Illinois, only a handful of cases have been decided bearing on the subject. With the exception of one class of cases (involving the right of privacy in regard to the return and distribution of fingerprints and photographs of arrested persons), the Illinois decisions involve the invasions of privacy by printed items, rather than movies,[2] radio and television programs[3] and harassment by debt collectors.[4] Due to the lack of sufficient coverage of the subject by

[1] The right of privacy is the right of the individual to be let alone or to lead a secluded life, or to be free from unwarranted publicity, or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned. Schmuckler v. Ohio Bell Tel. Co., 116 N.E.2d 819 (Court Common Pleas Ohio 1953.)

[2] Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

[3] Smith v. National Broadcasting Co., 138 Cal. App.2d 807, 292 P.2d 600 (1956).

[4] Housh v. Peth, 99 Ohio App. 26, 135 N.E.2d 440 (1955). There the defendant in attempting to collect a debt telephoned the plaintiff every day at home, for three

the few Illinois cases on point, reference will be made to holdings in other states for a necessary understanding of the subject.

INVASION OF PRIVACY BY UNAUTHORIZED USE OF A PERSON'S NAME OR LIKENESS FOR ADVERTISING PURPOSES

The well known case of *Eick v. Perk Dog Food*[5] was the first Illinois decision involving the right of privacy. The defendants in that case, used the photograph of a blind girl on the label of their product, depicting her as the prospective donee of a seeing eye dog. Briefly, the court held that:

> A person may not make an unauthorized appropriation of the personality of another, especially of his name or likeness, without being liable to him for mental distress as well as the actual pecuniary damages which the appropriation causes.[6]

As early as 1905, it was established that the publication of a person's photograph, without his consent, in connection with advertising, for the mere purpose of increasing the profits and gains of the advertiser, constituted an invasion of privacy.[7]

The right to privacy in regard to advertisements may be waived by the conduct of an individual. This is illustrated by the case of *Johnson v. Boeing*.[8] There the plaintiff, employed by the defendant company, was asked if he would pose for several photographs. The pictures were then used for advertising purposes. On cross-examination the plaintiff testified that he did not know the purpose for which the pictures were taken, but thought that they might be published in the plant newspaper. The court held that this admission by the plaintiff was proof enough that while posing for the pictures he was fully aware that they would be published somewhere. By making no objection to its publication nor prescribing any restrictions upon its use, he was deemed to have waived his right to privacy.

Though, (as will be shown below), the right of privacy is often waived by a person who has become "a public character" or one in whom the public has a rightful interest, "Such a public figure does not forfeit all right of privacy, and he may still recover for unauthorized commercial

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weeks (sometimes late at night) and telephoned her place of business. The defendant also notified plaintiff's employers of her debt. As a result of the calls at home and place of employment she lost a boarder and was threatened with dismissal by her employers. It was held that the defendant's action constituted an invasion of privacy.

[5] 347 Ill. App. 293, 106 N.E.2d 742 (1952).

[6] Ibid., at 299, 745.

[7] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Fairfield v. American Equipment, 138 Cal. App.2d 82, 291 P.2d 194 (1955).

[8] 175 Kan. 275, 262 P.2d 808 (1953).

uses of his name or photograph. . . ."[9] Thus, when a corporation distributed advertising showing that a Mr. X., a famous breeder of thoroughbred stock, used defendant's pills, when in fact he did not, the court held that there was an invasion of privacy.[10] In *Continental Optical Co. v. Reed*,[11] the plaintiff was a member of the U.S. Army working as a lens grinder. The Army photographed him and used the picture without his consent in several newspapers, as part of a plan for bolstering home front morale, amounting to a use of the picture for advertising purposes. It was contended by the defendant that the plaintiff, in joining the Army, became a public personage and was not entitled to the right of privacy respecting his activities while in service. The court maintained the cause of furthering the Army's war effort justified the plaintiff's loss of the right of privacy in connection with all legitimate use of his person; but this situation could not be extended into a license to private business to use the picture for advertising.

INVASION OF PRIVACY BY UNAUTHORIZED USE OF A PERSON'S NAME OR LIKENESS IN NEWSPAPERS AND MAGAZINES FOR PURPOSES OTHER THAN ADVERTISING

Certain requirements are fairly definite in determining whether the right to privacy, in regard to printed matter, has been violated. One such requirement is that the picture must be of and concerning the plaintiff. In other words, to violate the right of privacy there must be a likeness of the individual shown.[12] On this simple rule, a federal district court in Illinois decided the case of *Branson v. Fawcett Publications*.[13] The plaintiff, a cab driver, was a racing driver in the summer months. The defendant published *True Confessions* magazine. The picture which appeared in defendant's magazine, was used to illustrate a fictional story. It made no reference to the plaintiff, but the story concerned itself with an individual who was also a racing driver. The picture was a reproducion of a high speed photograph of a racing accident in which the plaintiff was injured. The plaintiff, because of the position of the car, could not be seen in the picture. No likeness, face, image, or silhouette of the plaintiff was shown. The court held, that the right of privacy does not extend to the reproduction of an auto.

The right of privacy is also a personal one, the action not being main-

[9] Prosser, Torts § 97 (1955).

[10] Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909).

[11] 119 Ind. App. 643, 86 N.E.2d 306 (1949).

[12] Branson v. Fawcett Publiactions, 124 F.Supp. 429 (N.D.Ill., 1954); Rozhon v. Triangle Publications Inc., 230 F.2d 359 (C.A. 7th, 1956).

[13] 124 F.Supp. 429 (N.D.Ill., 1954).

tainable by a relative of the person concerned, (unless of course that relative is himself brought into unjustifiable publicity),[14] nor does the cause of action survive the individual.[15]

It has been somewhat difficult to recover damages for the invasion of privacy. As the district court of California said:

> An invasion of the right of privacy occurs, not with the mere publication of a photograph, but occurs when a photograph is published where the publisher should know that its publication would offend the sensibilities of a normal person. Where the photograph portrays nothing to shock the ordinary sense of decency or propriety, where there is nothing uncomplimentary or discreditable in the photograph itself . . . no actionable invasion of privacy occurs.[16]

Thus, where the *Saturday Evening Post* showed a picture of the plaintiff talking to a person threatening to jump off a bridge, the court held that there was no invasion of privacy since the publisher of the picture could not have had reason to believe that the picture would offend the sensibilities of a normal person.[17]

Even though it would offend people of ordinary sensitivity the right of privacy does not exist,

> [I]f there has been consent to the publication or where the plaintiff has become a public character, and thereby waived his right of privacy, nor in the ordinary dissemination of news and events, nor in connection with the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit.[18]

Thus, it being very arbitrary as to what would and what would not affect the sensibilities of a normal person, the court, in the case involving "the man on the bridge" could have more easily determined the case by holding that such an occurrence was newsworthy, thereby waiving the right of privacy.

The situations which have been held newsworthy are numerous. Several may be illustrated. A paper's announcement of the fact that a twelve

[14] Kelly v. Johnson Publishing Co., 325 P.2d 659 (Ct. of App. 2d Dist. Cal., 1958).

[15] Ibid.

[16] Samuel v. Curtis Pub. Co., 122 F.Supp. 327 (N.D. Cal., 1954); See Leverton v. Curtis Pub. Co., 192 F.2d 974 (C.A. 3d, 1951); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

[17] Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal., 1954). In Gill v. Hearst, 40 Cal.2d 224, 253 P.2d 441 (1953), a picture was published in a magazine without permission of those photographed. This picture showed the plaintiffs sitting romantically close to one another, the man with his arm around the other. The court held that there was nothing so uncomplimentary or discreditable in the picture itself so that its publication might be objectionable as going beyond the limits of decency or indicating that the defendants should have realized that it would be offensive to persons of ordinary sensibilities.

[18] Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133, 138 (1945).

year old gave birth to a child was held to be a matter of public interest, and not an invasion of privacy.[19] In *Berg v. Minneapolis Star and Tribune*,[20] the plaintiff, by litigation with his wife over divorce proceedings to retain the custody of his children, was held to have made himself a legitimate item of news.

The question may be asked as to whether an event that was newsworthy at one time, loses this distinction by the passage of time. The answer is that usually it does not. The leading case of *Sidis v. F-R Publishing Corp.*[21] illustrates this point. There, *New Yorker Magazine*, in 1937, printed an article telling the whereabouts and activities of the plaintiff, who, in 1910, claimed world reknown as a child prodigy. At the time of the printing he was in seclusion, and had been for many years. The court held that the plaintiff's subsequent history, containing, as it did, answers to the question of whether or not the plaintiff had fulfilled his early promise, was still a matter of public concern. In another situation the defendant radio station broadcast a program concerning an elderly member of the community.[22] It told about the old man's disappearance from the community years ago, how he was believed to have been shot, how he finally showed up after everyone thought he was dead, and the fact that he left all his money to one of his two daughters. Both daughters' names were mentioned, and they brought suit for invasion of privacy. Because the story was part of the history of the community, the court held that the passage of time could not give privacy to the acts of the father.

RESTRICTIONS ON THE PUBLICATION OF NEWSWORTHY EVENTS

It is possible even though an occurrence concerning a plaintiff was newsworthy, the defendant may still be guilty of invasion of the right of privacy. Thus, if a newsworthy event takes place and the picture of the event is used by the defendant in connection with a story that deals with something other than this particular event, an invasion of privacy may occur. In *Leverton v. Curtis Pub. Co.*,[23] the defendant published, two years later, a picture taken of the plaintiff as she lay in the street after being hit by a car. It was published as an illustration for an article on

[19] Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1945).

[20] 79 F.Supp. 597 (D.C. Minn., 1948). Cf. Jenkins v. Dell Pub. Co., 251 F.2d 447 (C.A. 3d, 1958); Elmhurst v. Pearson, 153 F.2d 467 (D. D.C., 1946) where the court held that the plaintiff's misfortune in being a defendant in a criminal trial made him the object of legitimate public interest.

[21] 113 F.2d 806 (C.A. 2d, 1940). See Leverton v. Curtis Pub. Co., 192 F.2d 974 (C.A. 3d, 1951); Estill v. Hearst Pub. Co., 186 F.2d 1017 (C.A. 7th, 1951) where after 15 years the event was still considered newsworthy.

[22] Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948).

[23] 192 F.2d 974 (C.A. 3d, 1951). Accord: Gill v. Curtis Pub. Co., 38 Cal.2d 273, 239 P.2d 630 (1952).

traffic accidents with emphasis on pedestrian carelessness—entitled, "They Asked to be Killed." Evidence established that the child, at the time of the accident, was not careless. The court granted the fact that the accident was newsworthy, but that this use of the picture had nothing at all to do with her accident; that the plaintiff, the legitimate subject of publicity for one accident, now "becomes a pictorial, frightful example of pedestrian carelessness." Thus, it was concluded, this picture exceeded the bounds of the privilege.

Another restriction is that when a news account comes to be the basis for public entertainment, it will be considered that the bounds of the privilege were exceeded. In *Mau v. Rio Grande Oil Inc.*,[24] the plaintiff had suffered injuries by reason of being beaten and robbed. The defendant on a program called, "Calling All Cars" in dramatizing the holdup and shooting, used the plaintiff's name without his consent. It was held to be an invasion of privacy.

Exploitation of a newsworthy event, or public figure to facilitate the circulation of a magazine or newspaper, will be an invasion of privacy. That one is exploiting and facilitating circulation rather than using the story as a genuine article of information is shown by fictionalization. By way of illustration is the recent case of *Annerino v. Dell.*[25] In 1954, Mr. X was being held in the Criminal Court Building in Chicago. His girl friend gave him a gun which was later used in his escape. When apprehended, he shot a detective. The detective was taken to a hospital, where he was met by his wife, the plaintiff. The plaintiff was then told that her husband had died. While in a condition of shock and grief, pictures were taken of her. Three months later the defendant, in one of its magazines, *Inside Detective,* retold the story in an article entitled, *If You Love Me, Slip Me a Gun,* which included a photograph of the plaintiff. The story included a subtitle which read, "She lifted her ballerina skirt. 'There honey, fastened to the garter . . .' " The court held that this subtitle, along with other facts showed that the real story had been fictionalized. Quoting from *Hazlitt v. Fawcett,*[26] the court said:

> If so much of the story as is relied on was fictionalized and dramatized, I may not rule as a matter of law, that it was legitimate public interest because informational and on that account not actionable. . . . For, to the extent that the defendants indulged in fictionalization, the inference gathers strength that the dominant characteristic of the story was not genuine information but fictional readability conducive to increased circulation for the magazine. Thus

[24] 28 F.Supp. 845 (N.D. Cal., 1939).

[25] 17 Ill. App. 2d 205, 49 N.E.2d 761 (1958).

[26] 116 F.Supp. 538, 545 (D.C. Conn., 1953). In this case there was no photograph involved. The plaintiff was convicted of killing a man. The defendant published a story relating to the murder in a fictionalized version; held for the plaintiff.

the court may be deemed to state an actionable claim on the theory that the published story was in essence not a vehicle of information but rather a device to facilitate *commercial exploitation.*[27]

THE PROBLEM OF FINGERPRINTS AND PHOTOGRAPHS OF AN ARRESTED MAN IN RELATION TO THE RIGHT OF PRIVACY

The situation sometimes arises where a man, either acquitted or pardoned of a crime, demands a release of any files of identification taken of him by police.

In *Kolb v. O'Connor,*[28] the plaintiffs, arrested for various crimes, were tried and acquitted. Fingerprints, photographs, and other records of identification were taken from them by the Chief of Police of the City of Chicago. These records were kept *in the files* of the criminal department of the Chicago Police Department. The records were on view to members of the general public, who had been victims of various crimes. The plaintiffs demanded return of the files, on the ground that showing them to other victims would be an invasion of his privacy. The court, holding that the files did not have to be returned, said: "The right of the individual must be subordinate to the public."[29] Continuing, the court maintained that without a legislative mandate, the police may retain such files for the purpose of such *limited exhibition as is here involved.* The court stressed the individual's subordination to the state, and the fact that the police were using the pictures and prints for such a limited purpose. But where the photographs are used in a type of rogues' gallery, a different result is reached.

An action was brought in Indiana,[30] after plaintiff's acquittal in a criminal case, to compel defendants to surrender fingerprints and photographs made when the plaintiff was arrested. His picture was put in a rogues' gallery. As to the fingerprints, it was held that since they were filed in a cabinet, and only accessible to those who were trained to read them, there was not an invasion of the right of privacy. But as to the exhibition of the pictures, since a visitor brought there for the purpose of identifying someone, might conclude that all the pictures were of criminals, there was a violation of the right of privacy. The court added, by way of dictum, that if the photographs were filed away from the public view (as was

[27] Annerino v. Dell, 17 Ill. App. 2d 205, 209, 149 N.E.2d 761, 763 (1958).

[28] 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957). See Maxwell v. O'Connor, 1 Ill. App. 2d 124, 117 N.E.2d 326, which held that the criminal court of Cook County has no jurisdiction in an action to recover these records, on the ground that it is more in the nature of a right of privacy, and, therefore, involves a civil right. The Kolb case is noted in 7 De Paul L. Rev. 120 (1957).

[29] 14 Ill. App. 2d 81, 91, 142 N.E.2d 818 (1957).

[30] Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946).

done in the Illinois case) they would be in the same category as the filed fingerprints.[31]

The problem of whether a man's picture can be displayed in a rogues' gallery, or his photograph and fingerprints disseminated to law enforcement agencies over the world, before conviction or after acquittal has come up quite often.

Two early Louisiana cases,[32] not discussing the right of privacy, did not allow the placing of plaintiff's portrait in a rogues' gallery prior to his conviction; a Missouri court refused to allow dissemination of photographs and fingerprints to all parts of the country before conviction.[33] *In McGovern v. Van Riper*,[34] the validity of a New Jersey statute providing for distribution of fingerprints and photographs to law enforcement agencies immediately upon arrest was in issue. The court held the statute to be within the proper exercise of the state's police power for the purpose of facilitating crime detection and punishment. One who has been indicted has to "submit to such slight invasion of his claimed right of privacy as may accompany the performance of the police duty required by the statute."[35] It was also said that by reason of being indicted, the plaintiff's life ceased to be private; that since his life now became a matter of public interest,

> [S]uch steps as the legislature designates shall be taken by public officials in the interest of the public for the purpose of the due administration of the criminal laws of the state, can't be said to be an unwarranted infringement of complainant's right of privacy.[36]

Another court held it no invasion of privacy where plaintiff could not secure return of pictures after his release from a reformatory, the picture having been distributed to various parts of the country. The court felt that such distribution was justifiable to protect society.[37]

Another problem is shown in *Hansson v. Harris*.[38] There, the plaintiff was arrested for a misdemeanor and was photographed; an informal hearing was held where defendant's attorney (plaintiff here) promised to keep his client out of trouble. Now the plaintiff seeks to enjoin defendant from

[31] In Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (1944), where the action was not brought on the grounds of invasion of privacy, plaintiff was arrested, but no indictment was found. His pictures were sent to and remain in a rogues' gallery. The court held that in the absence of statute it is in the discretion of the police as to whether or not to give them up.

[32] Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906); Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906).

[33] 348 Mo. 426, 153 S.W.2d 834 (1941).

[34] 140 N.J. Eq. 341, 54 A.2d 469 (1947).

[35] Ibid., at 343, 472.

[36] Ibid., at 343, 472.

[37] Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915).

[38] 252 S.W.2d 600 (Tex. Civ. App., 1952).

disseminating the photographs. The court refused the injunction, stating that the taking of the pictures must be considered the same as other administrative procedure of the police to which a person, at times, must be subjected for the common good.

CONCLUSION

Though many of the factual situations dealt with have not come up in Illinois, it is probable that the courts here will follow the reasoning in sister state cases.

In the matters of advertising and magazine-newspaper articles, not too much difficulty arises. It is often obvious just what does constitute a newsworthy event which will deprive people of their right to privacy.

In regard to the problem of fingerprints and photographs of arrested men and the right to distribute such materials, the problem is slightly more complex. The present position in Illinois is that upon acquittal the file need not be surrendered, if the file was used for limited purposes and not in a rogues' gallery. But as to what must be done after a pardon, or before a conviction, in regard to placing a picture in a rogues' gallery or disseminating the information, the Illinois courts are silent.

THE RIGHT OF COMMUNISTS TO TRAVEL ABROAD AND THE UNRESOLVED PROBLEM OF DUE PROCESS

A Bill has been introduced in Congress which would give the Secretary of State the power to deny passports to persons knowingly engaged in activities intended to further the international Communist movement.[1] This proposed legislation comes as a result of two decisions, *Kent and Briehl v. Dulles*,[2] and *Dayton v. Dulles*,[3] by the Supreme Court on June 16, 1958, declaring that the Secretary of State has no such power in the absence of express Congressional provision.

POLICY TOWARDS COMMUNISTS FROM WORLD WAR I TO THE KENT AND DAYTON CASES

The policy of refusing passports to leading American Communists was first adopted after World War I. The policy was ignored between 1931

[1] H.R.55, introduced by Rep. Selden January 7, 1959. For an excellent historical and critical approach to American passport policies, together with recommendations for revised legislation, consult Freedom to Travel, New York Bar Association, Dodd, Mead & Company, New York, 1958.

[2] 357 U.S. 116 (1958).

[3] 357 U.S. 144 (1958). There is a sharp distinction between these two cases. Dayton was accused of being a Communist. Kent and Briehl were refused passports due to their refusal to file an affidavit stating whether or not they were or ever had been Communists.