nated. *Bessemer Savings Bank* v. *Rosenbaum Grocery Co.*, 137 Ala. 530, 34 So. 609 (1902). See annotation 71 Am. St. Rep. 176.

Ohio has recognized contracts for the benefit of third persons, *Thompson* v. *Thompson*, 4 Ohio St. 333 (1854); *Emmitt* v. *Brophy*, 42 Ohio St. 82 (1884), but they have not done so as yet in cases involving assumption of partnership debts. This argument was advanced in the principal case, and it could have reasonably been the basis of the decision had the court seen fit to so use it.

It was essential for the State of Ohio to evade the doctrine of marshalling assets in order to share with the individual bankrupt's creditors, and to prove the entire claim against the assuming partner's estate. The evasion could have been accomplished on any one of the three aforementioned theories; that is, upon the theory that the retiring partner became a surety, on the theory that the retiring partner was discharged by reason of a novation, or on the theory that the state became a third party beneficiary by reason of the assumption agreement.

MARGARETTA BEYNON

PRIVACY

THE RIGHT OF PRIVACY

Maxine Martin, an actress, sued the F.I.Y. Theatre Company for damages on two causes of action: (1) "Violation or breach of the right of privacy;" (2) Libel. She alleged that her picture was, without her permission, displayed by defendant in front of a burlesque house along with other pictures of "lewd and nude burlesque actresses"; that she was not under contract to defendant and did not intend to appear in his or any other burlesque theatre. She further alleged that the reputation of burlesque shows is of a low type both in her profession and in the public mind, and that such unauthorized display of her picture injured her in her profession. The Common Pleas Court of Cuyahoga County sustained a demurrer to the first cause of action, without disposing of the second cause, taking it for granted that plaintiff might proceed with her action for libel.[1] In sustaining the demurrer, the court, speaking through Judge Merrick, decided, in the absence of any authority in Ohio, that privacy was a personal and not a property right, and that "it does not exist under any theory where the person has become prominent, notorious or well-known so that by his very vocation or conduct he has dedicated his life to some continued contact with the public and thereby

[1] *Maxine Martin* v. *F.I.Y. Theatre Co.*, 10 Ohio O. 338 (1938)

has waived his right to privacy. There can be no privacy in that which is thereby public."[2]

The right of privacy as a right upon which an action may be based is a new one, having first been asserted in 1890,[3] and a violation thereof first redressed by a court of last resort in 1905.[4] In that short period of time, however, the subject has had a vast and varied treatment by law review writers and a much less vast but equally varied treatment by the courts. Since the principal case is one of first impression in Ohio, perhaps a brief history of the right of privacy is justified.

As stated above, the right as such was not given expression until near the end of the last century. No mention of it is made by any of the great commentators on the Common Law. In 1890, however, Samuel D. Warren and Louis D. Brandeis, writing for the Harvard Law Review, very cleverly and convincingly advanced the idea that a person's right to be let alone, to live as he pleases, free from unwarranted publicity, is a separate and distinct legal right based on a right of property in its widest sense, "including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality."[5] This provoked an almost immediate response from Mr. Herbert Spencer Hadley in the Northwestern Review, who with equal fervor and plausibility denounced any such right.[6] Since that time the battle between the commentators has continued to wage, each new case calling for a new divergence of opinion, with equally eminent authorities lined up on each side of the controversy. To attempt to review these many comments in this connection would be not only an arduous task but a futile one. Suffice it to say that there is a clear conflict of opinion as to the existence of the right either as one cognizable at law or in the courts of equity.

Prior to the first recognition of the right of privacy in the terms of any decision, the decisions in the cases which might be said to have involved this right were not decided on that basis but were based on a right of property, or on a breach of an implied contract or trust.[7] How-

[2] *Id.*, p. 341.

[3] 4 Harv. L. Rev. 193 (1890).

[4] *Pavesich* v. *New England Mut. L. Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 106 Am. St. Rep. 104, 2 Ann. Cas. 561, 69 L.R.A. 101 (1905).

[5] 4 Harv. L. Rev. 193, 211 (1890).

[6] 3 N.W. Law Rev. 1 (1895).

[7] *Abernethy* v. *Hutchinson*, 3 L.J.Ch. 209 (1825) surgeon restrained publication of notes taken from unpublished lectures at a hospital; *Prince Albert* v. *Strange*, 1 McN. & G. 25 (1849) Lord Cottenham, in granting an injunction against reproduction and description of etchings, recognized a right of property, but assumed that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract"; *Tuck* v. *Priester*, 19 Q.B.D. 629 (1887) injunction and damages for breach of contract granted against photographer who being employed by plaintiff to make a certain number of prints made some for his own use and sold them; *Pollard* v. *Photographic Co.*, 40 Ch. Div. 345 (1888) photographer who had taken lady's picture restrained from exhibiting it on ground of beach of implied contract.

ever, as society develops and its ramifications become more complex, it becomes increasingly difficult to work out the protection of a person's rights along the lines that have been recognized and applied in generations past. With the advent of instantaneous photography, and more particularly with the introduction of the "candid camera" mania, it is hard to see how any protection from over-zealous addicts of the art can be afforded by means of any theory of contract.[8] If such protection is to be afforded, it is not difficult to conclude that "the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and * * * the principle phich has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestice or otherwise."[9]

The fact that the right protected is that of privacy instead of contract is shown in an unreported case in the Supreme Court of New York.[10] In that case, the plaintiff, an actress, while playing in the Broadway Theatre, in a rôle which required her appearance in tights, was, by means of a flash light, photographed surreptitiously, and without her consent, from one of the boxes of the theatre. Although there was no opposition to the preliminary injunction being made permanent, the court

[8] "This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract of a special confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's person could seldom be taken without his consciously 'sitting' for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrine of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested." Warren and Brandeis, in 4 Harv. L. Rev. 193, at p. 210.

[9] *Id.*, p. 213.

[10] *Manola* v. *Stevens* (1890).

issued one to restrain any use being made of the picture so taken.[11] The only implication of a contract that could be made here is one between the manager or owner of the Broadway Theatre and the patron, who, upon being granted admission, impliedly agreed not to take any pictures. Even so, what right would an entertainer have to sue on that implied contract, unless it could be said that such implied contract arose in her favor, that she was a third party beneficiary? Such an idea seems to the writer to be an unconscionable stretch of our theory of contract. It seems more plausible to assume that the right which the court was protecting was the plaintiff's right of privacy, notwithstanding the fact that she was an actress, a public character who had dedicated her life to some continued contract with the public.

The law concerning the right of privacy has had an interesting development in the state of New York in both law and equity. In 1892, the relatives of a deceased person used the right of privacy as a basis for seeking an injunction against the erection of a statue of their deceased ancestor.[12] The court granted the injunction on the ground that no stranger had the right to invade the privacy which attaches to a person when living or to her memory when dead. The court said that if a living person were remediless and powerless to prevent the erection of such a statue "it would certainly be a blot upon our boasted system of jurisprudence that the courts were powerless to prevent the unwarranted doing of things by persons who are mere volunteers, which would wound in the most cruel manner the feelings of many a sensitive nature."[13] In the trial court no attempt was made to rely on any ancient branch of the law; the court flatly stated that the act was an unauthorized one which had caused, and which would continue to cause, damage.[14] The right, however, was not upheld by the Court of Appeals.[15] But the judge of the appellate court was careful to say that the decision was not to be interpreted as a denial of the existence of the right of privacy, but placed the decision upon the ground that no "sane and reasonable person" could have shrunk from the anticipation of such publicity after her death, even though it might have proved embarrassing during her lifetime. The case, therefore, would seem to turn on a denial of jurisdiction rather than of right.

[11] Case of *Manola* v. *Stevens*, cited and discussed in *Schuyler* v. *Curtis*, 15 N. Y. Supp. 787, 789.

[12] *Schuyler* v. *Curtis*, 64 Hun. 594 (1892).

[13] *Id.*, p. 596.

[14] *Schuyler* v. *Curtis*, 27 Abb. N.C. 387 (1891); *Schuyler* v. *Curtis*, 30 Abb. N.C. 376 (1893).

[15] *Schuyler* v. *Curtis*, 147 N.Y. 434, 42 N.E. 22, 49 Am. St. Rep. 671, 31 L.R.A. 286 (1895).

The right was again recognized in another lower court case in New York which theoretically is still the law since it has never been expressly repudiated.[16] There, the plaintiff, an actor by profession, then engaged in the study of law, refused to give defendant publisher his permission to print his picture along with that of another well-known actor, accompanied by an invitation to the readers to vote as to which was the more popular. In spite of the plaintiff's refusal to consent, the defendant published the picture. In granting an injunction against such publication, the court made a statement which seems particularly applicable to the principal case: "He might be placed in competition with a person whose association might be peculiarly offensive as well as detrimental to him. Such a wrong is not without its remedy. No newspaper or institution, no matter how worthy, has the right to use the name or picture of anyone for such a purpose without his consent."[17] It could hardly be denied that the association of pictures of a dramatic actress and a burlesque "artist" would be "peculiarly offensive as well as detrimental" to the dramatic actress.

The right of privacy was, however, expressly repudiated by the Court of Appeals in New York, in a case which has become the leading case denying such a right.[18] The court held unequivocally that a person's so-called right of privacy, grounded upon the claim that he has a right to go through life without having his picture published, whether favorably or otherwise, does not exist in the law and is unenforceable in equity. This decision was a reversal of the lower court which had held that there was an invasion of the right of privacy as well as of the right of property in the use of plaintiff's picture.[19] The refusal of the New York Court of Appeals to acknowledge the existence of any right of privacy in the *Roberson* case led to the almost immediate enactment of legislation giving injunctive relief and damages to one whose "name, portrait or picture" is used for "advertising purposes" or for the "purposes of trade" without his consent, and making the publisher subject to a misdemeanor charge.[20] The constitutionality of the statute was subsequently upheld.[21] In a later case, the New York court makes the following significant statement in regard to this statute: "I think the object had in view by the legislature was to restrain a somewhat similar

[16] *Marks* v. *Jaffa*, 6 Misc. (N.Y.) 290 (1893).

[17] *Id.*, pp. 291-292.

[18] *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 89 Am. St. Rep. 828, 59 L.R.A. 478 (1902).

[19] *Roberson* v. *Rochester Folding Box Co.*, 65 N.Y. Supp. 1109, 32 Misc. (N.Y.) 344 (1900), affirmed in 71 N.Y. Supp. 876, 64 App. Div. 30 (1901).

[20] N.Y. Civil Rights Law, secs. 50, 51 (1903), amended (1921).

[21] *Rhodes* v. *Sperry*, 193 N.Y. 223, 85 N.E. 1097, 127 Am. St. Rep. 945, 34 L.R.A. (N.S.) 1143 (1908); *Binns* v. *Vitagraph Co. of America*, 210 N.Y. 51, 103 N.E. 1108, Ann. Cas. 1915B, 1024, L.R.A. 1915C, 839 (1913).

occurrence to that described in the case of *Roberson* v. *Rochester Folding Box Co.*"[22] So the legislature has seen fit to recognize a right which has been denied by the courts. But the courts which have denied any relief for breach of the right of privacy have almost uniformly said that the function of providing such relief is a legislative and not a judicial one.[23]

Nor are the New York courts alone in denying the right. Many others likewise deny its existence either in law[24] or in equity,[25] the reason for denying the right in equity usually being based on the absence of a property right. There is, however, equally respectable authority which recognizes the right as one upon which a right to injunctive relief may be grounded,[26] and as one the violation of which gives rise to a legal action for damages.[27] The court in the *Pavesich* case unanimously adopts the dissenting opinion of Judge Gray in the *Roberson* case and presents what seems to the writer to be the preferable view in regard to the right of privacy. There the plaintiff was allowed to maintain an action for breach of the right without proof of special damages, and without regard to property right, solely on the ground that the defendant had breached a right of privacy which was embraced within plaintiff's absolute rights of personal liberty and security. To the writer, such a right seems no less worthy of protection than a lecturer's right in his spoken words, or a writer's right in ideas expressed in a letter. And when the right is recognized by courts as in the *Pavesich* case and by legislative enactment as in New York, there must be grounds for asserting the need for a recognition of the existence of the right, although as yet it is a more or less inarticulate concept. If the right exists, there should surely be a remedy for its violation.[28]

Granting that such a right exists, and the court in the principal case does not deny its existence, the only question remaining is whether or not the right can be asserted in favor of an actress, whose life has been more or less completely devoted to the public. Since it is a right, it may, like any other right, be waived. It is generally conceded that such a waiver has been made in case of convicted criminals, artists, candidates

[22] *Moser* v. *Press Publishing Co.*, 59 Misc. (N.Y.) 78, 82 109 N.Y. Supp 963 (1908).

[23] *Henry* v. *Cherry*, 30 R.I. 13, 73 Atl. 97, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006, 24 L.R.A. (N.S.) 991 (1909); *Hillman* v. *Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594, 35 L.R.A. (N.S.) 595 (1911).

[24] *Id.*

[25] *Atkinson* v. *Doherty*, 121 Mich. 372, 80 N.W. 285, 80 Am. St. Rep. 507, 46 L.R.A. 219 (1899).

[26] *Itzkovich* v. *Whitaker*, 115 La. 479, 39 So. 499, 112 Am. St. Rep. 272, 1 L.R.A. (N.S.) 1147 (1905).

[27] *Pavesich* v. *New England Mut. L. Ins. Co.*, *supra*; *Kunz* v. *Allen*, 102 Kan. 883, 172 Pac. 532 (1918); *Munden* v. *Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911).

[28] For a detailed discussion redefining the right of privacy, see 70 U.S. Law Rev. 435.

for public office, and the like.[29] The lives of such people are considered of public interest. It is on this basis that the court in the principal case denies the existence of the right in favor of the plaintiff. There is, however, a restriction generally placed on the right of free publication of pictures and comments concerning public characters. The publication must be fair and reasonable.[30] "The right of privacy may be waived either expressly or by implication * * * ; but a waiver authorizes an invasion of the right only to such an extent as is necessarily implied from the purpose for which the waiver is made."[31]

An actress may easily be said to have waived her right of privacy *for some purposes*. She is naturally interested in having her picture legitimately advertised; she wants the public to be interested in her, to patronize the theatres and the productions in which she is appearing. Her success, both financially and as an actress, depends on that patronage. Were she under contract to the owner of the burlesque house to appear in his theatre, she could have no complaint to the posting of the picture, despite the fact that it was displayed with other pictures of "lewd and nude burlesque actresses." Her contract would imply a waiver of any such complaint. But, in the absence of any contract, the publishing is an unauthorized invasion of the plaintiff's right of privacy, an invasion outside the scope of her implied waiver and intended solely as a financial benefit to defendant. It could scarcely be said without putting the tongue in the cheek, that such an invasion is not injurious to one in the plaintiff's position. One whose life has been devoted to the legitimate theatre can hardly expect to maintain a reputation along that line if her name is to be associated, by reason of an unauthorized act, with the burlesque boards. The fact that plaintiff has impliedly consented to the publication of her picture by one class, those with whom she is associated, does not authorize an invasion by another class with whom she has never had, and probably hopes never to have, any connection. Adopting this view, then, the court could have reached a more liberal, and, in the opinion of the writer, preferable decision. It must be recognized, however, that the ruling of the principal case is supported by respectable authority, and is justifiable in that light. But in the light of the contrary authority and the statutes recognizing the right of privacy, the court could well have followed this apparent trend and could have granted the plaintiff the relief prayed for. Perhaps, however, when the case comes up on appeal in the near future, the Court of Appeals may see fit to recognize the right in this case.

JAMES F. BELL, JR.

[29] *Pavesich* v. *New England Mut. L. Ins. Co., supra; Hodgeman* v. *Olsen,* 86 Wash. 615, 150 Pac. 1122, L.R.A. 1916A, 739.

[30] *Pavesich* v. *New England Mut. L. Ins. Co., supra.*

[31] *Id.,* p. 191.