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Discussion of Recent Decisions

W. E. Steven

B. A. Pitler

H. Gleiberman

S. Gardner

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DISCUSSION OF RECENT DECISIONS

CRIMINAL LAW—EVIDENCE—WHETHER OR NOT A DEFENDANT IN A FELONY PROCEEDING WHO TESTIFIES IN SUPPORT OF DEFENSE OF ENTRAPMENT MAY BE CROSS-EXAMINED AS TO A PRIOR CONVICTION FOR A SIMILAR OFFENSE—A seldom raised issue of evidence law received the attention of the United States Court of Appeals for the Ninth Circuit in the case of *Carlton* v. *United States*.[1] Charged with a felonious selling of morphine

[1] 198 F. (2d) 795 (1952).

to a government agent, the defendant there took the stand in the trial court and testified in support of a claimed defense of entrapment. On cross-examination, and over objection, the prosecution was permitted to bring out the fact that the defendant had previously been convicted of related offenses, but of the grade of misdemeanor, and the defendant was convicted. On appeal, the conviction was affirmed when the court stated the doctrine to be that, where the defense of entrapment has been raised, inquiry as to prior convictions for similar offenses, both misdemeanors and felonies, represents a permissible way to secure evidence by way of rebuttal.[2]

The problem concerned in the instant case deals with one aspect of the law relating to the admissibility of evidence tending to establish previous offenses by the same defendant. It would appear to be the general rule that evidence relating to previous crime is not competent for the purpose of proving guilt of the offense with which the defendant stands charged,[3] but there are many exceptions to this rule and, as is quite often the case, the exceptions seem to be more often applied than the rule itself. These exceptions, allowing the admission of evidence regarding separate offenses, can be grouped under two main headings, to-wit: (1) where it is necessary to admit such evidence because the proof is part of the *res gestae,* and (2) where evidence relating to such prior acts tends to establish the defendant's knowledge, intent or motive.

An illustration of the first exception may be found in the case of *United States* v. *Tandaric*[4] where relevant evidence tending to establish a material fact was not excluded simply because it also disclosed that the defendant had committed another offense. Similarly, in *Bracey* v. *United States,*[5] it was said that evidence of other criminal acts would be admissible when the acts were so blended or connected with the one on trial that proof of the one incidentally involved proof of the other,[6] explained the circumstances thereof,[7] or tended logically to prove any element of the crime charged.[8] Actually, in such cases, the test used in determining the

[2] The court pointed out that it was better practice for the prosecution to produce the record of past convictions, where available, but that it would be permissible to elicit the same evidence on cross-examination.

[3] See, for example, People v. Novotny, 371 Ill. 58, 20 N. E. (2d) 34 (1939).

[4] 152 F. (2d) 3 (1945), cert. den. 327 U. S. 786, 66 S. Ct. 703, 90 L. Ed. 1012 (1946).

[5] 79 App. D. C. 23, 142 F. (2d) 85 (1944), cert. den. 322 U. S. 762, 64 S. Ct. 1274, 88 L. Ed. 1589 (1944).

[6] Copeland v. United States, 55 App. D. C. 106, 2 F. (2d) 637 (1924).

[7] Behrle v. United States, 69 App. D. C. 304, 100 F. (2d) 714 (1938).

[8] Shettel v. United States, 72 App. D. C. 250, 113 F. (2d) 34 (1940). In Murphy v. State, 72 Okla. Cr. Rep. 1, 112 P. (2d) 438 (1941), the view was expressed that proof concerning any previous acts of the defendant could be admitted in evidence against him provided the same possessed any logical or legal tendency to prove any matter then in issue.

admissibility of evidence has been one bearing on the materiality of the proof in relation to the offense at hand.[9]

The second exception appears to have been stated more often and is the one more nearly involved in the instant case. It seems to be well-recognized law that, where the intent of the defendant is in issue, evidence as to previous acts may be admitted for the purpose of establishing that intent. In *People* v. *Popescue,*[10] for example, the Illinois Supreme Court approved the admission of evidence which, while it disclosed the commission of a previous offense, tended to establish the defendant's knowledge or intent, his motive for the commission of the crime, and the existence of a common scheme or plan. In that case, two defendants were accused of murder. Each claimed the death was due to an accident and objected to the action of the trial judge in receiving evidence to the effect that a similar crime had been committed by the defendants some three hours prior to the murder in question. The evidence was declared to be admissible as it had been offered for the purpose of showing intention with regard to, but not for the purpose of showing the commission of, the later crime. In that regard, the Georgia case of *Mimbs* v. *State*[11] goes as far as any in admitting evidence concerning independent and unrelated acts on the part of the defendant, the court there stating the doctrine to be one under which evidence as to an offense other than that charged against a defendant is admissible if such evidence is offered for the purpose of proving, and tends to show, a common design, scheme, plan, or purpose, or bears any other rational connection with the offense for which the defendant is being tried.

In cases of this character, Professor Wigmore has suggested that it is the desire of the courts to discover the intent which accompanied the act; that evidence of the prior doing of similar acts, whether clearly a part of a scheme or not, would be useful in reducing the possibility that the act in question was done with innocent intent; that the argument is based purely on the doctrine of chances; so there must be a similarity in the various instances in order to give them probative value.[12] For these reasons, evidence of prior acts has been received most often in cases involving sex crimes. In the interesting case of *Bracey* v. *United States,*[13] for example, the defendant was convicted of carnally knowing a twelve-year old girl. The defendant, in an effort to support an inference of conspiracy to secure a conviction, had cross-examined his own small step-

[9] Copeland v. United States, 55 App. D. C. 106, 2 F. (2d) 637 (1924).

[10] 345 Ill. 142, 177 N. E. 739, 77 A. L. R. 1199 (1931).

[11] 189 Ga. 189, 5 S. E. (2d) 770 (1939).

[12] Wigmore, Evidence, 3d Ed., Vol. 2, p. 200.

[13] 79 App. D. C. 23, 142 F. (2d) 85 (1944), cert. den. 322 U. S. 762, 64 S. Ct. 1274, 88 L. Ed. 1589 (1944).

daughter, who had testified as an eye-witness to the criminal act. Upon re-direct examination of this witness, the prosecution asked her why she did not like the defendant and she mentioned that the defendant had done the same thing to her. The defendant objected to the admissibility of such evidence, but the court received the testimony relating to the prior offense to rebut the inference and defense of conspiracy, and this was upheld as being within the discretionary power of the trial judge to determine what evidence should be regarded as admissible.[14] In another case, that of *People* v. *Westek,*[15] the evidence of prior acts of illicit relations with young boys was used to rebut the defendant's claim of good character. The doctrine, nevertheless, has its limitations. In *Lovely* v. *United States,*[16] a defendant accused of rape had relied on the defense of consent. To rebut this, the prosecutor brought in evidence to show that the defendant had raped another girl fifteen days earlier at the same place, but it was held that evidence would be inadmissible on the ground that no issue of identity, knowledge, or intent was involved.

Turning to the specific exception to the general rule involved in the case at hand, *i. e.,* use of evidence of prior crime to rebut a claim of entrapment, it should be noted that the case of *United States* v. *Sauvain*[17] closely resembles the instant case. The defendant there was charged with the possession and sale of narcotics. Officers sent an addict, with marked money, into the defendant's house and he emerged with narcotics in his possession. The defendant, seized with the marked money, took the stand and testified to a purported entrapment. On cross-examination, defendant was asked if he had ever sold morphine to another designated person at approximately the same time and, when defendant denied this, such other person was called, in rebuttal, to prove the sale. Approving the use of this evidence, the Court of Appeals for the Eighth Circuit said: "Care should be exercised in admitting evidence of other and distinct offenses . . . However, it appears here that the defendant claims he was entrapped; to meet that issue the government may properly show that the defendant was a dealer and not a victim of zealous officers."[18] The case of *Billingsley* v. *United States,*[19] wherein it became necessary to show the good faith of the state officials charged with entrapping the defendant, reached much the same conclusion.

[14] Devoe v. United States, 103 F. (2d) 584 (1939), cert. den. 308 U. S. 571, 60 S. Ct. 84, 84 L. Ed. 479 (1939).

[15] 31 Cal. (2d) 469, 190 P. (2d) 9 (1948).

[16] 175 F. (2d) 312 (1949), cert. den. 338 U. S. 834, 70 S. Ct. 38, 94 L. Ed. 508 (1949).

[17] 31 F. (2d) 732 (1929).

[18] 31 F. (2d) 732 at 733.

[19] 274 F. 86 (1921).

Approaching the problem from the standpoint of logic rather than precedent, it could be observed that the limitation placed on the use of rebuttal testimony first requires that such testimony should be used only to offset testimony advanced by the other side and should include nothing which could properly have been advanced as proof in chief. Accordingly, rebuttal evidence will be receivable only where new matter has been developed by the evidence of one of the parties and is then, ordinarily, limited to a reply to the new points.[20] The issue in the instant case, therefore, could not have arisen if the defendant had not put his innocence and good character in issue by pleading the defense of entrapment. The question then became one as to the way by which the defendant's claim of innocence and good character could be disproved. Professor Wigmore has said there are "three conceivable ways of evidencing defendant's character: (1) reputation of the community . . . (2) personal knowledge or opinion of those who know the defendant; (3) particular acts of misconduct exhibiting the particular trait involved,"[21] but that, in connection with the third of these methods, it is forbidden, when showing that the defendant has not the good character which he affirms, "to resort to particular acts of misconduct by him."

If, in the instant case, the government had offered its evidence of previous acts simply to rebut the defendant's claim of good reputation, the same would have been clearly inadmissible. Actually, however, the proof was introduced to negative the claim of entrapment, as by showing that the officers had good reason to suspect the defendant and had not simply picked on him in order to pin a crime on him. Put differently, the government sought to show the defendant already possessed a criminal intent and that the same had not been engendered solely by the acts of the prosecution. In that regard, it has been said that, where criminal intent is in issue and the effect of the defendant's testimony has been that he acted in good faith, he may be cross-examined as to similar offenses[22] for such cross-examination would tend to show the intent or purpose with which the particular act was done and to rebut the presumption that might otherwise prevail.[23]

20 See 64 C. J., Trials, § 176, p. 153.

21 Wigmore, Evidence, 3d Ed., Vol. 1, pp. 642-3. The reasons given for denying proof of particular acts of misconduct are (1) an over-strong tendency to believe the defendant guilty of the present charge; (2) a tendency to condemn because he has, perhaps, escaped all or adequate punishment for past misconduct; (3) the unpreparedness of the defendant to meet the attack based on his previous acts; and (4) the confusion arising from the injection of new issues: Wigmore, op. cit., Vol. 1, p. 650.

22 Todd v. People, 82 Colo. 541, 261 P. 661 (1927).

23 People v. Seaman, 107 Mich. 348, 65 N. W. 203 (1895). See also People v. Grutz, 212 N. Y. 72, 105 N. E. 843 (1914). Cardozo, J., wrote a dissenting opinion concurred in by Cuddeback and Miller, JJ.

The holding in the instant case, therefore, serves to establish more firmly the right of the prosecution to offer evidence of prior offenses for the purpose of discrediting a defendant's self-serving testimony. When a defendant has pleaded he is innocent by reason of entrapment, one way to dispute such a defense would be to show his prior acts of bad character. A degree of discretion should be left in the trial judge to determine whether the evidence relating to prior offenses should be admitted. Before exercising that discretion, the trial judge should consider whether the proof (1) would unnecessarily tend to multiply the issues, (2) would serve to prejudice the jury unduly against the defendant, and (3) would be unnecessary to prove a material fact already well-established. If he conceives neither of these eventualities would result, he should allow evidence of the prior offenses to be admitted for, to hold otherwise, would permit the defendant to use his prior wrongdoing as a shield against the sword of justice.

W. E. STEVENS

HUSBAND AND WIFE—COMMUNITY PROPERTY—WHETHER OR NOT A MARRIED WOMAN, IN A COMMUNITY PROPERTY STATE, MAY BRING AN ACTION FOR PERSONAL INJURIES IN HER OWN NAME AND FOR HER EXCLUSIVE BENEFIT—A problem of little concern to the lawyer practicing in Illinois but of considerable importance in community property states was presented in the recent New Mexico case of *Soto* v. *Vandeventer*.[1] A two-count complaint in tort for personal injuries was filed therein. The first count, filed in the name of the wife alone, sought to recover damages for her physical injury and pain and suffering allegedly caused by the negligence of the defendant's employee while operating a taxi-cab. The second, brought in the name of the husband as representative of the marital community, sought damages for economic and personal loss suffered by himself and by the marital community during the period of the wife's disability. The trial judge dismissed the first count and directed a severance as to the second claim. On appeal, the Supreme Court of New Mexico reversed the decision, holding that, as each count stated a separate cause of action, it was proper to regard the wife's cause of action as her distinct property, although the husband, as head of the community, could also sue for the injury done to the community.

According to the common law, the wife's legal non-existence made it necessary, during coverture and in order that she might have standing in court, to join her husband in any action which had accrued to her.[2] This

[1] 56 N. M. 483, 245 P. (2d) 826 (1952).

[2] Vernier, American Family Laws (Stanford University Press, 1935), Vol. 3, § 179, p. 255 et seq.

procedural disability has been removed in most American jurisdictions by the enactment of so-called "Married Women's Acts"[3] which operate to abolish the legal fiction that a husband and wife are one person and give the married woman the same rights as a *feme sole.* She can, therefore, in most common-law jurisdictions, now sue and be sued without being joined by any person who is not a party interested in the litigation. It is true, however, that the husband, not being divested of his right to the services of his wife, given to him by virtue of the marriage relationship, may bring his separate action, in his own right, for any deprivation of his wife's companionship and the like.[4] Even if the husband should join in the same suit, his claim, while derivative, is separate and distinct from that maintainable by the wife for the personal injury inflicted upon her body, so the proceeds from the latter will go into the wife's separate estate.

In contrast to these common law concepts which prevail in most American jurisdictions, eight of the United States, known as the community property jurisdictions,[5] have legal systems which do not stem from common law ancestry but which rest, more nearly, on Spanish civil law. The community, or ganancial, system of property there applied dates further back than the common law system[6] and proceeds on the basis that marriage operates to create a form of partnership between the spouses, at least as to all property acquired by the spouses after the marriage has been celebrated, which property is deemed to have been acquired through the joint efforts of the "partners." Necessarily, such a theory would exclude from its operation all property which either might have owned before the marriage, or which either might acquire after the marriage but not due to their joint efforts, and such property, as well as all right of action arising therefrom, would be classed as separate property.[7] The presence of such an arrangement projects the question presented in the instant case, one regarding the ownership, and hence the right to sue, on

[3] See, for example, Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1.

[4] Blair v. Bloom. & Nor. Ry., E. & H. Co., 130 Ill. App. 400 (1906). See also annotation in 21 A. L. R. 1517.

[5] The states involved are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. For tax purposes, a few other states have adopted aspects of community property law, but have otherwise generally maintained their common-law inheritance.

[6] deFuniak, Principles of Community Property (Callaghan & Co., Chicago, 1943), Vol. 1, § 2, p. 4 et seq.

[7] N. M. Stat. Ann., 1941 Comp., §§ 65-304 and 65-305, typical of community property jurisdictions, declare: "All property owned . . . before marriage, and that acquired afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof is . . . separate property." These sections should be read in conjunction with § 65-401, which states: "All other real and personal property acquired after marriage by either husband or wife, or both, is community property . . ."

a cause of action for physical harm done to the wife during the existence of the marriage.

Among these community property jurisdictions, three different views on the point have been established. Under one view, the action must be brought by the husband, or in the name of the husband and wife, and the recovery goes into the community assets. Under another, the wife may bring the action in her own name, but the recovery belongs to the community. Pursuant to the third view, the wife is permitted to maintain her own action and is allowed to retain the proceeds as her separate estate. New Mexico has now, through the instant case, adopted the last of these views. The impact of that holding goes beyond the simple procedural question concerning who should be plaintiff for, in those jurisdictions which follow either the first or second of these views, the negligence of the husband may be imputed to the wife and could operate to bar recovery.[8] In those jurisdictions, since the community, which comprises both the husband and wife, would benefit from the recovery, it would seem to be just and reasonable to deny recovery to prevent a wrongdoer from benefiting by his own wrongdoing, a result clearly contrary to sound legal reasoning. In jurisdictions following the third of these views, no such problem will arise since the proceeds, being the separate property of the wife, may not be exposed to loss by reason of the negligence of the husband who will not participate therein.[9]

The first view is the one most widely followed by the community property jurisdictions and has, for its constituents, the states of Arizona,[10] Idaho,[11] Texas,[12] and Washington.[13] Courts there look to the statutes defining community property and use a mechanical formula as a test. It may be stated thusly: (1) the cause of action for personal injury inflicted during the marriage is a chose in action which was not in existence prior to the marriage; (2) it was not acquired, subsequent to the marriage, by

[8] W. W. Clyde & Co. v. Dyess, 126 F. (2d) 719 (1942); Pacific Const. Co. v. Cochran, 29 Ariz. 554, 243 P. 405 (1926); Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 P. 530 (1910); Dallas Ry. & Terminal Co. v. High, 129 Tex. 219, 103 S. W. (2d) 735 (1937); Ostheller v. Spokane & I. E. R. Co., 107 Wash. 678, 182 P. 630 (1919).

[9] King v. Yancey, 147 F. (2d) 379 (1945); Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579, 59 A. L. R. 148 (1928).

[10] Pickwick Stages Corp. v. Hare, 37 Ariz. 570, 295 P. 1109 (1931).

[11] Labonte v. Davidson, 31 Ida. 644, 175 P. 588 (1918).

[12] Lynch v. American Motorists Ins. Co., 101 F. Supp. 946 (1951), held that the husband had a priority but not an absolute right to bring the action, so the wife could act if the husband should shirk his responsibility. See also Roberts v. Magnolia Petroleum Co., 142 S. W. (2d) 315 (Tex. Civ. App., 1940), and Pacific Greyhound Lines v. Tuck, 217 S. W. (2d) 699 (Tex. Civ. App., 1948).

[13] Ostheller v. Spokane & I. E. R. Co., 107 Wash. 678, 182 P. 630 (1919); Schneider v. Biberger, 76 Wash. 504, 136 P. 701, 6 A. L. R. 1056 (1913).

gift, bequest or devise; hence (3) it must fall within the statutory phrase "all other property acquired after marriage," so as to constitute community property.[14] The most recent affirmation of this theory appears in the Texas case of *Johnson* v. *Daniel Lumber Company,*[15] an action brought by a husband and wife for injuries, allegedly sustained by the wife in an automobile accident which occurred some three and one-half years prior to the filing of the suit. The defendant relied on a two-year statute of limitation, to which defense the wife replied that the statute of limitation had not run against her since she was, at all times, under the disability of coverture.[16] The court, sustaining dismissal of the suit, held that the provisions of the statute pertaining to disability were inapplicable since, to have the benefit thereof, the wife would have had to be the proper party to bring the action which, in Texas law, she was not.

It would be proper to note that the Texas legislature tried to correct this dogmatic adherence to mechanistic formulae by passing a statute purporting to authorize the wife to sue in her own name.[17] Unfortunately, the statute was declared unconstitutional, in the case of *Arnold* v. *Leonard,*[18] when the Supreme Court of Texas held the constitutional definition of the wife's separate property to be exclusive in character. Idaho has also enacted a statutory provision which would purport to allow the wife to bring suit in her own name[19] but no case, directly in point, has yet reached the reviewing courts of that state although dicta in what would appear to be the only two cases argued since the adoption thereof[20] leans in the direction that the husband is still a necessary part to the litigation. It should also be noted that courts in the Territory of Porto Rico would decide in much the same way, judging by the holding in the case of *Porto Rico Railway, Light & Power Company* v. *Cognet.*[21]

The second view, followed only in California, would appear to be a compromise one. It developed out of the case of *Sheldon* v. *Steamship*

14 Labonte v. Davidson, 31 Ida. 644, 175 P. 588 (1918).

15 249 S. W. (2d) 658 (Tex. Civ. App., 1952).

16 Vernon, Tex. Civ. Stat. Ann., Vol. 15, Art. 5535.

17 Tex. Sess. L. 1915, Ch. 54, p. 103. The text thereof also appeared in Tex. Civ. Stat. 1928, Art. 4615.

18 114 Tex. 535, 273 S. W. 799 (1925).

19 Ida. Code 1948, Vol. 2, § 5-304, states: "A woman may while married sue and be sued in the same manner as if she were single. . . ." The section was first enacted in 1903.

20 Lorang v. Hays, 69 Ida. 440, 209 P. (2d) 733 (1949); Labonte v. Davidson, 31 Ida. 644, 175 P. 588 (1918).

21 3 F. (2d) 21 (1924), cert. den. 268 U. S. 691, 45 S. Ct. 511, 69 L. Ed. 1159 (1924). It was there stated that a cause of action for injuries sustained by the wife, during marriage, was community property and that the husband had to sue to recover damages for such an injury. The court did hold, however, that while the wife was not a necessary party to the litigation, she could be regarded as a proper one since she was a party in interest.

Uncle Sam[22] in which case the plaintiff wife had entered into a contract of passage with the defendant company. The steamship company breached the contract and caused the plaintiff to suffer an injury to her person by putting her off the ship at a strange port and leaving her without protection or assistance. Two distinct causes of action accrued, one in contract and the other in tort but, on an election by the plaintiff, either cause of action would merge in the other. The court indicated that, if the election went in favor of a contract suit, it would be a misjoinder to include the wife as plaintiff since she was neither a necessary nor a proper party to that action, which would have to be conducted by the husband as the representative of the marital community. If, on the other hand, she wished to litigate the tort case, she would be a proper party even though her husband would have to join therein. The result attained was much the same as one which would have been achieved by a common-law court following the older common-law theory on the point.

The California solution was later changed by the enactment of an appropriate statute,[23] one which makes the mode of acquisition the test to determine whether particular property is separate or part of the community.[24] Under it, the cause of action for personal injuries sustained by the wife is still considered to be community property although she may bring an action based thereon in her own name.[25] In the case of *Sanderson* v. *Neimann*,[26] for example, a married woman sued individually to recover damages for personal injuries sustained in an automobile collision and the court held that the aforementioned statute created an exception to the otherwise generally recognized principle that it is the husband who must bring all actions relating to community property. This doctrine was carried to its logical conclusion in the California case of *Zaragosa* v. *Craven*[27] wherein it was held that, if a married woman should attempt to bring an action for personal injuries in her own name following an adverse judgment rendered against her husband in an action brought by him alone to recover for his own personal injuries arising out of the same tortious act, the prior decision rendered against the husband would be *res judicata* since the recovery in either case would benefit the community.[28]

[22] 18 Cal. 527, 79 Am. Dec. 193 (1861).

[23] Deering, Cal. Civ. Pro. Code, Vol. 1, § 370.

[24] See Pedder v. Commissioner of Int. Revenue, 60 F. (2d) 866 (1932).

[25] Frost v. Mighetto, 22 Cal. App. (2d) 612, 71 P. (2d) 932 (1937). See also Louie v. Hagstrom's Food Stores, Inc., 81 Cal. App. (2d) 601, 184 P. (2d) 708 (1947).

[26] 17 Cal. (2d) 536, 110 P. (2d) 1025 (1941).

[27] 33 Cal. (2d) 315, 202 P. (2d) 73 (1949), noted in 1 Stanf. L. Rev. 765.

[28] Dicta in the Zaragosa case would lead to an inference that, if the husband and wife should enter into an agreement prior to the bringing of the respective actions to the effect that the recovery realized should be regarded as separate property, the decision of the court on the procedural question might be different.

The third manner of dealing with the instant question is that found operating in Louisiana[29] and Nevada[30] and now, by virtue of the case under discussion, in New Mexico also. These three states, by statute, have taken the wife's action for personal injuries inflicted during the marriage out of the realm of community property and have placed it in the category of separate property. To that extent, they follow a view consistent with the one followed in the American common-law jurisdictions, with one brief exception. If, in these states, one should injure an unmarried woman, the wrongdoer would be liable to answer to but one action. If, on the other hand, the injury was inflicted on a married woman, the wrongdoer could be subjected to liability in two suits; one conducted by the injured person for her individual benefit[31] and another by the husband to recover damages suffered by the community,[32] although these two actions could be joined if the parties should so wish.[33] The recovery in the community suit, unlike the common-law suit by the husband for loss of consortium, would redound to the benefit of both spouses for the proceeds thereof would be added to the community fund.

The desirability of having courts in the other community-property jurisdictions follow the path marked out by the instant case would seem to be self-evident for the issue represents one of the best examples of social lag which could be noted anywhere. A married woman, generally, is considered to be on a par with her husband in more instances than not. As the court in the instant case pointed out, such a woman would bring her body to the marriage and, on its dissolution, should be entitled to take it away.[34] It follows therefrom that she should similarly be entitled to collect compensation from one who may have wrongfully violated her right to personal security. If a kind word has ever been said in favor of the majority holding, it has escaped attention. It is doubtful if a kind word could be said in that direction.

B. A. PITLER

[29] See application of Dart, La. Civ. Code, Vol. 9, Art. 2402, in the case of Hollinquest v. Kansas City Southern Ry. Co., 88 F. Supp. 905 (1950).

[30] Nev. Comp. Laws, 1943-49 Supp., § 3389.01.

[31] Chief Justice Breese, in Chicago, B. & Q. R. R. Co. v. Dunn, 52 Ill. 260 at 264, 4 Am. Rep. 606 at 609 (1869), once emphasized the point by saying: "A right to sue for an injury is a right of action—it is a thing in action, and is property . . . Who is the natural owner of this right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain."

[32] Rollins v. Beaumont-Port Arthur Bus Lines, Inc., 88 F. Supp. 908 (1950).

[33] Hollinquest v. Kansas City Southern Ry. Co., 88 F. Supp. 905 (1950).

[34] Soto v. Vandeventer, 56 N. M. 483 at 489, 245 P. (2d) 826 at 832 (1952).

SPECIFIC PERFORMANCE—CONTRACTS ENFORCIBLE—WHETHER OR NOT A UNION EMPLOYEE MAY BRING A CLASS SUIT IN A STATE COURT TO SPECIFICALLY ENFORCE A COLLECTIVE BARGAINING AGREEMENT MADE BETWEEN HIS UNION AND HIS EMPLOYER—The case of *Masetta* v. *National Bronze & Aluminum Foundry Company*[1] recently presented the Ohio courts with an issue of first impression. The plaintiff therein, in his own behalf and on behalf of other affected union members, petitioned a state court for specific performance of a collective bargaining agreement entered into between plaintiff's union and his employer, defendant in the case. Plaintiff charged that the defendant, without prior notice, had discharged plaintiff and those whom he represented; had replaced them with new workers; that such action constituted a violation of the collective bargaining agreement then in full force; and that such lay-off caused, and would continue to cause, plaintiff and the other employees similarly situated to suffer irreparable damage by way of loss in wages, loss in seniority rights, and loss of vacation pay. The defendant contended that the state court lacked jurisdiction and moved to dismiss the petition. That motion having been granted in the trial court, the Ohio Court of Appeals, on plaintiff's appeal from the order of dismissal, decided that there was nothing in the National Labor Relations Act[2] nor in the state constitution which prohibited the state court from taking jurisdiction in such a case. It, therefore, reversed the trial court ruling and remanded the case for further proceedings.

The instant case presents four interesting questions. First, may a state court take jurisdiction over a suit for a breach of a collective bargaining agreement entered into pursuant to the Taft-Hartley Act? Second, is an employee who is also a member of the contracting union a proper party plaintiff in a suit to enforce such an agreement? Third, if the latter is a proper party, may he bring a representative suit to enforce the agreement? Fourth, should a state court grant specific performance as a remedy for a breach of the collective bargaining agreement? Historically speaking, the last three questions have been answered in the negative while the first query has had no answer until now inasmuch as the Taft-Hartley Act[3] presents a comparatively recent legislative development with little or no historical background.

In some of the earlier cases, the right of an individual employee to enforce a collective bargaining agreement against his employer was denied

1 — Ohio App. —, 107 N. E. (2d) 243 (1952). Skeel, J., noted a dissent on the ground the allegations in the petition did not make out a class action.

2 29 U. S. C. A. § 151 et seq.

3 29 U. S. C. A. § 301(a).

on the ground that such an agreement was not a valid or enforcible contract;[4] that no principal and agent relationship existed between the employee and the contracting union;[5] that the employee had not ratified the agreement;[6] or that the collective bargaining agreement was not incorporated in the individual employment contract.[7] With the growth of the industrial age and its corresponding mass employment, courts began to realize the efficacy of permitting members of a union to enforce collective bargaining agreements made between the union and the employer for their benefit. In *Sullivan* v. *Doehler*,[8] for example, the court stated that the reasons for this new trend lay in a realization that such contracts had, as their purpose, the lawful procurement of shorter hours, better working conditions, and equitable wage scales for employees. As the benefit thereof would flow to the employee, individually or as a member of a class, and not merely to the union itself as a bald entity, courts realized the inconsistency in admitting that such collective bargaining agreements were made for the benefit of the union employee while denying to the beneficiary the right to sue thereon. Courts, therefore, slowly began to allow individual employees to enforce contracts made between their unions and their employers, at least to the extent such contracts embodied rights inserted for the employees' benefit.

The basis on which recovery eventually became possible took shape in one or more of three theories. The earliest theory was that the union agreement with the employer created a custom or rule for the industry which, in effect, resembled a treaty. Until abrogated, such treaty became a part of every contract for employment.[9] The second theory treated the union as being the agent of its members, so that the contract, when made, was really a direct contract between the employer and his employees.[10] The third, and incidentally the most generally accepted, theory regarded the collective bargaining agreement as a third-party beneficiary contract, made between the union and the employer for the direct benefit of the

[4] Swart v. Huston, 154 Kan. 182, 117 P. (2d) 576 (1941); Rentschler v. Missouri Pac. R. R. Co., 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1 (1934).

[5] Hudson v. Cincinnati, N. O. & T. P. R. Co., 152 Ky. 711, 154 S. W. 47, 45 L. R. A. (N. S.) 184 (1913).

[6] West v. Baltimore & O. R. Co., 103 W. Va. 417, 137 S. E. 654 (1927).

[7] Kessell v. Great Northern R. Co., 51 F. (2d) 304 (1931).

[8] 15 Ohio Supp. 122 (1945).

[9] Whiting Milk Co. v. Grondin, 282 Mass. 41, 184 N. E. 379 (1933); Yazoo & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); McCoy v. St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); Rentschler v. Missouri Pac. R. R. Co., 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1 (1934).

[10] Janalene, Inc. v. Burnett, 220 Ind. 253, 41 N. E. (2d) 942 (1942); Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S. W. 1042 (1923); Gregg v. Starks, 188 Ky. 834, 224 S. W. 459 (1920); Mueller v. Chicago & N. W. R. Co., 194 Minn. 83, 259 N. W. 798 (1935).

union employees.[11] The last mentioned theory has been emphasized in the Illinois case of *Dierschow* v. *West Suburban Dairies, Inc.*,[12] where the court said that, in order to qualify under the third-party beneficiary rule, the union member would have to show (1) that he was specifically named in the contract as an individual or be a member of a class there designated which was easily identifiable; (2) the contract would have to be made expressly for the benefit of the individual or the class; (3) the benefit to be received would have to be a direct benefit, not merely an incidental one; and (4) although the third-party beneficiary need not provide the consideration for the contract, it would have to be shown that the contracting parties either intended the contract to benefit the designated individuals or that adequate consideration did pass between the two contracting parties, that is between the union and the employer.

While present-day courts have generally accepted one of the three aforementioned theories and will now, therefore, allow an individual employee to enforce the collective bargaining agreement, a question remains as to whether or not the same union employee can bring a representative or class suit to enforce such a contract. In that connection, the law relating to class suits requires that the plaintiff, suing for himself and all others similarly situated, be a member of a class too numerous to bring before the court, which class possesses a community of interest in a right of action arising from a common source, provided the person in whose name the suit is to be brought will act as a bona-fide representative of the class and has an interest in the outcome of the cause of action. There is no reason to doubt, then, that when all of these elements exist, the principle of the representative suit ought to be applied to an action based upon a breach of a collective bargaining agreement.[13]

[11] See United Protective Workers of America v. Ford, 194 F. (2d) 997 (1952); Searles v. City of Flora, 225 Ill. 167, 80 N. E. 98 (1906); Cobb v. Heron, 180 Ill. 49, 54 N. E. 189 (1899); Kadish v. New York Evening Journal, Inc., 67 N. Y. S. (2d) 435 (1946), affirmed in 272 App. Div. 872, 72 N. Y. S. (2d) 402 (1946); Sullivan v. Doehler Die Casting Co., 15 Ohio Supp. 122 (1945); Ellis v. Hazel-Atlas Glass Co., 6 Ohio Supp. 78 (1940).

[12] 276 Ill. App. 355 (1934). See also annotation in 18 A. L. R. (2d) 352.

[13] Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, 31 L. R. A. 1916 (1915); Milk Wagon Drivers Union v. Associated Milk Dealers, Inc., 42 F. Supp. 584 (1941); Grand Int. Brotherhood of L. Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); Almon v. American Car Loading Corp., 324 Ill. App. 312, 58 N. E. (2d) 199 (1944); Leveranz v. Cleveland Home Brewing Co., 24 Ohio N. P. (N. S.) 193 (1922). The case of O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S. E. 564 (1930), best illustrates the procedural aspects of the problem. In that case, four members of a union brought suit for themselves and all others similarly situated to enjoin the defendant-employer from breaching a collective bargaining agreement. It was held proper to overrule a general demurrer, based on the proposition that each plaintiff had a separate claim and an adequate remedy at law, as the joinder had not created any duplicity or multifariousness. The court went on to say that, where there is a common right to be established by or against several, and one is asserting the right against many, or many against one, equity would determine the whole matter in one action.

Passing to the question as to whether a suit for specific performance of such an agreement would be proper, it should be noted that the remedies available for breach of a collective bargaining agreement depend somewhat on the nature of the tribunal which is to grant the relief. Redress can be had through an arbitration board created pursuant to the agreement between the union and the employer; before an administrative tribunal such as the National Labor Relations Board or the National Railroad Adjustment Board; or before the judiciary. It is clear that even a state court can give relief in an action at law for wages lost[14] or for damages arising from a wrongful discharge.[15] While an equity court may issue an injunction to protect seniority rights,[16] the question of whether the remedy of specific performance is available is one which has given the courts most concern.

Traditionally, a court of equity would not specifically enforce a collective labor agreement, particularly where the contract was one for personal services.[17] Today, however, keeping in pace with industrial progress, courts have concluded that the legal concept of property should be broadened with the changes made in the economic and industrial system,[18] so the right to work has come to be recognized as being as much a property right as is true of the more obvious forms of goods and merchandise. Logically, therefore, since to destroy the means by which wealth could be acquired would be the same as destroying wealth itself,[19] courts have reached the conclusion that the right to earn a livelihood is entitled to protection by a court of equity, through the remedy of specific performance,[20] to the same degree as is true of any other property right.

[14] United Protective Workers of America v. Ford, 194 F. (2d) 997 (1952); Novosk v. Reznick, 323 Ill. App. 544, 56 N. E. (2d) 318 (1944); Grosso v. General Bronze Corp., 57 N. Y. S. (2d) 227 (1945).

[15] Marranzano v. Riggs Nat. Bank of Washington, D. C., 184 F. (2d) 349 (1950); Kadish v. New York Evening Journal, Inc., 67 N. Y. S. (2d) 435 (1946), affirmed in 272 App. Div. 872, 72 N. Y. S. (2d) 402 (1946); Ellis v. Hazel-Atlas Glass Co., 6 Ohio Supp. 78 (1940). But see Keel v. Terminal Railroad Co., 346 Ill. App. 169, 104 N. E. (2d) 659 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 189.

[16] Ledford v. Chicago, M., St. P. & P. R. Co., 298 Ill. App. 298, 18 N. E. (2d) 568 (1939), noted in 27 Ill. B. J. 307; Gregg v. Starks, 188 Ky. 834, 224 S. W. 459 (1920); Chambers v. Davis, 128 Miss. 613, 91 So. 346 (1922).

[17] Salinsky v. McPherson, 45 F. (2d) 778 (1931); Roquemore & Hall v. Mitchell Bros., 167 Ala. 475, 52 So. 423 (1910); Green v. Pope, 140 Ga. 743, 79 S. E. 846 (1913); Clark v. Truitt, 183 Ill. 239, 55 N. E. 683 (1899).

[18] Grand Int. Brotherhood of L. Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934).

[19] Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853 (1916).

[20] Montaldo v. Hires Bottling Co., 59 Cal. App. (2d) 642, 139 P. (2d) 606 (1943); Evans v. Louisville & N. R. Co., 191 Ga. 395, 12 S. E. (2d) 611 (1940); Almon v. American Car Loading Corp., 324 Ill. App. 312, 58 N. E. (2d) 199 (1944); Janalene, Inc. v. Burnett, 220 Ind. 253, 41 N. E. (2d) 942 (1942); Baton Rouge Building

Accepting all this to be true, the remaining query is one as to whether or not a state court should take jurisdiction of a suit based on the breach of a collective bargaining agreement made pursuant to the Taft-Hartley Act. That statute recites that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties."[21] While this section clearly confers jurisdiction on the federal courts, it will be noticed that it is cast in permissive form, hence does not expressly prohibit state courts, otherwise competent, from exercising jurisdiction over the parties and the subject matter. The Ohio court concerned with the instant case has taken the position that a state court is so empowered to act. The rule so promulgated would seem to be a sound one.

H. GLIEBERMAN

TORTS—INVASION OF PERSONAL SAFETY, COMFORT, OR PRIVACY—WHETHER OR NOT INTERFERENCE WITH AN INDIVIDUAL'S PRIVACY AMOUNTS TO AN ACTIONABLE INJURY IN ILLINOIS—Until the recent case of *Eick* v. *Perk Dog Food Company*,[1] no appellate tribunal in Illinois had ever passed upon the matter of the existence, or non-existence, of a right of privacy for the citizens of the state. The defendants there concerned had engaged in an advertising campaign under which purchasers of the product of one of the defendants would, by their purchases, enable blind persons to secure guide dogs without charge. Plaintiff, a blind girl made the subject of advertising pictures bearing the legend "Dog owners your purchase of Perk Dog Food can give this blind girl a Master Eye dog," complained that, as this use of her picture was made without her consent, the same amounted to a breach of her claimed right of privacy. She further alleged that, as she already possessed a Master Eye dog and had no need for another, the advertisements caused her to suffer humiliation and mental anguish, but she charged no injury to any property interest.[2] The

Trade Council v. T. L. James & Co., 201 La. 749, 10 So. (2d) 606 (1942); Hudson Bus Trans. Drivers' Ass'n v. Hill Bus Co., 121 N. J. Eq. 582, 191 A. 763 (1937); Basson v. Edjomac Amusement Corp., 259 App. Div. 1005, 20 N. Y. S. (2d) 924 (1940).

[21] 29 U. S. C. A. § 185(a).

[1] 347 Ill. App. 293, 106 N. E. (2d) 742 (1952), noted in 41 Ill. B. J. 120, 1952 Ill. L. Forum 459.

[2] A second count, based on an alleged libel, was dismissed upon motion for failure to state a cause of action. That action was sustained when the Appellate Court failed to find any libel *per se* and observed an absence of allegation relating to special damage.

trial court, on motion, dismissed the complaint for failure to state a cause of action. On plaintiff's appeal, the Appellate Court for the First District, declaring the right of privacy to be a legally enforcible right in Illinois, came to the conclusion that the plaintiff's complaint stated a cause of action, hence required reversal of the trial court judgment.

The court, in arriving at its decision, relied upon the historical development of the right of privacy for support for its conclusion. Recognizing that, under the common law, no provision had been made for recovery of damages where the sole injury sustained took the form of mental suffering,[3] the court noted that early attempts to secure relief in equity also failed because of Lord Eldon's holding, in *Gee* v. *Pritchard*,[4] to the effect that equity would lack jurisdiction where the alleged right breached was not in the form of a property right. At that stage, the right of privacy was recognized neither at law nor in equity. Under the guise that contract or property rights were being protected, equity did gradually grant a degree of recognition, particularly where the injury grew from the use made of some tangible, once the property of the plaintiff, which the plaintiff may have parted with but did so under circumstances indicating an absence of intention to surrender all claim in the item. That rationale was used principally in connection with cases involving private letters where it was held that the sender would retain a sufficient interest in the letter to restrain the use being made thereof either by the recipient or by some third person.[5] In much the same way, where a contractual breach caused the creation of the injurious thing, courts relied upon the plaintiff's property interest in the contract to enjoin the invasion of provacy. Thus, where the invasion of privacy was caused by a photographer,[6] a painter,[7] an engraver,[8] or a printer[9] who exceeded his authority, courts turned to the breach of the employment contract to find a basis for enjoining the injury to privacy.

[3] In Lynch v. Knight, 9 H. L. Cas. 577 at 598, 11 Eng. Rep. 854 at 863 (1864), Lord Wensleydale stated: "Mental pain or anxiety the law cannot value, and does not pretend to redress, where the unlawful act complained of causes that alone."

[4] 2 Swans. 403, 36 Eng. Rep. 670 (1818). Lord Eldon there stated: "The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect."

[5] Gee v. Pritchard, 2 Swans. 403, 36 Eng. Rep. 670 (1818), a letter; Abernathy v. Hutchinson, 1 H. & T. 28, 47 Eng. Rep. 1313 (1825), lectures; Prince Albert v. Strange, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849), etchings; Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912), letters.

[6] Pollard v. Photographic Co., L. R. 40 Ch. Div. 345 (1888); McCreery v. Miller's Grocerteria Co., 99 Colo. 499, 64 P. (2d) 803 (1936); Moore v. Ragg, 44 Minn. 28, 46 N. W. 141 (1890).

[7] Klug v. Sheriffs, 129 Wis. 468, 109 N. W. 656 (1906).

[8] Prince Albert v. Strange, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849).

[9] Abernathy v. Hutchinson, 1 H. & T. 28, 47 Eng. Rep. 1313 (1825); Tuck & Sons v. Priester, 19 Q. B. D. 629 (1887); Levyeau v. Clements, 175 Mass. 376, 56 N. E. 735 (1900).

Up to this point, courts were concerned in protecting only the property or contractual rights of the plaintiff, not his right to privacy *per se* but, with the publication of a renowned law review article on the point,[10] a demand arose for the granting of recognition to a right of privacy as a right by itself. After meeting with an initial set-back in New York,[11] the doctrine was accepted in Georgia[12] and five other states in fairly rapid succession[13] and eventually achieved such wide acceptance that it is, today, applied in at least twenty-five jurisdictions[14] with only two notable rejections.[15] Acceptance of the doctrine has taken different forms, occasionally appearing in the form of express legislation,[16] more often in the shape of an express rejection of Lord Eldon's views, but sometimes expressed as a right of modern development forming a part of the modern common law.[17] These noteworthy decisions of the sister states, and in England, forming the basis of a modern concept regarding the common law, served a guides for the result reached in the instant case.

[10] Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890).

[11] Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442 (1902). Gray, J., wrote a dissenting opinion, concurred in by Bartlett and Haight, JJ.

[12] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905).

[13] In order of adoption, following the Georgia holding, the next five cases were: Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1905); Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 A. 97 (1907); Pritchett v. Board of Commissioners, 42 Ind. App. 3, 85 N. E. 32 (1908); Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909); and Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911).

[14] Smith v. Doss, 251 Ala. 250, 37 So. (2d) 250 (1949); Smith v. Suratt, 7 Alaska 416 (1928); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Cason v. Baskin, 155 Fla. 198, 20 So. (2d) 243 (1945); Pasevich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N. E. (2d) 742 (1952); Pritchett v. Board of Commissioners, 42 Ind. App. 3, 85 N. E. 32 (1908); Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918); Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909); Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1905); Graham v. Baltimore Post Co., 22 Ky. L. J. 108 (Super. Court, Baltimore, Md.); Pallas v. Crowley, Milner & Co., 322 Mich. 41, 33 N. W. (2d) 911 (1949); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Norman v. City of Las Vegas, 64 Nev. 38, 177 P. (2d) 442 (1947); Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 A. 97 (1907); Thompson, N. Y. Cons. Laws 1939, Vol. 1, Civil Rights Law, §§ 50-1; Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938); Friedman v. Cincinnati Local Joint & Executive Board, 6 Ohio Supp. 276 (1941); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P. (2d) 438 (1941); Harlow v. Buno Co., 36 Pa. Dist. & Co. 101 (1939); Holloman v. Life Insurance Co. of Va., 192 S. C. 454, 7 S. E. (2d) 169 (1940); Utah Rev. Stat. 1933, § 103-4-7 and § 103-4-9; Va. Code 1950, § 8-650.

[15] Henry v. Cherry & Webb, 30 R. I. 13, 73 A. 97 (1909); Milner v. Red River Valley Pub. Co., 249 S. W. (2d) 227 (Tex. Civ. App., 1952).

[16] Thompson, N. Y. Cons. Laws 1939, Vol. 1, Civil Rights Law, §§ 50-1; Utah Rev. Stat. 1933, § 103-4-7 and § 103-4-9; Va. Code 1950, § 8-650.

[17] See 77 C. J. S., Right of Privacy, § 1b. In that regard, compare the rationale used by the Arizona Court, in Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945), where the court accepted the right of privacy upon the ground that it would follow the view of the Restatement where questions concerning new legal concepts arise, with that expressed in Texas, to the effect that where no right existed at common law at the time when Texas became a state, none can exist without express legislation: Milner v. Red River Valley Pub. Co., 249 S. W. (2d) 227 (Tex. Civ. App., 1952).

Despite this acknowledgement that a right to privacy does exist, it should be noted that it is not one of universal character. Being a purely personal right, it does not inure to the benefit of partnerships,[18] corporations,[19] or animals.[20] It is one, however, which may be protected both in law and in equity. The legal remedy for its invasion rests in an action in tort similar, in many respects, to a suit for defamation.[21] For example, the defense of privilege will be available for both of these torts,[22] but the action for interference with privacy differs from that for slander in that an oral publication will not be sufficient for the purpose of the former.[23] Another difference lies in the fact that truth, which may serve as a defense to an action for defamation, will not be a defense in an action involving privacy.[24] Perhaps the most basic difference between the two rests on the fact that the suit for defamation deals primarily with the reputation while the one for interference with privacy deals primarily with peace of mind.[25] The equitable remedy merely adds the use of injunctive relief to the recovery permissible in a legal tort action.

While the court in the principal case merely made passing reference to limitations based on consent and public interest, these limitations have been spelled out in fuller detail in decisions achieved in other jurisdictions. Although the existence of consent is usually a question of fact for the jury, it has quite generally been held that he who puts himself in the public spotlight thereby waives his right of privacy.[26] In the same manner, an application for a copyright or the publication of a book, a play, or a song would cause the same to be submitted to the public,[27] placing the public interest in a superior position to that of the right of privacy. A famous personage, or a participant in a newsworthy event, would lose the right of privacy provided the article was published for its news,

18 Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982 (1912).

19 Rosenwasser v. Ogoglia, 172 App. Div. 107, 158 N. Y. S. 56 (1916).

20 Lawrence v. Ylla, 184 Misc. 807, 55 N. Y. S. (2d) 343 (1945), deals with an unauthorized sale of the photograph of a dog.

21 Themo v. New England Newspapers Pub. Co., 306 Mass. 54, 27 N. E. (2d) 753 (1940).

22 Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890), at p. 216.

23 Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1928).

24 Themo v. New England Newspapers Pub. Co., 306 Mass. 54, 27 N. E. (2d) 753 (1940).

25 Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890), at p. 197.

26 See Stryker v. Republic Pictures Corp., 108 Cal. App. 191, 238 P. (2d) 670 (1952), a soldier in a famous battle; Cohen v. Marx, 94 Cal. App. 655, 211 P. (2d) 320 (1950), a prize-fighter; Martin v. Dorton, 210 Miss. 668, 50 So. (2d) 391 (1951), a public official; and Paramount Pictures v. Leader Press, Inc., 24 F. Supp. 1004 (1938), motion picture stars.

27 Thompson v. Curtis Pub. Co., 193 F. (2d) 953 (1952).

rather than for its commercial, value.[28] Usage for a commercial purpose, as by way of advertising, if done without consent, clearly constitutes an invasion of privacy,[29] but a mere lapse of time will not serve to destroy the newsworthy aspects of the publication.[30] Reproduction of a picture having no relation to the accompanying story, serving merely as as illustration to a feature article, would be lacking in newsworthy aspects[31] and the use of a picture, once newsworthy, but subsequently appropriated for advertising purposes, would also be improper.[32] Use, in advertising, of a letter may be an invasion of the right of privacy of either the sender[33] or the recipient,[34] particularly where the impression thus falsely created is a plausible one.

Public interest, by contrast, extends beyond those cases involving the publication of news for it includes cases dealing with the exercise of the police power and subsequent legal actions based thereon. It has, for example, been held that the power of the police to keep files of photographs and fingerprints of persons suspected of crime, even though subsequently found innocent, overrides the personal right of privacy,[35] but excessive publication, as by display in a "rogue's" gallery, could give rise to a cause of action.[36] In addition, while eavesdropping[37] and wiretapping[38] may constitute invasions of privacy, publication of the facts attending on the arrest and subsequent prosecution will be regarded as matters of public interest.[39] Unlawful entry into the home, on the other hand, whether made by a law officer[40] or a private citizen,[41] could well constitute an invasion of privacy. Insofar as civil proceedings are concerned, a threat to institute a suit would not be an invasion,[42] even though the claim be erroneous or

28 Gill v. Curtis Pub. Co., 193 F. (2d) 953 (1952), citing Restatement, Torts, § 867, comments C and D.

29 Pallas v. Crowley, Milner & Co., 322 Mich. 41, 33 N. W. (2d) 911 (1949).

30 Leverton v. Curtis Pub. Co., 192 F. (2d) 974 (1952).

31 Gill v. Hearst Pub. Co., 38 Cal. (2d) 279, 239 P. (2d) 636 (1952).

32 Continental Optical Co. v. Reed, 119 Ind. App. 643, 84 N. E. (2d) 306 (1950).

33 Kerby v. Hal Roach Studios, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942).

34 Perry v. Moskins Stores, Inc., — Ky. —, 249 S. W. (2d) 812 (1952).

35 Miller v. Gillespie, 196 Mich. 423, 163 N. W. 22 (1917); McGovern v. Van Riper, 137 N. J. Eq. 24, 43 A. (2d) 514 (1945). But see State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N. E. (2d) 755 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 166.

36 Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1905).

37 McDaniel v. Atlantic Coca-Cola Co., 60 Ga. App. 92, 2 S. E. (2d) 810 (1939).

38 Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931).

39 Coverstone v. Davies, 38 Cal. (2d) 315, 239 P. (2d) 876 (1952).

40 Walker v. Whittle, 83 Ga. App. 445, 64 S. E. (2d) 87 (1951).

41 Young v. Western Pa. R. R. Co., 39 Ga. App. 761, 148 S. E. 414 (1929).

42 Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d) 789 (1948); Lewis v. Physicians and Dentists Credit Bureau, 27 Wash. (2d) 267, 177 P. (2d) 896 (1947); Voneye v. Turner, — Ky. —, 240 S. W. (2d) 588 (1951).

unfounded,[43] but the giving of undue publicity to an unpaid debt could well give rise to a cause of action.[44]

Now that Illinois has taken a step toward the recognition of a right of privacy it can be expected, if the instant decision should be upheld, that other cases will arise calling for the application of the doctrine to diverse fact situations not heretofore considered actionable in this state. The interest shown in persuasive authority to be found elsewhere, if maintained hereafter, should aid the courts of Illinois as they seek to arrive at the full scope of the doctrine relating to privacy and the potential invasions of that right.

S. GARDNER

[43] Davis v. General Finance & Thrift Corp., 80 Ga. App. 708, 57 S. E. (2d) 225 (1950).

[44] Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1928); Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S. W. 558 (1918); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424 (1934).