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Torts--Right of Privacy

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A recent Kentucky case held that a city's duty to keep sidewalks reasonably safe extended to every part thereof. *Louisville Railway Co.* v. *Jackey*, 237 Ky. 125, 35 S. W. (2nd) 28.

The problems of negligence, notice, reasonably safe conditions, and proximate cause are questions of fact arising in every case. After a study of the cases involving the above problems it will be seen that the principal case of *Paducah* v. *Konkle*, *supra*, is in accord with the general as well as the Kentucky rule; namely, that a city must exercise ordinary care in the maintenance of its streets or be liable for injuries occasioned by defects of which the city has notice.

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TORTS—RIGHT OF PRIVACY. Since the doctrine of the right of privacy was discussed pro and con in this Law Journal in the January, 1931, issue, three new cases have appeared to further complicate the situation. Two of them were decided in states which have already recognized the right of privacy, Kentucky and Georgia; but the third case, *Melvin* v. *Reid*, Cal. App., 297 Pac. 91, apparently brings within the select circle of those acknowledging the existence of such a right, the hitherto virgin state of California.

This California case, *Melvin* v. *Reid*, not only brings within the fold another state to give relief to those who allege that their rights of privacy have been violated, but also adds California to the list of states which in effect deny the right of privacy a common law standing. The court says:

> "In the absence of any provision of law, we would be loath to conclude that the right of privacy as the foundation for an action in tort, in the form known and recognized in other jurisdictions, exists in California." 297 Pac. 91 at 93..

By thus becoming authority for both proponents and opponents of the doctrine, the case loses most of its value for either side.

The seeming paradox in this case is explained away through the conscription of that indefinable constitutional guarantee to every man of the right to pursue happiness. This provision of the California Constitution, Section I of Article I, provides as follows:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

The capitalizing by the defendants of the unsavory incidents of the plaintiff's past life through the medium of cinematography, coupled with the use of her true maiden name, was held actionable as a direct invasion of this inalienable right to pursue and obtain happiness.

Laudable as is the result reached by the court, and damnable as the scurrilous practices of the defendant appear to be; it is believed that the result does not so logically follow from the provision quoted that other states having approximately the same, or similarly worded,

constitutional guarantees would be justified in following the lead of the California court. The interpretation of the Constitution of each state is for the highest court of that particular state; so *Melvin* v. *Reid*, since it is based solely on constitutional grounds, is really of little value in other jurisdictions.

The constitutional basis for the right of privacy has been raised in a few prior cases. In *Pavesich* v. *New England Life Insurance Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, the pioneer case recognizing the right of privacy, the right of recovery was based in part on constitutional grounds. There, however, the "due process" clauses of the United States and Georgia Constitutions were the ones relied on. The court said:

> "The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." 50 S. E. 68 at 71.

On the other hand, the United States Supreme Court in *Prudential Insurance Co. of America* v. *Cheek*, 259 U. S. 530, 60 L. Ed. 1044, 42 Sup. Ct. Rep. 516, 27 A. L. R. 27; and the Supreme Court of Rhode Island in *Henry* v. *Cherry*, 73 Atl. 97, 30 R. I. 13, have repudiated this constitutional ground for recognizing the right of privacy. It should be noted in passing that the California court, which is the first to base the right of privacy solely on constitutional provisions, is not a court of last resort.

The other two recent cases, *Rhodes* v. *Graham*, 238 Ky. 225, 37 S. W. (2) 46, and *Bazemore et al.* v. *Savannah Hospital et al.*, 155 S. E. (Ga.) 194, were decided in states which had previously recognized the right of privacy; hence they are justifiable on precedent. Whether or not the result reached could have been based on other grounds of recovery therefore becomes a question of only secondary importance.

The Kentucky case, *Rhodes* v. *Graham*, held that the tapping of telephone wires leading to plaintiff's home, and the listening-in on the plaintiff's conversations constituted an invasion of the plaintiff's right of privacy for which redress at law would be granted. The chief value in this case lies not in the enunciation of a new right, or in the unearthing of a new basis for an already recognized right, but in the application of an established right to a new set of facts. The result is clearly desirable, even though the development of the right of privacy be admittedly a piece of judicial legislation.

The Georgia Case, *Bazemore* v. *Hospital*, slightly extends the doctrine of the right of privacy in that it gives a right of recovery to parents against the parties who, without authority, published photographs of the malformation of the plaintiff's deceased infant child. In a strong dissenting opinion, Justice Hill pointed out that heretofore the right of privacy had been considered a purely personal right; and

that in this case the plaintiff's right to an "inviolate personality" had in no sense been infringed. This dissent was concurred in by Presiding Justice Beck. While the result may not find even law review statements to support it, it is less a departure from established principles of tort law in Georgia than was the original right of privacy case decided by the Georgia Court, *Pavesich* v. *New England Life Ins. Co.* The acts of the defandants outrage the sense of decency of the court, and the right of privacy is invoked to give relief.

From a purely ethical standpoint, probably no civilized man would disagree with the results reached in many of the cases giving relief for right of privacy violations; but good morals do not always make good law. Casuistry is a poor substitute for *stare decisis*.

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