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Kentucky Law Journal

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THE RIGHT AGAINST FALSE ATTRIBUTION OF BELIEF OR UTTERANCE.

In the Kentucky Law Journal for December, 1915, (Vol. IV, p. 22), appeared an approving comment, by L. Meriwether Smith, Esq., of the Harrodsburg Bar, on the Right of Privacy as recognized by the Kentucky Court of Appeals, in Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909).

The right of privacy is indeed recognized explicitly in that opinion. But the right of privacy covered only part of the wrongful act in that case, viz.: the publication of the plaintiff's picture for advertising purposes, and was so understood by the Court.[1] The remainder of the wrongful act, viz.: the false attribution to the plaintiff of a testimonial for the defendant's pills, was not covered by any right of privacy, and the Court apparently recognized it as a distinct element of the wrong.[2] The right of privacy protects against the publication or exposure of facts—of things which truly exist but ought to be published, e. g., one's facial features, family history, etc. And the right to be protected against false statements—here, statements of opinions not held or utterances never made—is a distinct right, and belongs under the head of defamation.

Moreover, this was here and in similar cases the really serious part of the wrong. The case was this: The defendant published in an advertising pamphlet a testimonial recommending its kidney pills; this testimonial was attributed to Col. Jack Chinn, the plaintiff, and read: "I join in endorsing Doan's Kidney Pills. * * * A few

1.—"The publication of the picture, * * * is a violation of the right of privacy," per Hobson, J., for the Court, p. 432.

2.—"A man has the right to complain when he is published in a directory * * * as indorsing a patent medicine he has never seen," per Hobson, J., p. 432.

boxes of pills effectually routed my ailment. * * * Yours truly, J. P. Chinn;" the plaintiff had not written the letter, nor authorized it, and his friends had ridiculed him by reason of this false publication; moreover, there was a notorious custom of selling such testimonials to medicine-vendors, and this implied possible lack of integrity in the plaintiff.

It is important to place this species of wrongful act where it belongs in the law, because it is becoming more common in several forms; and greater protection is needed against it in all its forms.

On its face, the present case falls within the well-known fourth category of defamation, viz., words actionable **per se**, because tending to bring the plaintiff into hatred, ridicule, or contempt. But the narrow limitation of this term "hatred, ridicule, or contempt," does not suffice to include all the kinds of such defamation that need protection, nor all the kinds that have in fact been protected by the courts. Let us review the several classes of utterance, and see whether they can be generalized. We are concerned with cases in which the defendant **falsely attributes to the plaintiff some utterance.**

(1) First may be noted these cases, like Col. Chinn's, in which the **false attributon of an utterance does tend to produce hatred, ridicule or contempt.** Another instance is that of **Peck vs. Chicago Tribune Co.,** 214 U. S. 185, 29 Sup. 554 (1909), in which the defendant falsely attributed to the plaintiff, a nurse, a testimonial recommending whisky as used by her; this tended to lead "an appreciable fraction of persons to regard the plaintiff with contempt." So also **Martin v. Picayune Co.,** 115 La. 979, 40 So. 376 (1906), where the defendant published a glowing account of a marvelous cure performed by the plaintiff physician, and falsely represented the story as communicated by him; the publication was ostensibly laudatory, but it placed the plaintiff in the class of advertising physicians, and thus brought him into contempt with professional and public opinion. And in England we have **Clark v. Freeman,** 11 Beav. 112 (1848), where the defendant advertised pills of his own, purporting to be "a certain cure for consumption," as "Sir James Clark's Consumption Pills," thus falsely attributing to the plaintiff the composition of the pills and the assent to the quack vending of them. Here the Court treated the publication as wrongful on two grounds; first, that the defendant imputed to the plaintiff a share in the quack vending, which would be

"a serious injury to him in the way of slander," and, secondly, that the public might be induced through the plaintiff's name to use pills which might be harmful.

The latter aspect of **Clark v. Freeman**, viz., the false attribution to the plaintiff, not of any statement, but of the invention or composition of the medicine, belongs under a distinct class of cases, like that of Edison, cited later.

(2). Next, there are the cases in which the defendant falsely attributes to the plaintiff an association or **connection with a third person's business.** In **Routh v. Webster,** 10 Beav. 561 (1847), the defendant had issued a prospectus of his projected transportation company, and named the plaintiff, without authority, as one of the trustees of the company; the redress was placed on the ground that the publication might "involve him in all sorts of liabilities" and in litigation to defend himself from them. So also in **Dixon v. Holden,** L. R. 7, Eq. 488 (1869) the defendant was enjoned from publishing a creditor's notice of bankruptcy of a firm in which the name of the plaintiff was given as a "solvent partner;" the effect would have been "seriously damaging to the plaintiff's business of a merchant." And again, in **Walter v. Ashton,** (1902), 2 Ch. 282, where the defendant was advertising his bicycles as "The Times Bicycles," imputing the same sort of connection as The London Times (owned by the plaintiff), had with the sale of the Encyclopedia Britannica, the Court forbad the advertisement on the grounds that it might "expose him to risk or liability" and thus of injury to property.

(3). Thirdly, there is the case where the defendant falsely attributes to the plaintiff the **authorship of an essay, book, poem, or other expression of views which carries no probability of causing hatred, ridicule or contempt.** The only case apparently is that of **Lord Byron v. Johnston,** 2 Merivale 29 (1816), where the defendant was restrained from falsely advertising certain poems for sale as the composition of the plaintiff. The grounds of the judgment are not reported; the sale might of course interfere with the sale of genuine poems; and the false poems might detract from the plaintiff's professional repute. But the latter circumstance does not appear in the case; and the former aspect was not essential, and moreover would not be covered by any copyright, for the plaintiff had no author's copyright in these poems. The principle of this class of

cases is quite independent of copyright, or of the marketable quality of the utterance ascribed to the plaintiff. It includes all cases where the defendant falsely attributes to the plaintiff's composition any statement, whether it be in book, pamphlet, or interview; whether it be of personal opinion or of fact; and whether the tenor of the statement be hateful or contemptible in the minds of readers. This is the class of cases in which belongs the false attribution of testimonials which are not in themselves (as Col. Chinn's was) disreputable.

(4). Fourthly, there is a class of cases,, analogous to the preceding, in which the defendant falsely attributes to the plaintiff, not the authorship of a written utterance, but the **authorship of an article or substance,** invented or discovered or manufactured by his act. In **Edison v. Edison Polyform & Mfg. Co.,** 73 N. J. Eq. 136, 67 Atl. 392, (1907) the defendant published an advertisement of a painkiller under the name "Edison Polyform," bearing Thomas Edison's picture. Now Thomas Edison had in fact discovered a painkiller formula, which he had named "Polyform," and had sold to L., from whom by due assignments it had come to the defendant. But the defendant made the substance himself, and in making it omitted one element of Edison's original formula. There was therefore no flaw in the defendant's right to use the original formula, nor the name of Edison as its inventor. But Edison objected to the false imputation that he was the inventor of the incorrect formula actually used by the defendant, and that he, Edison, was concerned in making the substance as sold by the plaintiff. There was here a possible relation to the first class of cases above, if it had plainly appeared that the incorrect formula was a failure as a painkiller, and was therefore likely to injure the plaintiff's repute by causing ridicule or contempt. But this possibility was not essential. What Edison was entitled to be protected against was the false attribution to him of a formula and substance for which he had no actual responsibility as an inventor, regardless of whether he could prove that it was dangerous or futile as a painkiller. And the defendant's use of the plaintiff's name was enjoined.

A related class of cases is found where the defendant impudently adopts the name of a famous person or institution to advertise his wares—as for example by dubbing his shoeblacking "Henry Watterson Shine," or by naming his fertilizer the "Harvard Fertilizer."

These acts cannot be reached by the law of trademark or of unfair trade, because the plaintiff is not in any trade that is competed for. Nor does the right of privacy protect. The wrong belongs in the present place. A plain case of it was that of **Vassar College v. Loose-Wiles Biscuit Co.,** D. C. Mo., 197 Fed. 982, (1912), where the defendant without authority placed the plaintiff's name upon chocolate candy and sought thereby to imply that its candy was favored at Vassar College. It is disappointing to find the learned Federal Court impotent to reach such a wrong. Trade is full of such unjust and contemptible expedients, and it is a disgrace to our law that a Court should declare itself unable to give protection.

The case of **Vanderbilt v. Mitchell,** 72 N. J. L. 910, 927, 67 Atl. 97, 103 (1907), belongs either here or in the second class. The plaintiff's wife in this case had borne a child two years after marriage, but by an adulterous father; the wife had falsely stated to the attending physician that the plaintiff was the father; the physician had so stated in the birth certificate, which was duly recorded in the State Bureau of Vital Statistics. This record might become evidence of paternity, and thus entitle the child to a share in the plaintiff's estate and a reception in the community as his child. And the plaintiff was held entitled to have the record expunged and the wife and child restrained from claiming the plaintiff's paternity. Here there is an aspect of a contingent property liability, as in the second class above, but essentially it is a case of the fourth class.

(5). Finally there is the common situation (but not yet, apparently, represented by any decisions) in which the defendant falsely attributes to the plaintiff the **possession of some opinion.** This is unlike the third class, in that it does not attribute any statement or utterance of the opinion. And it is unlike the fourth class, in that it does not attribute any **act of invention or authorship.** But it is a not uncommon form of injury in current journalistic practice. The irresponsible vendors of sensations, moved by the meanest motives of mankind, will recklessly attribute to this or that personage some view on current affairs which is alien to his actual thoughts and is calculated to make hard feelings that never can be assuaged by protestation. If a journalist attributes to Senator Smith the sentiment, that "Colonel Roosevelt is a firebrand," or to Mr. Howells the belief that "H. G. Wells is a scatterbrained dreamer," it is a false statement which

ought to be actionable **per se.** And the intrinsic offensiveness of the uterance is not the main element is the wrong, but **the incorrectness of the attribution of any opinion.** At this point the essence of wrong in the third class of cases and in this fifth class of cases is the same. The writer once made an address before the Young Men's Christian Association on "The Legal Profession," and a newspaper report made without consent, attributed falsely to the speaker the assertion that "a man need not be honest to be a successful lawyer." Now the test of wrongfulness here should not be whether this opinion or utterance falsely attributed, tends to bring the person into hatred, ridicule, or contempt, but whether the opinion ascribed is one which it is disagreeable to the speaker to be supposed to entertain. I am entitled to be judged in public by my **actual** opinions and utterances. To have false ones ascribed to me is an injury to my feelings of self respect. And that is the injury against which I am entitled to be protected. The right of privacy is really a right to be protected against a certain kind of injury to feelings. And that is the feature common to that right and the present one. The right to be protected against defamation, i. e., against loss of repute and patronage among other persons, does not here reach the essence of the wrong. Suppose that some journalist falsely publishes my name on the committee list of the Progressive party or the Democratic party; or attributes to me the views of the futurist painters or the classical painters. Now the essential thing is not whether in this community the Progressive party or the Democratic party is viewed with contempt; nor whether the public laughs more at the futurists or at the classicists. The essential thing is that I do not entertain the convictions falsely ascribed me—that it injures my just feelings of self respect to be classed where I do not care to be classed—and that I am entitled to be protected against such an unauthorized misrepresentation of my personality.

There seems to be germ enough of principle in the precedents to invite the Courts to give this protection whenever they have the claim squarely presented to them. But the question is, how to phrase the principle?

Let us try to cover all the foregoing classes of cases, dealing in some form with the false attribution of a belief, act, or utterance:

I. Where the false attribution of a belief, act, or utterance, tends to produce hatred, ridicule, or contempt, or imputes professional impropriety, it is actionable. This is a simple application of the established principles of defamation. It represents class (I) of the above cases.

II. Where the fact falsely attributed is one which if true would by reasonable possibility involve liability of the plaintiff, or his estate, to a third person on a claim of contract or tort, or diminution of the property right of the plaintiff or his estate, it is actionable. This covers the second class of cases. It is not reached by the orthodox definitions of defamation as hitherto recognized, though the decisions justify it.

III. Where the false attribution consists in the authorship of an alleged utterance (whether or not the utterance is of the former two sorts), it is actionable; provided that if the utterance is one which would not have been copyrightable, a substantially correct report may be justified. (This is necessary, because in the case of poems or the like, any garbling of the text would be an injury). This covers class (3) above.

IV. Where the false attribution consists in the association of the plaintiff's name with any substance or article alleged to have been invented, discovered, made, or approved by the plaintiff, it is actionable. This covers class (4) above. The Courts have here not gone far enough yet.

V. Where the false attribution consists in an opinion or belief, it is actionable, provided the opinion is one which the plaintiff does and reasonably may resent as disagreeable to him. Here the Courts have still a forward step to take. But amidst modern conditions of insolent false publicity there is no reason why the law should not extend its protection.

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