the only course open to it in view of our dual system of government and the problems that it raises. This is just another example of the futility of the present double sovereignty system. It cannot cope with a big problem of this sort. The benefits of one nation-wide telephone system are great and in fact such a unification is practically necessary. Then why not a federal commission to regulate such a system? This brings up the constitutionality of such a commission—a problem beyond the scope of this note.

ROBT. B. SNOW, JR., '30.

RECENT DEVELOPMENTS IN THE RIGHT OF PRIVACY

The recognition of the right of privacy as a complement to the rules of libel and slander in the field of tort law has received a definite stimulus by a recent Kentucky case, *Brents v. Morgan,* decided in 1927.[1] In this case a petition alleging that defendant caused a notice to be placed on a show window fronting on a principal street stating that "Dr. M (plaintiff) owes an account here of $49.67, and, if promises would pay an account, this account would have been settled long ago," was held to state a good cause of action in tort for an unwarranted invasion of the plaintiff's right of privacy. In the decision the court declares its unqualified adherence to the recognition of such a right where the actions of libel and slander are not adequate to meet such situations.

The field of privacy, as such, is of relatively modern development, and has been inadequately treated both in decisions and in text-books. Nor has its scope received accurate and permanent definition to meet the exigencies of a body of law in the process of formation. The principal case defines the right as the "right to be let alone; that is, the right to be free from unwarranted publicity, or the right to live without unwarranted interference by the public in matters with which it is not necessarily concerned." "A more specific but less accurate definition is the right to live without having one's name, picture or statue, or that of a relative, made public against his will."[2] Conceptually treated, the right is one of personal immunity and can have no logical basis as a rule of property.

The right had little or no recognition at early common law, and finds no mention in the classic commentaries. It was involved, directly or indirectly, in a number of cases, but in none was there a complete acceptance or rejection of the right, and

[1] 221 Ky. 765, 299 S. W. 967.
[2] 21 R. C. L. 1196.

in none was the decision put on the tort basis.[3] From a historical viewpoint the major obstacle to an earlier recognition of the right was the inability of the common law courts to recognize a right of action for sentimental and psychological injuries entirely apart from and unconnected with invasions of rights of property or physical security. The development in the field of privacy is indicative of the trend away from the narrow common law viewpoint.[4] Where the courts have not recognized mental suffering under certain circumstances as giving rise to a cause of action, they have generally considered it as an element of damage.[5] And in the construction of a railroad, as well as in condemnation proceedings, the loss of privacy has been held to contribute to the damage.[6]

The earlier and more common form of violation of the right has consisted of the unauthorized publication of the plaintiff's photograph or name, usually for advertising purposes. The right has been encroached upon in fewer instances as a means of enforcing the collection of debts, as in the principal case, with such variations in method as the leaving of collectors' notices and the advertisement of accounts for sale. In such cases the courts have not been careful to distinguish the libel theory from the closely related theory of privacy.[7]

Until 1890 the right of privacy as a new basis in tort liability received no recognition, either in decision or in article. In that year an article by Warren and Brandeis served to focus attention on this new development in a way distinctly favorable to the extension of the right.[8] In addition the authors proposed certain limitations which have been adopted in jurisdictions which have recognized the right. These are:

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[3] Yovatt v. Wingard (1820), 1 Jac. & W. 394; Abernethy v. Hutchinson (1825), 3 L. J. C. H. 209; Prince Albert v. Strange (1849), 1 McN. & G. 25; Tuck v. Priest (1887), L. R. 19 Q. B. Div. 639; Pollard v. Photographic Co. (1888), L. R. 40 Ch. Div. 345; Monson v. Tussauds Ltd. (1899), L. R. 1 Q. B. Div. 679; Corelli v. Wall (1906), 22 L. T. Rep. 532. In the Prince Albert case a bill was brought to enjoin the publication of a number of etchings made by plaintiff for his own amusement. The court found not only a property right, but also a breach of trust, and granted an injunction, holding that since "privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether." See Gately, LAW OF LIBEL AND SLANDER, p. 28.

[4] See note, 89 A. S. R. 844.

[5] See Edwards, Right of Privacy and Equity Relief, 55 Cent. L. Journ. 123.

[6] Moore v. N. Y. Elev. R. Co. (1892), 130 N. Y. 523, 29 N. E. 997.

[7] Muetze v. Tuteur (1890), 77 Wis. 236, 46 N. W. 123, 20 A. S. R. 115, 9 L. R. A. 86; Thompson v. Adelberg & Berman (Ky. 1918), 205 S. W. 558.

[8] Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 195.

(1) The right of privacy does not prohibit any publication of matter which is of public or general interest.
(2) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication under the rules of libel and slander.
(3) There cannot be a grant of redress for the invasion of privacy by oral publication.
(4) The right to privacy ceases upon the publication of the facts by the individual or with his consent.
(5) The truth of the matter published does not afford a defense.
(6) The absence of malice in the publisher is no defense.

Within a few years of the publication of this article a series of decisions was made in suits predicated on the existence of a right of privacy which arrayed the jurisdictions involved in uncompromising conflict on the question of the legal existence of the right, and resulting in a few states in statutory recognition of the right in a modified form.[9] It is to be noted that a number of photograph cases where the decisions were ostensibly put on the basis of breach of contract, violation of trust, or existence of a right of property, the right ultimately involved was the plaintiff's right to be free from unwarranted publicity.[10]

The existence of a right of privacy in the absence of statute has been denied in New York,[11] Michigan,[12] Rhode Island,[13] and Washington,[14] and vigorously affirmed in Georgia,[15] Kentucky,[16] and Kansas.[17] In Missouri[18] and New Jersey[19] the recognition of the right has been confused with the question of property rights in photographs.

In New York the famous *Roberson v. Rochester Box Co.* case had several antecedents which may be briefly noted. In the unreported case of *Manola v. Stevens* a bill was filed to restrain the

This article and Ragland, The Right of Privacy, in 17 Ky. L. Journ. 85 (Jan. 1929), are leading contributions on the subject.

[9] N. Y. Civil Rights Law, C. 50, 51. Also Pen. Code Cal., 1909 p. 258.

[10] See article in 28 YALE L. JOURN. 269.

[11] Roberson v. Rochester Folding Box Co. (1902), 171 N. Y. 540, 64 N. E. 444.

[12] Atkinson v. Doherty (1899), 121 Mich. 372, 80 N. W. 285.

[13] Henry v. Cherry (1909), 30 R. I. 13, 73 A. 97.

[14] Hillman v. Star Pub. Co. (1911), 64 Wash. 691, 117 P. 594.

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

[16] Foster-Milburn Co. v. Chinn (1910), 134 Ky. 424, 120 S. W. 364.

[17] Kunz v. Allen (1918), 102 Kan. 883, 172 P. 532.

[18] Munden v. Harris (1911), 153 Mo. A. 652, 134 S. W. 1076.

[19] Edison v. Edison Polyform Co. (1907), 67 A. 392.

use of a photograph of the plaintiff, an actress, taken surreptitiously. An injunction was granted, no defense being made. In the following year an injunction was granted by the New York Supreme Court in favor of a physician to restrain the unauthorized publication of his name in a recommendation of a medical preparation.[20] In this case the right was at least impliedly recognized. The right seemed to have been clearly recognized in *Schuyler v. Curtis*[21] in 1892, but the case was reversed on the ground that the right of privacy dies with the person, and that no such right exists in relatives of the deceased person as to prevent the making of a statue of her.[22] In *Murray v. Gast Lithographic Co.*,[23] a suit to enjoin the publication of a picture of an infant child, although the point was not definitely settled, the court uses the following language, showing a reversal of the previous tendency:

> "If, . . . it be insisted that the parent has suffered a personal injury,—one to his mental sensibility, by the invasion of his child's right to the enjoyment of personal privacy, and the indiscriminate distribution of her portraits,—the answer is that the law does not take cognizance of, and will not afford compensation for, sentimental injury, independent of redress for a wrong involving physical injury to person or property. 'The law protects the property and the person.' The person includes the reputation. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres, the law does not attempt to guard the peace of mind, the feelings, or the happiness of everyone. . . . The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation."

This tendency was definitely recognized in the decisive Roberson case in which a bill was brought to restrain the use of plaintiff's picture in a flour advertisement. The injunction was denied by a vote of four to three, reversing the decision of the lower court.[24] The opinion clearly and unambiguously denies

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[20] Mackenzie v. Soden (1891), 27 Abb. N. C. 402, 18 N. Y. S. 240.

[21] (1892), 24 N. Y. S. 512.

[22] Schuyler v. Curtis (1895), 147 N. Y. 434, 42 N. E. 22. The dissent by J. Gray should be noted.

[23] (1894), 8 Misc. 36, 28 N. Y. S. 271.

[24] (1901) 64 App. Div. 30, 71 N. Y. S. 876.

the existence of a right of privacy, the court holding that there is no precedent in decisions, that the right is not referred to by writers, that the recognition of such a right would overwhelm the courts with litigation and might result in unreasonable oppression. It was unreasonable, wrote Judge Parker, for a person to expect to go through the world without having his picture published. The dissenting opinion, by Judge Gray, points out the obvious fallacies in the reasoning of the majority view, showing it to be a decision of expediency rather than one of legal rationality. As might be expected, the decision proved highly unpopular and in the following year a statute was passed to remedy the situation.[26] The constitutionality of this statute was upheld in 1908.[27] A considerable body of law in interpretation of this statute has grown up, but cannot be treated within the scope of this paper.[28] It cannot be said that the New York statute, which provides for both criminal liability and injunctive relief, has adequately met the need which stimulated its passage. Since it applies only to the use of names and photographs for advertising purposes, it could not remedy the wrong with which we are confronted in the principal case. Nor would it apply to other actionable forms of invasions of the right of privacy, short of libel and slander.

In Michigan the question arose in a suit in equity brought by relatives of a deceased person to restrain the use of the name and likeness of the deceased as part of a label for a brand of cigars.[29] The court held that there was no authority for the recognition of such a right, and since the right asserted in the case was not based on a right of property nor one arising from contract the injunction must be refused.

In *Henry v. Cherry & Webb*[30] the Rhode Island court held that "there is no common law right of privacy, entitling a person to

[25] For a brief statement regarding the right of privacy and the press see W. G. Hale, THE LAW OF THE PRESS, p. 243.

[26] Chapter 132 of the Laws of N. Y., p. 308.

[27] Rhodes v. Sperry (1908), 193 N. Y. 223, 85 N. E. 1097.

[28] Noteworthy cases under the N. Y. Statute are: Jeffries v. N. Y. Evening Journal Co. (1910), 67 Misc. 570, 124 N. Y. S. 780; Colyer v. Fox Pub. Co. (1914), 162 App. Div. 297, 146 N. Y. S. 999; Merle v. Sociological Research Film Corp. (1915), 166 App. Div. 376, 152 N. Y. S. 829; Humiston v. Universal Film Mfg. Co. (1919), 178 N. Y. S. 752; D'Altamonte v. N. Y. Herald Co. (1923), 154 App. Div. 453, 139 N. Y. S. 200; Damron v. Doubleday Doran & Co. Inc. (1928), 231 N. Y. S. 444. In Rosenwasser v. Ogoglia (1916), 172 App. Div. 107, 158 N. Y. S. 56, it was held that the statute does not extend to a copartnership, which is an association of individuals for purposes of trade. Such a holding might logically be followed in jurisdictions which recognize the right of privacy in the absence of statute.

[29] (1899), 121 Mich. 372, 80 N. W. 285.

[30] (1909), 30 R. I. 13, 73 Atl. 97.

damages for mental suffering by the publication of his picture as a part of an advertisement of automobile coats without his permission, though it exposes him to the jeers of those who recognized his picture in the advertisement." The court was impressed by a fear that "the right of privacy contended for would embrace all forms of interference with the mental well-being of an individual, whether by publishing his picture, by gossip, or by pointing him out as possessed of peculiar qualities." The court, however, overlooks the fact that in the field of privacy, as well as in the field of libel and slander, definite and well-founded limitations to the general rule guard against extreme applications.[31]

In Washington the negation of the right occurred in a case the facts of which merited some form of relief in favor of the plaintiff.[32] In this case it was held that the publication in a newspaper of the photograph of a young girl in connection with an article stating that her father was to be arrested for using the mails to defraud was not the invasion of any legal right of privacy so as to be actionable on the part of the girl, there being no legal remedy for any wrong done to her in its publication. In supporting the defendant's contention the court states: "The defense in this case is purely technical, a call to precedent as it has been established. A wrong is admitted, but it is said there is no remedy. We regret to say that this position is well taken."

In opposition to the narrower views of the above-named jurisdictions Georgia gave complete recognition to the right of privacy in the leading case of *Pavesich v. New England Life Ins. Co.*[33] In reversing the lower court and allowing recovery the court holds that the plaintiff has a good cause of action against defendant for a publication in a newspaper advertisement of plaintiff's picture without his consent, which picture tended to bring him into ridicule. Explaining the viewpoint of the court, Judge Cobb writes:

> "It is to be conceded that prior to 1890 every case which might be said to involve the right of privacy was not based on the recognition of such a right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and therefore a claim to a right of privacy independent of a property or contractual right, or some right of a similar nature, had, up to that time never been recognized. . . . The entire absence of a precedent for an asserted right should have the effect to cause the courts

[31] See articles cited in footnote 8.
[32] Hillman v. Star Publishing Co. (1911), 64 Wash. 691, 117 P. 594.
[33] (1905), 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 A. S. R. 104.

> to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the law-making power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection when an injury cognizable by law is shown to have been inflicted on the plaintiff. . . . The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. . . . The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail or free from other physical restraints."

The convincing logic of the *Pavesich* case had its effect in the crystallization of the Kentucky holding in the case of the *Foster-Milburn Co. v. Chinn* in 1909.[34] Here the plaintiff was represented as having indorsed a patent medicine. Although the decision was put on the joint grounds of libel and invasion of privacy the court states, "While there is some conflict in the authorities we concur with those holding that a person is entitled to the right of privacy as to his picture, and that the publication of his picture without consent for advertising is a violation of the right of privacy, and entitles him to recover without proof of special damages." This view was affirmed in another case in 1912.[35]

Missouri took a modified stand in favor of the right in 1911 although the decision in the case, involving the use of a picture for advertising purposes, was put on the ground of a property right in the picture.[36] The court criticizes the *Roberson v.*

[34] 134 Ky. 424, 120 S. W. 364. It is interesting to note that this case had some precedent in the early case of Grigsby v. Breckenbridge, 65 Ky. 480, 92 Am. Dec. 509 (1867), in which it was held that the sender of a letter may enjoin its publication by the recipient or others.

[35] Douglas v. Stokes (1912), 149 Ky. 506, 149 S. W. 849. In this case it was held that one who employs a photographer to photograph the dead body of his malformed child may recover damages in case the latter copyrights the picture and attempts to use it for his own purposes. Although the decision is put on the ground of an implied agreement to make prints only for the plaintiff, the court uses this language: "The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done to the body, and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation."

[36] Munden v. Harris (1911), 153 Mo. A. 652, 134 S. W. 1076.

Rochester Box Co. case saying: "It may be admitted that the right of privacy is an intangible right, but so are numerous others which no one would think of denying to be legal rights, which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name." The property basis followed in the Missouri holding was in accord with that of an earlier New Jersey case, *Edison v. Edison Polyform Mfg. Co.*[37] In 1918 Kansas joined the liberal forces by holding that the exhibition in a moving picture of a photograph of plaintiff for advertising purposes was a violation of the right.[38]

Before considering the position of the principal case in the evolutionary growth of the doctrine, several cases which mark the development of the law of privacy in other phases should be noted briefly. That public officers, charged with the enforcement of the criminal laws, and having in their custody individuals charged with crime, may use photographs for the purpose of identifying the individuals accused was held in *Mabry v. Kettering.*[39] But where the accused person has been found to be innocent, it is held that he may enjoin the placing of his photograph in the rogues' gallery.[40] Another and different application of the doctrine of personal security was made in *Schultz v. Frankfort Marine Accident Co.*[41] in which it was held that the open or rough shadowing of a person who was wanted to remain as an available witness was actionable. Although the decision is put on the ground of libel it is none the less true that the facts of this case take it out of the categories of the ordinary libel cases and serve to give it significance in the field of privacy. In *Byfield v. Candler*[42] it was held that a passenger on a vessel is entitled to the privacy of the room to which she has been assigned as against improper or unreasonable intrusions of others.

In the principal case a coordinate question which presents itself is as to the extent to which a creditor may go in giving publicity to a debt in order to coerce its payment. The two interests which conflict in such cases are on the one hand the creditor's right to stimulate the payment of debts owing to him, and on the other hand, the debtor's right to be free from unwarranted and obnoxious publicity about matters distinctly personal. Viewed from this light the question is ultimately one of justification of method in the attempt to preserve an interest which the law

[37] (1907), 67 A. 392. This case and another in the same volume, Vanderbilt v. Mitchell, 67 A. 97, strongly criticize the Roberson case.

[38] Kunz v. Allen (1918), 102 Kan. 883, 172 P. 532.

[39] (1909), 89 Ark. 551, 117 S. W. 746, 16 Ann. Cas. 1123.

[40] Itzkovich v. Whitaker (La. 1905), 115 La. 479, 39 S. 499.

[41] (1913), 151 Wis. 53, 139 N. W. 386.

[42] (Ga., 1924), 125 S. E. 905.

recognizes. A further complication arises from the fact that the law of libel is not adequate to meet such situations, inasmuch as truth forms a complete defense to an action of libel in most jurisdictions. May the creditor publish to the world that the debtor has long owed him money and refuses to pay, and then rely on the truth of the assertion to defeat an action of libel where all the other elements of libel exist? If we hold that the creditor cannot do so, we are faced with the necessity of creating an exception to the well-established rule that truth is a complete defense to an action for civil libel, or the more logical and satisfactory solution of the recognition of the right of privacy as in the principal case.[43]

This problem has arisen in several cases, and the inability to discriminate between the libel and privacy theories has been conducive to obscure and ambiguous rationalization. In *Muetz v. Tuteur*,[44] a Wisconsin case, the sending of a red envelope to plaintiff marked "For collecting bad debts," and in *Thompson v. Adelberg & Berman*[45] the leaving at plaintiff's residence of large collector's notices in conspicuous positions were held to support an action of libel. In both of these cases the courts overlooked the possibility of the truth of the existence of the debts involved, and treated the method of collection employed by the defendants as unwarranted and tending to disgrace and humiliate the plaintiff, and therefore libellous.[46]

It is submitted that the principal case is no more than a logical and reasonable application of the right of privacy as previously developed. The writer maintains that not only should the right of privacy be recognized as a necessary complement of the law of libel, but that this development should come through the amplification of the existing common law rather than through statutory enactments which, in fields such as this one, have often proved to be inflexible and inadequate. The reluctance to recognize sentimental injury, the lack of precedent, and the possibility of increased litigation are unconvincing arguments against the recognition of a new phase of the old right of personal security, particularly when such recognition is made urgently necessary by "modern" journalistic methods and "progressive" forms of enforcing the collection of debts. Ex-

[43] Obviously, the necessity for such a choice would not exist in those few jurisdictions where, by statutory change or common law development, the general rule that truth is a defense to libel has been modified.

[44] (1890), 77 Wis. 236, 20 A. S. R. 115, 9 L. R. A. 86.

[45] (Ky., 1918), 205 S. W. 558.

[46] In State v. Armstrong (1891), 106 Mo. 395, 16 S. W. 604, the use of the words "Bad Debt Collecting Agency" on the face of an envelope was held to subject defendant to a prosecution for criminal libel. It should be remembered, however, that truth generally is not a defense to criminal libel.

pressive of this feeling are the words of Dean Pound: "A man's feelings are as much a part of personality as his limbs. The actions that protect the latter from injury may well be made to protect the former by the ordinary processes of legal growth."[47]

SAM ELSON, '30.

POWERS OF RECEIVERS APPOINTED IN MORTGAGE FORECLOSURE PROCEEDINGS

It often becomes necessary for a court of equity to appoint a receiver of mortgaged property pending foreclosure, either to preserve the corpus of the estate from deterioration, or to sequester the rents and profits to make good an anticipated deficiency, or for some other cogent reason. The question which at times seems perplexing is just how far a court of equity may go in giving the receiver power over property incident to, but not covered by the mortgage. In a recent federal case,[1] a foreclosure suit to sell mortgaged property and apply the proceeds to the mortgage debt, the receiver was directed to take charge of all company property, and to receive the rents, earnings, issues, profits, and income therefrom, although the mortgage did not cover all the assets of the company. On appeal this direction in the case was reversed, because though "the court had power to appoint the receiver—it did not have the power to direct him to take charge of any property not covered by the mortgage." Granting that it is often laid down as a concrete rule that the mortgagee has no equitable right to have the receivership extended over other property of the mortgagor not embraced in the mortgage,[2] still we must not lose sight of the underlying reasons for having a receiver. The object of appointing a receiver is to preserve the property for the benefit of all parties interested,[3] and if this object is best attained by continuing the business, such procedure has a strong argument in its favor. Perhaps the primary objection to such an extension of the receiver's dominion is the hindrance of other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts. This general doctrine is stated in *Scott v. Farmers' Loan and Trust Co.*,[4] an important federal case, and will be considered later.

[47] 28 HARV. L. REV. 343.

[1] A. B. Leach & Co. v. Grant (1928), 27F (2d) 201.

[2] As in 27 Cyc. 1623; Gluck & Becker, RECEIVERS OF CORPORATIONS, p. 231; Smith v. McCullough (1881), 104 U. S. 25.

[3] Knickerbocker v. McKinley Coal Co. (1898), 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

[4] (1895), 69 F. 17.