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lower courts to apply the Tort Claims Act in a broad and liberal spirit. The rule laid down in *Dalehite v. United States* would certainly have reversed a number of the cases cited *supra*. However, there is perhaps no reason to assume that the rule in the *Dalehite* case will be carried to its ultimate, and logical, conclusion, namely, that the negligence of any federal employee, however humble, and including truck drivers, will be held to be exempt as a matter of discretion if the employee is acting under the orders or supervision of responsible superiors who have laid down a plan for the performance of his duties, but who, in the process, has decisions of his own to make.

Of course, in all such matters, practical considerations cannot be entirely ignored. Two hundred million dollars is a large sum of money, by any measure, and as a penalty for negligence it is unquestionably immense. There is nothing to indicate that this aspect of the situation influenced the Court, unless, translating freely, one might read such an intimation into the closing words of Mr. Justice Jackson's dissenting opinion: "Surely a statute so long debated was meant to embrace more than traffic accidents." If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'

MILTON E. LOOMIS

Privacy—Unauthorized Use of Photographs—Infringement of Personal and Property Rights

In a recent New York case, *Haelan Laboratories, Inc. v. Topps*, plaintiff manufacturer had contracts with certain major-league ballplayers for the exclusive right to exploit the publicity value of their photographs in advertising its products. Defendant subsequently used the photographs of these same ballplayers in a competing merchandising and advertising scheme. In an action to secure damages and to enjoin

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1. 202 F. 2d 866 (2d Cir. 1953). Plaintiff had for several years been successfully merchandising and advertising its bubble gum by using pictures of big-league ballplayers, which it obtained by exclusive contracts. Defendant, a competitor, attempted to use pictures of players under contract with plaintiff. Held, plaintiff has a cause of action for this infringement.

2. This use of a photograph is to be distinguished from "indorsement" or "testimonial" advertising. One who falsely claims an indorsement may subject himself to sec. 43(a) of the Lanham Act where a wrongdoer in cases of false advertising is "liable to a civil action ... by any person who believes that he is likely to be damaged by the use of any such false description or representation." 60 STAT. 441, 15 U. S. C. § 1125(a) (1946). See Callman, *Unfair Competition and Trade Marks*, § 20.2(f) (2d ed. 1950); Callman, *False Advertising as a Competitive Tort*, 48 Col. L. Rev. 876, 885 (1948).
the use of such photographs as an encroachment on plaintiff's "rights of publicity" in these pictures, defendant argued, and the lower court so held, that a person has no legal interest in the publication of his picture other than his non-assignable right of privacy, consequently, plaintiff's contracts constituted mere releases from liability to the ballplayers for his invasion of their privacy through use of their photographs. On appeal the court held that under New York law "... in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else."

Prior to this decision a person might prevent the unauthorized commercial publication of his name or photograph by invoking his right of privacy. Consequently, he might "cash in" on his publicity value by the threat of a privacy suit. Privacy, however, was developed as the personal, non-assignable right of the individual to be let alone. While damages for injured feelings are a just compensation for the person who desires seclusion, an actress who has been in the limelight and whose feelings cannot be said to be injured by publicity can recover only nominal damages for invasion of her privacy. Although defendant violated the New York Privacy Statute, the plaintiff could show no loss and

8 N. Y. CIVIL RIGHTS LAW §§ 50, 51 (1938). "Any person whose name, portrait or picture is used within this state for advertising purposes or purposes of trade without the written consent first obtained ... may maintain an equitable action ... against the person ... so using ... to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reasons of such use...." This statute is the result of a rejection of the right of privacy at common law in Robertson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902). North Carolina, on the other hand, recognized the common law right of privacy in Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938) and relied on the able dissent of Judge Gray in the above New York case.

4 Haelan Laboratories v. Topps, 202 F. 2d 866, 868 (2d Cir. 1953). There being some question of defendant wrongfully inducing a breach of contract, Chief Judge Swan concurred "... in so much of the opinion as deals with the defendant's liability for intentionally inducing a ballplayer to breach a contract which gave a plaintiff the exclusive privilege of using his picture."


recovered nothing for the commercial exploitation of her name and photograph. A professional entertainer may waive his right of privacy against the unauthorized and protested telecasting of his act to thousands of non-paying onlookers because at the time he was performing publicly. Thus, it has been submitted that privacy may be an inadequate remedy for those who desire publicity rather than to be let alone. A "right of publicity," however, would assure damages commensurate with the commercial value of a celebrity's name or photograph, and prior publicity would enhance the value of the right rather than constitute a waiver of a cause of action.

Defendant's contentions, in the principal case, that one has no legal interest in the publication of his picture other than his right of privacy is based on an earlier New York case where plaintiff was denied protection of his contractual rights to the exclusive use of the photographs of certain motion picture actresses. However, specific reference was made to the fact that the complaint was predicated on the New York privacy statute, so the question of other rights, such as the "right of publicity," was not before the court. Defendant's argument overlooks the fact that a person may have a common law copyright in his photograph, and that contract rights have been enforced against a photographer for the unauthorized publication of a customer's picture. Doctrinally important in the case is the holding that the grant of the exclusive privilege to use a person's photograph may validly be made "in gross," i.e., without an accompanying transfer of a business or anything else. This is in direct opposition to a Fifth Circuit ruling involving the assignability of names of famous ballplayers, which relied strongly on

9 Harris v. H. S. Gossard Co., 194 App. Div. 688, 185 N. Y. Supp. 861 (1921). Actress sued to recover damages for the unauthorized use of her name and portrait for advertising and purposes of trade contrary to the New York Civil Rights Law. Since her name and portrait had frequently been published without objection on her part and since in this case she admitted that she was not averse to the publicity gained by such publications, and that it helped her in her profession, a verdict of six cents was held not insufficient.


11 Note, The Right of Privacy, 7 N. C. L. Rev. 435, 438 and n. 16 (1929).


15 Hanna Mfg. Co. v. Hillerich & Bardsky Co., 78 F. 2d 763 (C. C. M. D. Ga. 1935). Plaintiff, a manufacturer of baseball bats, contracted with certain famous ballplayers for the exclusive right to use their names in advertising its bats. The bats were marked with a player's autograph, and each model became known to purchasers by the name it bore. Defendant, a competitor, without agreements with the players under contract with plaintiff, stamped the players' names in block letters on its bats. One ground on which the District Court granted an injunction was that defendant's practice violated plaintiff's property right to the use of the names. The Circuit Court of Appeals reversed on this ground since a player has in his name no property right assignable in gross according to its holding. Re-
the general rule that a trade-mark, trade name or the good will of a business cannot be assigned apart from the business in which it is employed. This general rule, however, is not without exception and it has been suggested that a more sensible rule would recognize assignability where there is no likelihood of deception to the public.

The "right of publicity" has, by implication, been recognized in the exclusive right of an agent to sell the indorsement of a famous designer who attempted to breach her contract; in the good name, reputation, and good will of a hockey team which derived substantial revenues from the licensing of genuine photographs of the team by name in feature motion pictures; and in the exclusive right to use a person's name in a manufacturing process. Other cases recognize a property right in a person's photograph on the theory that the pecuniary value therefrom should belong to its owner rather than to one seeking to make an unauthorized use of it. Where an unauthorized publication has resulted in no injury to the personality of an individual and privacy is an inadequate remedy, some courts, by dicta, imply the possibility of recovery on quasi-contract or some other legal theory.

Ferring to the names of famous ballplayers the court said: "But if they be his property in a sense, they are not vendible in gross so as to pass from purchaser to purchaser unconnected with any trade or business. Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property."


Note, 28 Col. L. Rev. 353, 356 (1928).

Wood v. Lucy, Lady Duff Gordon, 222 N. Y. 88, 118 N. E. 214 (1917). Plaintiff, who possessed a business organization adapted to the placing of such designs and indorsements as he might make or approve, entered into an agreement for the exclusive right to use the name of defendant, a famous designer. Defendant attempted to break the contract by authorizing to others the use of her indorsement on dresses, etc. Held, plaintiff had contract rights to the exclusion of defendant's practices.

Madison Square Garden v. Universal Pictures, 255 App. Div. 459, 7 N. Y. S. 2d 845 (Sup. Ct. 1938). For many years plaintiff granted licenses to take and reproduce photographs of events in its arena, Madison Square Garden, for use in motion picture news reels only, but not for use in feature films without plaintiff's consent. Defendant, produced a feature film of plaintiff's arena and team without permission and payment. Held, plaintiff had a property right in its reputation and good will which defendant had infringed.

Liebig's Extract of Meat Co. v. Liebig Extract Co., 180 Fed. 688 (C. C. S. D. N. Y. 1910). Complainant, held, entitled to an injunction restraining defendant from using the word "Liebig" in connection with the sale of the extract of meat, on evidence showing without contradiction that Baron Liebig granted to complainant's predecessor in business the exclusive right to use his name in connection with extract of meat made by his process.


The question of whether the "right of publicity" is recognizable, as such, has yet to be presented in North Carolina. In *Flake v. Greensboro News Co.*, however, a recognition of the right of privacy provided indirect protection to one's commercial interest in his name and photograph. Certain language in the *Flake* case in labeling rights in a person's photograph as a "property" right; in referring to the value in one's features as exclusively his until granted away; and in recognizing that modern advertising techniques consider the name or photograph of some people a valuable asset, indicates that a decision, if and when rendered, would be substantially in accord with the principal case. It is submitted that an action in privacy is inadequate protection to commercial interests in personality; and, in agreement with the *Haelan* case, the value of this commercial interest will be greatly diminished if, as an incident to a purchase, a legally protectible interest is not transferred as the "right of publicity."*

JOHN RANDOLPH INGRAM

Torts—Charitable Institutions—Liability to Paying Patients

In two recent cases the North Carolina Supreme Court held that a charitable hospital was not liable in damages to a paying patient for injuries caused by the negligence of employees of the hospital on the grounds that (1) The doctrine that a charitable institution may not be held liable to a beneficiary of a charity for the negligence of its servants or employees if it has exercised due care in their selection and retention is settled law in this jurisdiction and should not be lightly overruled or whittled away by the court and (2) On the basis of authority and reasoning, no exception should be made in the rule of immunity in favor of paying patrons of charitable institutions.

Justice Barnhill dissented saying that when a hospital charges and receives pay for services rendered a patient, it assumes an obligation to

*Williams v. Randolph Hospital, Inc., 237 N. C. 387, 75 S. E. 2d 303 (1953); Williams v. Union County Hospital Ass'n, 237 N. C. 395, 75 S. E. 2d 308 (1953) (The case was first before the Supreme Court in 234 N. C. 536, 67 S. E. 2d 662 (1951)).