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Recent Cases

RECENT CASES

REAL PROPERTY—"ONE MAN" CORPORATIONS—SOLE SHAREHOLDER'S INTEREST IN CORPORATE REALTY —DOWER RIGHTS OF SOLE SHAREHOLDER'S SPOUSE

In a recent New Jersey case, *Frank* v. *Frank's Inc. et al.*,[1a] the state's highest court unanimously denied a widow's claim of dower in the real property of a corporation in which her husband was once the sole shareholder.

The basis of the court's decision was that, although her husband was the sole shareholder of a corporation whose only asset was realty, the corporation, nevertheless, in the absence of fraud as to the plaintiff, held the land to it's own use and not to the use of her husband. The court thus concluded that, since the realty was at no time during the marriage legally or equitably owned by the husband, it was not subject to her statutory dower claim.[1]

The facts of the case were these:

Decedent was the owner of a parcel of real estate which had a building on it. He conducted his business there. In 1934 he was involved in an automobile accident. Fearing entry of judgment against himself, he formed a corporation that's stated purpose was ". . . to operate the business and acquire real estate." Thirteen shares of stock were issued: seven were issued to the decedent in consideration of his transfer of the realty and the business to the corporation, one to his son and five to a third person.

In due course, judgment was entered against the decedent (hereinafter referred to as Frank). He thereupon filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. Subsequently, Frank became acquainted with the present plaintiff and in time they were married. Frank had by this time acquired all of the outstanding shares of the corporation. The marriage continued for approximately nine years after which the parties were separated. A suit was brought against Frank for separate maintenance.[2] The court in that case ruled against the present plaintiff giving as its reason that ". . . Frank neither abandoned nor separated nor neglected to support her." Shortly thereafter Frank became totally disabled and transferred all of the shares which he held to his two sons by a prior marriage in consideration of their promise to support him for the rest of his life.

When Frank died, the widow brought her action. She alleged that at one time during her coverture the decedent was sole stockholder of the corporation, and that therefore the realty was held not by the corporation for itself, but "to his

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1a 87 A.2d 724 (1952).

1 N.J.S. 3A: 35-1; N.J.S.A. "The widow whether alien or not, of a person dying intestate or otherwise shall be endowed, for the term of her natural life, of one full and equal half part of all real estate whereof her husband or another to his use was seized of an estate of inheritance at any time during the coverture."

2 Frank v. Frank, 76 A.2d 527 (1950).

(Frank's) use" and that by statute she had a right of dower in the corporate premises of the defendant. The trial court entertained doubts as to the plaintiff's right to recover. However, believing itself bound by a prior case (*Telis* v. *Telis*,)[2a] and a line of decisions in support of it, the court held that "since the corporation was solely owned by Frank in the equitable sense it was a fraudulent attempt on his part to deprive his wife of her right of dower in the property and that, therefore, the premises were subject to her claim." On appeal the state's highest court distinguished the *Frank* case from the previous holdings and reversed the lower court.

On closer analysis several of the distinctions enumerated by the appellate court seem to be of little merit. Others seem to be under emphasized. The court said that in the *Telis* case "inchoate dower" was sought while in the *Frank* case "dower consummate" is claimed. It is true that the two are not identical interests, for the former does not rise to the status of dower consummate until the contingency that the wife outlive the husband is fulfilled. The court fails to say in what manner this variance in the interests claimed effects the difference in result of the cases and the writer has been unable to discover any reason why it should.

As a second distinction in the cases the court finds that ". . . in this case the husband formed the corporation a year and a half before he even knew the plaintiff while in the previous case the entity was formed after marriage." This distinction is emphasized by the court. It seems to be material since the circumstances and situations of the parties would be pertinent to the issue of whether fraud was present in corporate formation. But it must be pointed out that the ultimate effect of the corporate existence in both cases was to attempt to bar the spouse's claim of dower.

Also the court continues "in the *Frank* case corporate officers were elected, the shares were actually delivered to those to whom they were issued, meetings were held and minutes kept while, in the former case none of these factors were present." This distinction is borne out by the facts of the two cases but in many cases courts do not hestitate to disregard the corporate personality where the circumstances so warrant even though all of these technical requisites have been complied with. In other cases the corporate formation is held valid though little or none of these formalities have been met.

As an additional difference in the two cases the court points out that ". . . in the present case the sons will be divested of rights acquired by the previous contract with their father if the corporate structure is disregarded while in the *Telis* case there were no rights of third parties involved." This is a valid basis for distinguishing the cases since courts generally should act cautiously if their decision might affect the previously acquired rights of innocent third persons who gave value. But from the facts of the case it might be argued that the sons do not fall within this class which the courts are eager to protect. The contract by which

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2a 26 A.2d 249.

they acquired the corporate shares was entered into while Frank was defending a support action brought by the plaintiff in this action, and actual delivery of the shares was delayed until Frank was awarded verdict in that action on appeal. Even disregarding such circumstances of the contract and transfer and assuming that they were innocent, the value that they gave was not great, for their father only lived a short time after the promise of support was made to him. Also the sons were at least morally bound to render support to their father in the absence of such a contract. Although the rights of third persons might be extremely important in some cases, this writer would be inclined to doubt that great significance should attach to the rights of the third persons involved in this case.

Finally, the court brought out the distinction that in the prior case ". . . the wife brought her suit to establish her dower in the property after the court had awarded support to her and her children; but in this case two courts with juries have determined that Frank had not deserted his wife or failed to support her." This element of the instant case although not strongly emphasized by the court seems to the writer to be the primary element in the court's decision. One might wonder what the result in the *Frank* case would have been had the widow been awarded a verdict in the previous support case, and thus the same in that respect as the *Telis* case but retaining the other distinctions.

The court held that ". . . a corporation though all of its stock is owned by one person does not hold its property to the use of such shareholder but holds it for the use of the corporation itself as an artificial entity which is as much recognized by the law as any natural person." This is so, continued the court, despite the fact that a sole shareholder has the power to dissolve the corporation and become owner of the real property held by the corporation, ". . . for such right must be exercised in accordance with statute and subject to the rights of creditors." The court then added that to hold to the contrary would ". . . cause hardship to the corporate creditors and confusion in the law of real property; for one would never be safe in accepting title to realty from a corporation which has or has ever had a single beneficial owner."

The principle enunciated by the court is in accord with the overwhelming weight of authority for it is well-settled in the law that a stockholder has neither a legal nor an equitable title in the corporate property. "(H)is private property includes his shares in the corporation, that is, the right which his membership gives him to participate in the control of the corporation in its surplus or profits and in the distribution of the corporate assets upon dissolution."[8] Thus it can be seen that in a given case the finding by the court that a valid corporate entity exists, which the court refuses to disregard, coupled with the above rule of law will necessarily bar a dower claim in the corporate realty by the spouse of a former shareholder

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8 Stevens on Corporations, p. 86; Donaldson v. Anderson, 300 Pa. 312. But compare, Warren v. Davenport Ins. Co., 31 Iowa 764 which holds that "it is recognized that they have an indirect or beneficial interest which will supply the insurable interest necessary to support a policy of insurance."

in a "one man" corporation. This is so because if the corporation holds title to the realty absolutely it cannot at the same time hold ". . . to the use of" its shareholders so as to subject the realty to the dower statutes of the type enacted in New Jersey.

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The Pennsylvania statutory provisions in respect to dower are contained in the Intestate Act of 1947. Our statute[4] is somewhat different in context from the one enacted in New Jersey but this difference apparently would not alter a decision by our courts should they be confronted with a factual situation like that in the *Frank* case. In respect to realty both statutes give the widow a right to share in that property which the deceased husband legally or equitably owned at the time of his death. Both the New Jersey and Pennsylvania statutes also give the widow a right to share in any realty the husband legally or equitably owned at any time during the coverture which he conveyed without her joinder. The claim of the widow in the *Frank* case was directed against realty owned by a corporation in which her husband prior to death had ceased to be a stockholder. Her contention was that since at one time he was sole shareholder he was legally or equitably the owner and when he transferred the shares to his sons he in effect conveyed the realty by deed which lacked her joinder and therefore she had right to her dower in the corporate premises. Thus it can be seen that no matter which of the two statutes had been applied in the *Frank* case the claimant would still face the task of showing that by reason of the husband's sole ownership of the stock he was also owner of the corporate realty.

Our courts are entirely in accord with the premise set out in the *Frank* case that "a shareholder has neither a legal nor an equitable title in the corporate property." It necessarily follows that as long as the validity of the corporation is upheld the realty of the corporation will not be subject to any dower claims. Pennsylvania does, however, adhere to the principle that ". . . under some circumstances and in particular cases the corporation may be disregarded as an intermediate between the ultimate person and the adverse party."[5] Thus in a given case if the corporate personality is used to ". . . defeat public convenience, justify wrong, protect fraud or when resorted to as evading a defined public policy,"[6] the court will disregard the entity and view the case as if the ultimate and the adverse party were the only

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4 Intestate Act of 1947, 20 P.S. 1.5. "The shares or the estate to which the widow is entitled shall be in lieu and full satisfaction of her dower at common law, so far as relates to real estate of which the husband dies seized; and her share in real state aliened by the husband in his lifetime, without her joining in the conveyance her share shall be the same as her share in real estate of which the husband dies seized. . ."

5 Fletcher Cyclopedia of the Law of Private Corporations, vol. 1, p. 134. Accord: Stony Brook Lumber Co. v. Blackman, 286 Pa. 305, which case quotes 7 R.C.L., 27. "The doctrine, however, that a corporation is a legal entity existing separate and apart from the person or persons composing it, is a mere fiction, introduced for purposes of convenience and to subserve the ends of justice. This fiction cannot be urged to an extent and purpose not within its reason or policy and it has been held in an appropriate case, and in furtherance of the ends of justice, a corporation and the individual or individuals owning all of its stock and assets will be treated as identical."

6 Stevens on Corporations, p. 95.

litigants involved. Might it not be argued that there is no stronger or more clearly defined policy of the law than that which deters the courts from denying a deserving widow of her dower.

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The closer the observation, the more it seems apparent that the seemingly inconsistent opinions in the *Frank* case and the *Telis* case can be harmonized. To the writer the cases seem both to turn on the answer to the question—was the corporate entity used to thwart a deserving widow's claim of dower? If the answer is in the affirmative, then the courts will treat the case as if the corporation were nonexistent. If it be in the negative, the courts will give the usual legal effect to the corporate personality. If we view the two cases in the light of the comparative equities, the two decisions can be harmonized without undue difficulty.

Kenneth J. Duffy
Member of the Senior Class

UNEMPLOYMENT COMPENSATION—COMPENSABLE UNEMPLOYMENT

In *Golbuski* v. *Unemployment Compensation Board of Review*[1] the facts were these:

> The plant in which the claimant was regularly employed had been closed by the employer company for the purpose of taking inventory. The company and the union of which the claimant was a member had previously agreed that the company might use this two week shut-down period as vacation time for those employees who were eligible for paid vacations under the company's plan. The plan provided that those employees who had worked for the company for a certain period of time would receive two weeks vacation with pay, and those with lesser time would receive one week vacation with pay. Finally it provided that those who lacked sufficient time to receive one week paid vacation were not entitled to any paid vacation. As to the first class there was no problem. They were paid for the two weeks they were out of work and thus they were not compensably "unemployed." Those who received one week paid vacation were not "unemployed" for that week but there was a question of whether or not they were entitled to use the other week as their "waiting week."[2] The main problem of the case concerned those in the third class who had not received any vacation pay for the two week shut-down. The local office of the Bureau of Employment Security allowed the claims and the referee upheld the bureau's decision but the Board of Review on appeal by the employer reversed the referee and denied benefits.

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1 171 Pa. Super. 634, 91 A.2d 218 (1952).

2 Act of 1936, December 5, P.L. 2897 § 401 (e), 43 P.S. § 801, provides that in order to be eligible to receive benefits the claimants must have been unemployed for a waiting period of one week. This case does not decide whether the employees in the second class could use the uncompensated week as constituting their "waiting week." It would seem that they could since the claimants in the third class were allowed the one week waiting period and benefits for the other week.

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The board used as the basis in its ruling the decision of the Superior Court in the *Mattey* case.[3] They stressed one of the tests of eligibility for unemployment compensation, *viz.*, "involuntary unemployment." On this point the *Golbuski* case and the *Mattey* case are clearly distinguishable.

In the *Mattey* case the union and the company had agreed that the period from June 27th to July 7th was to be the annual vacation period. The company had a vacation plan similar to the one in the *Golbuski* case. It provided that those employees who had worked for a certain period of time would receive two weeks vacation with pay, those with a lesser time would receive one week vacation with pay and those without sufficient time to receive one week paid vacation would not receive any compensated vacation time. Here again the appeal involved those employees who had not sufficient time for any paid vacation. The decision in this case was that the men were not involuntarily unemployed and thus they were not entitled to unemployment benefits.

In the *Mattey* case the court and the board based their decisions on agency law. They found that the union was the exclusive bargaining agent for the employees and since the union asked for and agreed to this vacation period the employees were bound by the union action and could not say that they were not voluntarily unemployed. The board thought this same reasoning applied in the *Golbuski* case.

The facts in the *Golbuski* case differed materially, however, from the situation in the *Mattey* case. First of all, in the *Mattey* case by their original contract the company and the union agreed that the establishment should be closed for vacation. In the *Golbuski* case the union did not agree that the plant might be closed for vacation; they agreed that the company might designate any period when the plant was closed for any reason as the time to give compensated vacations to those who were entitled to them. Secondly, in the *Mattey* case the establishment was actually closed for vacation time while in the *Golbuski* case the claims at issue were filed while the plant was closed for the purpose of taking inventory. It was for the company's benefit and the union had not agreed to have such shut-downs operate as a vacation for those who were not entitled to paid vacations.

In both cases the union acted as the agent for the employees but in the *Golbuski* case the union never agreed to the creation of any unemployment, so one could not say that the employees consented to become unemployed. It is true that the union agreed that the period in question might be used as vacation time for those who had compensated vacation time coming, but this was only an agreement to the allocation of vacations by the employer in accordance with the right reserved to the employer in the original contract.[4] Under agency principles, therefore, while the

[3] Mattey Unemployment Compensation Case, 164 Pa. Super. 36, 163 A.2d 429 (1949).
[4] The original contract provided: "Promptly after January 1 of each calendar year each eligible employee shall be requested to specify the vacation period he desires . . . but the final right to allot vacation periods . . . is exclusively reserved to the company."

acts of the union were the acts of the employees, since the union had never agreed that the employees should be laid off, they were in fact involuntarily unemployed. Consequently on the test of "involuntary unemployment" the court decided that the men were involuntarily unemployed and reversed the board's disallowance.

It should be noted that "involuntary unemployment" is only one of a number of tests of eligibility for unemployment compensation of persons unemployed during shut-downs and vacation periods.[5] There are other tests, for example "availability for work," which are not fully discussed in the *Golbuski* case. On the test of involuntary unemployment and under agency principles, however, it is apparent that the ruling in the *Mattey* case did not apply and that the decision in the *Golbuski* case is a sound one.

Richard J. Murray
Member of the Middler Class

TORTS—RIGHT OF PRIVACY—EFFECT OF LAPSE OF TIME AFTER PRIVILEGED EVENT—USE OF PHOTOGRAPH FOR PRIVATE RATHER THAN NEWS PURPOSES

The plaintiff, a child of ten, was photographed as a woman bystander was lifting the child to her feet after nearly being run down by a motor car. The following day the photograph appeared in a Birmingham (Ala.) newspaper and twenty months later it was used by the defendant as an illustration for an article on traffic accidents emphasizing pedestrian carelessness entitled, "They Ask To Be Killed." The plaintiff claims that this second publication of her picture twenty months after the accident was an invasion of her right of privacy. The United States Court of Appeals for the Third Circuit affirmed judgment for the plaintiff of the United States District Court for the Eastern District of Pennsylvania.[1]

The two issues presented by this case are:

(1) How long after the event that draws one into the public eye does the privilege of publicity exist?, and

(2) May a photograph, which was privileged as a waiver of the right of privacy because of public interest, be used for another purpose without liability?

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(1) *How long after the event that draws one into the public eye does the privilege of publicity exist?*

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[5] Act of 1936, December 5, P.L. 2897 § 401, 43 P.S. § 801.

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[1] Leverton v. Curtis Publishing Company, 192 F.2d 974 (1951).

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[1] Leverton v. Curtis Publishing Company, 192 F.2d 974 (1951).

One who is the subject of a striking catastrophe is the object of legitimate public interest.[2] By drawing public attention or participating in activities which have a public interest, the individual waives his right of privacy. Persons occupying prominent positions in public life and government impliedly grant the right to the public of their pictures.[3] Where a person has placed himself in the public eye, as an actor or candidate for public office, or where one has become newsworthy and the object of legitimate public interest, his right of privacy is limited.[4] The interest of the public in being informed overbalances the right to be left alone.

Must such a person who once received publicity for an act go through his entire life with possible republication of his infamy haunting him? Is the privilege lost by lapse of time? The plaintiff admits that the original publicaton of her picture was not an actionable invasion of her right of privacy, but says that its reappearance twenty months later was because it was no longer newsworthy.

William James Sidis was a child mathematics prodigy, who lectured to a group of Harvard professors on the fourth dimension at the age of 11 and was included in an article "Where Are They Now?" thirty years later describing his career since his childhood days. The court did not permit him recovery.[5] This article, although written to promote sales of the magazine, contained information of public interest.

The experiences of a hold-up victim were related on a radio program, "Calling All Cars," seventeen months after its occurrence and he recovered.[6] However, the court apparently based its decision on the fact that the story was used for entertainment rather than news purposes.

The film, "The Red Kimono," led to a suit involving the invasion of the plaintiff's right of privacy. The plaintiff, a denizen of the underworld and a prostitute, was tried for murder and was acquitted, thereupon abandoning her life of shame and becoming rehabilitated. She married and was settled in a new community when the film using her single name was released. It was held that there was no cause of action because the unsavory incidents of the plaintiff's former life were on public record.[7]

From these three decisions it seems to follow that publication of an article, photograph, or other "news" item does not violate one's right of privacy merely because of lapse of time alone, but that other factors must be present for the plaintiff to recover. Furthermore, the *Sidis* case and the case involving the hold-up victim seem to substantiate the conclusion that the right of privacy is not violated

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2 Restatement, Torts, § 867 (1939).
3 Friedman v. Cincinnati Local Joint Executive Board of Hotel v. Restaurant Employees International Alliance and Bartenders International League of America, 6 Ohio Supp. 276.
4 Gill v. Curtis Publishing Company, 231 P. 2d 565 (1952).
5 Sidis v. F-R Publishing Company, 34 F. Supp. 19.
6 Mau v. Rio Grande Oil, Inc. et al., 28 F. Supp. 845.
7 Melvin v. Reid, 297 P. 91 (1931).

by reappearance of a newsworthy item solely because time has elapsed between the original admittedly privileged publication and its recurrence.

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(2) *May a photograph which was privileged as a waiver of the right of privacy because of public interest be used for another purpose without liability?*

The cases on this point are in unanimous agreement that a photograph taken for one purpose may not be used for any other. A photographer employed to take a patron's picture cannot make additional copies and use them for his own purposes without authorization.[8] The unauthorized use of a photograph of a person for commercial purposes is generally an invasion of his right of privacy.

A Pennsylvania decision[9] directly on point prohibited a doctor from exhibiting photographs of a semiconscious patient to his classes to illustrate the patient's facial disfiguration resulting from coronary thrombosis. The doctor had taken the pictures without the permission of the plaintiff or her family.

While the appellee was serving with a mobile optical unit, the War Department took his picture and published it in a United States' news item of military activities overseas. The appellant, engaged in private enterprise, used the picture as appellee endorsing his product. Appellee recovered.[10]

Pictures and letters were published to induce others to become sales representatives. As long as they were under a trade magazine this was permissible, but this privilege did not extend to a popular magazine.[11]

These illustrative cases show that a photograph cannot be used unless it is used for a privileged purpose or unless the right of privacy is waived.

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Of course, all of the foregoing discussion is based on the theory that an invasion of the "right of privacy" is a tort. Perhaps, a summary of the history of the concept would better enable us to reach a conclusion as to the stand the various jurisdictions will take toward the problems raised in the *Leverton* case.

Unknown to the common law, the concept of the right of privacy is of recent development. The doctrine was first discussed in an article by Professor Samuel D. Warren and Louis D. Brandeis, later to become Associate Justice of the United States Supreme Court, published in the *Harvard Law Review* in 1890.[12] Recently numerous articles have been written on this subject in legal periodicals[13] and the *Restatement of Torts* recognizes its existence.[14] Included among

8 Itinish v. Meier & Frank Co., 113 P. 2d 438, 166 Ore. 482, 138 A.L.R. 1 (1940).
9 Clayman v. Bernstein, 38 D. & C. 543 (1940).
10 Continental Optical Co. v. Reed, 86 N.E. 2d 306 (1949).
11 Marek v. Zanol Products Co., 9 N.E. 2d 393, 298 Mass. 1 (1937).
12 Brandeis and Warren, Right of Privacy, 4 Harv. L. Rev. 193 (1890).
13 Feinberg, Recent Developments in the Law of Privacy, 48 Col. L. Rev. 713 (1948); Nizer, The Right of Privacy, 39 Mich. L. Rev. 526 (1941); 40 Geo. L. J. 633 (1952); 25 Temp. L. Q. (1951); 5 Vand. L. Rev. 116 (1951); 100 U. Pa. L. Rev. 772; 21 Fordham L. Rev. 79 (1952).
14 Restatement, Torts, § 867 (1939).

those states that have adopted this principle, at least to some extent, are: Pennsylvania, California, Florida, Kentucky, Indiana, Massachusetts, Missouri, Montana, New Jersey, New York,[15] Oregon, South Carolina, Utah, Virginia and Washington.

The right of privacy is derived from natural law, having its foundation in the instincts of nature.[16] Most humans resent any encroachment by the public on their rights, particularly those of a private nature. The right to life has come to mean the right to enjoy life—to be left alone.[17] The invasion of this right is a tort.[18] The interest invaded is that interest a person has in being left alone.

Pennsylvania's first decision on this subject is that of *Owen v. Henman*,[19] holding that no right of action exists for a worshipper in a church who was annoyed by another "making loud noises in singing, reading, and talking." However, since then a few other Pennsylvania cases have recognized the right of privacy,[20] the federal district court decision here being the latest.

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Conclusion

Thus, in those states (including Pennsylvania) that recognize that an invasion of the right of privacy is a tort, the problems raised in the *Leverton* case will undoubtedly be resolved in the following manner.

(1) A mere lapse of time between the happening of the event and its first privileged publication immediately thereafter and its recurrence sometime later is not a violation of one's right of privacy.

(2) Using a once privileged printing for another purpose is a violation of one's right of privacy. In every case in which this was the issue upon which the case was decided, it was held that a photograph cannot be used without the subject's permission for any purpose other than the one for which it was taken.

JO ANN NATALIE ESTERLY
Member of the Middler Class

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15 New York Civil Rights Law, Consolidated Laws, N.Y., ch. 6 §§ 50, 51.
16 Peavy v. Curtis Publishing Company, 78 F. Supp. 305 (1948).
17 Cooley on Torts, 4th Ed., vol. 1, § 135; see also n. 2, supra.
18 "The right of privacy is a legal right entitled to judicial protection.", Pavesich v. New England Life Insurance Company, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cases 561 (1904).
19 Owen v. Henman, 1 W. & S. 548, 37 Am. Dec. 481 (1841).
20 Leverton v. Curtis Publishing Company, 97 F. Supp. 181, affirmed 192 F.2d 974; Harlow v. Buno Co., 36 D. & C. 101 (1939); Waring v. W.D.A.S., 327 Pa. 433 (1937); Lisowski, etc., et vir v. Joskiewiez et vir, 76 D. & C. 79 (1951).

CRIMINAL LAW—HOMICIDE—DUTY TO RETREAT—ATTACKED IN PLACE OF BUSINESS

In *State* v. *Baratta*[1] the defendant was convicted of murder in the second degree. On appeal the cause was reversed and remanded by the Supreme Court of Iowa which held, *inter alia,* that the instructions as to the law of self-defense were contradictory.

This case is illustrative of the trend by the majority of American courts to depart from the old common-law rule of "retreat to the wall."[2] The court, in this case, emphatically upholds the rule that a person unlawfully attacked in his place of business may meet force with force, even to the extent of taking life, if it is necessary or reasonably appears to be necessary.

The facts of the case are briefly as follows: The defendant was the owner and operator of a tavern; the deceased was a patron. The deceased became engaged in an altercation with another patron and defendant came to the scene of the controversy to find out what was going on. During the conversation which followed, the defendant challenged the deceased to take off his glasses and fight. The defendant apparently changed his mind, however, and told the deceased to get out of the tavern. There was evidence which indicated that as the deceased was walking peacefully out of the tavern, the defendant struck him on the head with his fist; the deceased fell, striking his head against the wall of the building. As a result of these blows on his head, the deceased died.

But there also was testimony for the defendant that the deceased turned and started back towards defendant with his arm raised as if to strike him. Although the state's evidence controverted this, it clearly raised an issue of self-defense which the trial court recognized and upon which it instructed.

On appeal, defendant made the contention that in part of instruction No. 11, the court laid down the correct rule governing the law of self-defense; but that in one sentence of this instruction and in instruction No. 12, the jury was given a different, contradictory and erroneous rule. The challenged part of No. 11 contains the statement that defendant had the right to kill in self-defense, "if that seemed to be the *only means* of preventing such injury or death." Instruction No. 12 closes with the words, "to be the *only means* of preventing the threatened injury or death."

In discussing the above instructions, the Supreme Court of Iowa held as follows:

> "The duty to retreat is not mentioned in specific terms; but we think that the average juror, being told that defendant could use force sufficient to kill *only* if that was the *only means* of preventing his own death or

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1 —— Iowa ——, 49 N.W.2d 866 (1951).

2 Beal, "Retreat from a Murderous Assault," 16 Harv. L. Rev. 567 (1902-1903); Levine, 5 Wis. L. Rev. 500 (1928-1930).

> injury, would immediately turn to the thought of retreat as the likeliest 'other means.' Retreat has always been recognized as the most promising way of promoting one's safety from danger."

After further discussion on the instructions, the court stated the following rule of law:

> "We are committed to the rule that a person attacked in his home, or place of business, may meet force with force, even to the extent of taking life if it is necessary or appears to be necessary. The doctrine of 'retreat to the wall' in such cases has been expressly repudiated."[3]

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It is necessary to note that most courts will not extend this majority view to allow a person, who is violently attacked, to kill his assailant, without retreating from his place of business, if that business is unlawful.[4] The majority rule seems to be then that even though the right of a person to defend himself, without retreating, exists in *all* cases where the defendant is in his dwelling at the time of the attack, this right extends to a place of business *only* when the business conducted at such place is a lawful one.[5]

In some jurisdictions the doctrine of "retreat to the wall" has been frankly modified and limited as no longer applicable to modern living conditions.[6] A few courts go so far as to say that where a person is in any place where he has a lawful right to be and is unlawfully assaulted by another or put in apparent danger of his life or great bodily harm, he need not retreat but may lawfully stand his ground and meet force with force even to the extent of taking his assailant's life if it is necessary or apparently necessary to save his own life or to prevent great bodily harm.[7]

It is of interest to note the following part of the opinion written by Justice Holmes in *Brown* v. *United States*:[8]

> "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether defendant went farther than he was justified in doing; not a categorical proof of guilt."

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The Pennsylvania courts have been inclined to follow the old common-law rules as to the law of self-defense. In the recent case, *Commonwealth* v. *Fraser*,[9]

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[3] State v. Sipes, 202 Iowa 173, 209 N.W. 458, 47 A.L.R. 407 (1926); State v. Leeper, 199 Iowa 432, 200 N.W. 732, 736 (1924). Cf., 94 Ky. 322, 22 S.W. 333 (1893).

[4] Hill v. State, 194 Ala. 11, 69 S. 941, 2 A.L.R. 509 (1915), 29 Harv. L. Rev. 544 (1915-1916), 16 Col. L. Rev. 156 (1916); State v. Sorrentino, 31 Wyo. 129, 224 P. 420, 34 A.L.R. 1477 (1924); Cf., 61 Fla. 50, 54 S. 360 (1911) and 64 Cal. App. 27, 220 p. 315 (1923).

[5] Hill v. State, supra n. 4, 2 A.L.R. 509.

[6] Miller, Handbook of Criminal Law, 212 (1934) (Hornbook Series).

[7] People v. Smith, 404 Ill. 350, 88 N.E.2d 834 (1949); 40 C.J.S., Homicide, 1015, § 130.

[8] 256 U.S. 335, 343, 41 S. Ct. 501, 65 L.Ed. 961, 18 A.L.R. 1276 (1921). Note also Beard v. United States, 158 U.S. 550, 559, 15 S. Ct. 962, 39 L.Ed. 1086 (1894).

[9] 369 Pa. 273, 85 A.2d 126 (1952).

the court emphatically followed the common-law rule that a person, who—without fault—is attacked in his own home, need not retreat (even though he can do so without increasing his danger) but may lawfully resist even to the extent of taking life if necessary.

The doctrine followed in *Commonwealth* v. *Fraser* has been strictly and narrowly construed by the Pennsylvania courts. In *Commonwealth* v. *Johnson,*[10] it was held that where the house in which the homicide was committed was the property of the defendant's wife, who was also the mother of the deceased, and both the defendant and the deceased were members of her family, the ordinary rules of self-defense were alone applicable, and the rights of a householder against a violent intruder did not apply. In *Commonwealth* v. *Brown,*[11] the court held that a house cannot be said to be the owner's castle, within the meaning of the rule of law with reference to the use of force in defense of it, where it is not used as a dwelling but merely as a storehouse.

Although the Pennsylvania courts have not allowed a person violently attacked in his place of business to kill his assailant if necessary or apparently necessary to save his own life, it is interesting to note the following instruction of the court in *Commonwealth* v. *Foster*:[12]

> "We say to you that any person in that barroom, whether they were personally attacked or not, would have had a right to have killed any or all of these three men who entered for that purpose (robbery)."

From the above instruction it would seem that the Pennsylvania courts will not force a person, in his own or in another's place of business, to retreat from an assailant who has entered the premises for the purpose of committing a felony.

How far will the American courts go in modifying the common-law rule of "retreat to the wall?" This is a difficult question to answer and one which only time and experience can determine. Although some cases have carried the exceptions to extremes,[13] the exceptions created and accepted by the majority of courts are basically sound. It seems certain that the exception, as illustrated by this case, that one unlawfully attacked in his place of business need not retreat, is now firmly established as part of the criminal law of the majority of American states.[14]

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10 213 Pa. 432, 62 A. 1064 (1906).
11 14 Erie 63, 6 Som. 50 (1932).
12 364 Pa. 288, 72 A.2d 279 (1950).
13 State v. Borwich, 193 Iowa 639, 187 N.W. 460 (1922).
14 Other recent cases: State v. Sally, 233 N.C. 225, 63 S.E.2d 151 (1951); State v. Pennell, 231 N.C. 651, 58 S.E.2d 341 (1950); Bryant v. State, 252 Ala. 153, 39 S.2d 657 (1949).