Footnotes:

* Provided through internet by Stephen R. Laniel, 18 May 1996: slaniel@together.net
Mr. Laniel evidently converted footnotes at the bottom of pages to endnotes; he indicates the original numbering for each page. Having originally converted Mr. Laniel's HTML formatted text to MS Word 5.1, I have reconverted the text to HTML since Mr. Laniel's homepage seems no longer available.

[1] Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault. [p. 194 Note 1 in original.]

[2] These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations. [p. 194 Note 2 in original.]

[3] Year Book, Li. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander. [p. 194 Note 3 in original.]

[4] Winsmore v. Greenbank, Willes, 577 (1745). [p. 194 Note 4 in original.]

[5] Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." Cassoday, K., in Lavery v. Crooke, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented; Martin v. Paine, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. Bedford v. McKowl, 3 Esp. 1992 (1800); Andrews v. Askey, 8 C. & P. 7 (1837); Philips v. Hoyle, 4 Gray, 568 (1855); Phelin v. Kenderline, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, e.g., the suffering of the parent in case of physical injury to the child. Flemington v. Smithers, 2 C. & P. 292 (1827); Black v. Carrolton R.R. Co., 10 La. Ann. 33 (1855); Covington Street Ry. Col. v. Packer, 9 Bush (1872). [p. 194 Note 5 in original.]

[6] "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in Jefferys v. Boosey, 4 H. L. C. 815, 869 (1854). [p. 194 Note 6 in original.]

[7] Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61. [p. 195 Note 1 in original.]

[8] Gibblett v. Read, 9 Mod. 459 (1743), is probably the first recognition of goodwill as property. [p. 195 Note 2 in original.]

[9] Hogg v. Kirby, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. Blanchard v. Hill, 2 Atk. 484. [p. 195 Note 3 in original.]

[10] Cooley on Torts, 2d ed., p. 29. [p. 195 Note 4 in original.]

[11] 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879). [p. 195 Note 5 in original.]

[12] Scribner's Magazine, July, 1890. "The Rights of the Citizen: To his Reputation," by E.L. Godkin, Esq., pp. 65, 67. [p. 195 Note 6 in original.]

[13] Marian Manola v. Stevens & Myers, N.Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued ex parte, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition. [p. 195 Note 7 in original.]

[14] Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass quare clausum freg t. Wyman v. Leavitt, 71 Me. 227; Canning v. Williamstown, 1 Cush. 451. The allowance of damages for injury to the parents' feelings, in case of seduction, adbuction of a child (Stowe v. Heywood, 7 All. 188) or removal of the corpse of child from a burial-ground (Meagher v. Driscoll, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense. [p. 197 Note 1 in original.]

[15] "Injuria, in the narrower sense, is every intentional and illegal violation of honour, i.e., the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salowski, Roman Law, p. 668 and p. 669, n. 2. [p. 198 Note 1 in original.]

[16] "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in Millar v. Taylor, 4 Burr. 2303, 2379 (1769). [p. 198 Note 2 in original.]

[17] Nicols v. Pitman, 26 Ch. D. 374 (1884). [p. 199 Note 1 in original.]

[18] Lee v. Simpsson, 3 C. B. 871, 881; Daly v. Palmer, 6 Blatchf. 256. [p. 199 Note 2 in original.]

[19] Turner v. Robinson, 3 C. B. 871, 881; S. C. ib. 510. [p. 199 Note 3 in original.]

[20] Drone on Copyright, 102. [p. 199 Note 4 in original.]

[21] "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated has not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive, -- rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or dimunition of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." Knight Bruce, V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 695 (1849). [p. 199 Note 5 in original.]

[22] "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." Knight Bruce, V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 694. [p. 199 Note 6 in original.]

[23] Duke of Queensbury v. Shebbeare, 2 Eden, 329 (1758); Bartlett v. Crittenden, 5 McLean, 32, 41

(1849). [p. 200 Note 1 in original.]

[24]. Drone on Copyright, pp. 102, 104; Parton v. Prang, 3 Clifford, 537, 548 (1872); Jefferys v. Boosey, 4 H. L. C. 815, 867, 962 (1854). [p. 200 Note 2 in original.]

[25] "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court." Lord Eldon in Gee v. Pritchard, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 695.

It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in Woolsey v. Judd, 4 Duer, 379, 384 (1855). [p. 200 Note 3 in original.]

[26] "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

"Suppose, however, -- instead of a translation, an abridgement, or a review, -- the case of a catalogue, -- suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published, -- suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the maunscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

"By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his wordings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of

literature, is dangerous, though the danger is sometimes escaped.

"Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 693. [p. 201 Note 1 in original.]

[27] "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgements, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in Prince Albert v. Strange, I McN. & G 23, 43 (1849). "Mr. Justice Yates, in Millar v. Taylor, said, that an authors's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances."

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an inunction; and if not the more, yet, certainly, not the less, because it is an intrusion, -- an unbecoming and unseemly intrusion, -- an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man, -- if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life, -- into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 696, 697. [p. 202 Note 3 in original.]

[28] Kiernan v. Manhattan Quotation Co., 50 How. Pr. 194 (1876). [p. 202 Note 2 in original.]

[29] "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another, -- may be not only an ideal calamity, -- but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce. V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 689, 690. [p. 203 Note 1 in original.]

[30] Hoyt v. Mackenzie, 3 Barb. Ch. 320, 324 (1848); Wetmore v. Scovell, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813). [p. 203 Note 2 in original.]

[31] Woolsey v. Judd, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purpose of justice, civil or criminal, require the publication." Sir Samuel Romilly, arg., in Gee v. Pritchard, 2 Swanst. 402, 418 (1818). But see High on Injunctions, 3d ed., § 1012, contra. [p. 204 Note 1 in original.]

[32] "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The

latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right of legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in Bartlett v. Crittenden, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. Eyre v. Higbee, 22 How. Pr. (N.Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived -- proprius -- is 'one's own.'" Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal. [p. 205 Note 1 in original.]

[33] "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." Knight Bruce, V.C., in Prince Albert v. Strange, 2 DeGex & Sm. 652, 696. [p. 207 Note 1 in original.]

[34] "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'expres or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a

subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both of these cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidently placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in Tuck v. Priester, 19 Q.B.D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunctiom, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, of to sell the additional copies in this country in competition with his emplopyer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself.. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." North, J., in Pollard v. Photographic Co., 40 Ch. D. 345, 349-352 (1888).

It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, S. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or exeuted.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of theirir common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of Morison v. Moat [9 Hare, 241] and Tuck v. Priester [19 Q.B.D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., ibid. p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the smiliar cases, that the statute provision becomes applicable only when there is a publicatiom, and that before the act of registering there is property in the thing upon which the statute is to operate. [p. 209 Note 1 in original.]

[35] Duke of Queensberry v. Shebbeare, 2 Eden, 329; Murray v. Heath, 1 B. & Ad. 804; Tuck v. Priester, 19 Q.B.D. 629. [p. 210 Note 1 in original.]

[36] "If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and a fortiori, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. A fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion." [p. 211 Note 1 in original.]

[37] "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication of himself." Per Hon. Joel Parker, quoted in Grigsby v. Breckenridge, 2 Bush. 480, 489 (1857). [p. 212 Note 1 in original.]

[38] In Morison v. Moat, 9 Hare, 241, 255 (1951), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V.C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to

contract, and in others, again, it has been treated as founded upon trust or confidence, -- meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." [p. 212 Note 2 in original.]

[39] A similar growth of the law showing the development of contractual rights into rights of property is found in the law of goodwill. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "goodwill," but it was not until 1743 that goodwill received legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2, 3. [p. 212 Note 3 in original.]

[40] The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involved judicial legislation should not be taken against the property of making it. This power has been commonly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever chnging society and to apply immediate relief for every recognized wrong, have been its greatest boast.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made that that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule. [p. 213 Note 1 in original.]

[41] Loi Relative à la Presse. 11 Mai 1868.

"11. Toute publication dans un écrit periodique relative à un fait de la vie privée constitue une contravention punie d'un amende de cinq cent francs. "La poursuite ne pourra être exercée que sur la plainte de la partie interessée." Riviére, Codes Francais et Lois Usuelles. App. Code Pen., p. 20. [p. 214

Note 1 in original.]

[42] See Campbell v. Spottiswoode, 3 B. & S. 769, 776; Henwood v. Harrison, L.R. 7 C.P. 606; Gott v. Pulsifer, 122 Mass. 235. [p. 214 Note 2 in original.]

[43] "Nos moeurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du publique, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le theâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui repriment la diffamation et l'injure." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b). [p. 215 Note 1 in original.]

[44] "Celui-la seul a droit au silence absolu qui n'a pas expressément ou indirectment provoqué ou authorisé l'attention, l'approbation ou le blâme." Corc. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar and also, unhappily, too well pleased; while not entitled to the "silence absolu" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection. [p. 216 Note 1 in original.]

[45] Wason v. Walters, L.R. 4 Q.B. 73; Smith v. Higgins, 16 Gray, 251; Barrows v. Bell. Gray, 331. [p. 217 Note 1 in original.] [46] This limitation upon the right to prevent the publication of private letters was recognized early: -- "But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach." Story, J., in Folsom v. Marsh, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone; but the reasoning upon which his denial rests does

[47] Townshend on Slander and Libel, 4th ed., 18; Odgers on Libel and Slander, 2d ed., p. 3. [p. 217 Note 3 in original.]

[48] "But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but barely reached, those who knew nothing of him. It did make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossipped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it." E.L. Godkin, "The Rights of the Citizen: To His Reputation." Scribner's Magazine, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in Prince Albert v. Strange, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue. [p. 217 Note 4 in original.]

[49] See Drone on Copyright, pp. 121, 289, 290. [p. 218 Note 1 in original.]

[50] Compare the French law. "En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède été pire que le mal, si un débat avait pu s'engager sur ce terrain." Circ. Mins. Just., 4 Juin, 1868. Rivière Code Français et Lois Usuelles, App. Code Penn. 20 n(a). [p. 218 Note 2 in original.]

[51] Comp. Drone on Copyright, p. 107. [p. 219 Note 1 in original.]

[52] Comp. High on Injunctions, 3d ed., §1015; Townshend on Libel and Slander, 4th ed., §§ 417a-417d. [p. 219 Note 2 in original.]

[53] The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation:

SECTION 1. Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, professional, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest,

shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act. SECT. 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged.