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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

THE DUTY OF A COMMON CARRIER TO GUEST OF A PASSENGER.— The duty which a common carrier owes to a person assisting another who is to be a passenger was recently defined by the Supreme Court of Alabama in Mobile & Ohio Railroad Company v. Davis.¹ A petition for a rehearing was denied and so this case becomes the last expression in that state upon the question.

Tuscaloosa was the place from which the train started its course. The plaintiff Davis and his party arrived at the station about fifteen minutes before the scheduled leaving time. Davis boarded the train to deliver a ticket and baggage check to his daughter-in-law and to aid her in getting seated. The conductor had notice of plaintiff’s intention, and acquiesced in such actions. The plaintiff remained on the train until it began to move, and in attempting to alight he was injured. The negligence charged against the railroad company was first, in failing to give him a reasonable opportunity to alight, and second, in failing to blow the train’s whistle or ring its bell before leaving the station.

The theory of plaintiff’s case is that there was a breach of the duty owed to plaintiff in starting the train while he was upon it,

¹ 223 Ala. 600.
when the defendant had notice that he was there to assist his daughter-in-law and her children.

In passing on the question the court said: "Now if the train were one which was merely passing through, stopping long enough only to load and unload, and then immediately to go on, it may have been plaintiff's duty to alight immediately upon performing his mission with due diligence, and that he should know that such was his duty without the aid of the starting signals.... But in this case the evidence without conflict showed that plaintiff and his party went aboard some appreciable time before the schedule for starting. In such event, plaintiff was not under any particular duty to depart until such time before schedule as would enable the train to leave on its appointed time."

At the outset it is necessary to consider what, if any, duties are owed by a carrier to one assisting a passenger. If any duties are owed, it becomes necessary to determine from what circumstances they arise and to understand the extent to which these duties are applicable.

Ordinarily, there is no duty on the part of the carrier to assist passengers in boarding or alighting from its trains or cars. In the case of Croom v. Chicago, Milwaukee & St. Paul Railway Company, Justice Mitchell, speaking for the Supreme Court of Minnesota stated: "... a railroad company is not bound to turn its cars into nurseries or hospitals, or its employees into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity." And it has been said by courts in several cases that under certain circumstances, as where the passenger was carrying a child or was hampered by luggage, there was a duty upon the carrier to render assistance to the

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3 52 Minn. 296.
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passenger in boarding, or in alighting from, the train. If, under the facts, there was a duty to assist the passenger and a failure to perform it, the carrier would be guilty of negligence.

In the usual course of the business of a common carrier of passengers, it frequently becomes necessary for those not passengers to board the cars of the carrier for the purpose of assisting one who is a passenger, and the practice of permitting this has grown up in response to the necessity. It has been said that this practice arose out of a consideration for the security and convenience of the travelers, but it has likewise proved beneficial to the carriers, for it has resulted in an increase in passenger traffic. The person performing this service is doing it in the common interest of both the carrier and the passenger, and his entry upon the cars is with the carrier's implied permission or invitation, which entitles him to demand ordinary care for his safety from the carrier.

The carrier of passengers is under a duty to receive persons who come to help the passengers in some way, in the absence of any rules to the contrary by the carrier. Such a person is one who comes to the carrier's premises to assist a passenger onto the train or to welcome an incoming passenger. Although he is not a passenger, he is entitled to demand that he be admitted to the station; and he may, in order to assist a passenger, demand admittance to a train, at least until the carrier furnishes the proper assistance. "One who escorts a passenger to a station or to a seat in a train is not a mere trespasser, to whom the company owes no duty except to abstain from willful injuries; nor, on the other hand, is he a passenger toward whom the company is bound to the exercise of the highest degree of care and skill; but he is on the company's premises on its implied invitation, and it is bound to exercise ordinary care for his safety. This implied invitation and consequent duty to those who go to welcome the coming, or speed the parting, guest is founded on the amenities and social observances which are an inseparable concomitant of modern railway and passenger traffic."


6 Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 295; Louisville & Nashville R. Co. v. Crunk, 119 Ind. 542; Doss v. Missouri, Kansas & Texas R. Co., 59 Mo. 27.

The decisions seem to divide the cases into three classes; first, those where a person merely goes onto the train to assist a passenger with baggage and to aid him in getting seated; second, those where special circumstances exist—as when a passenger is ill, feeble, or, because of his extreme youth or old age, is unable to care for himself, and aid is given; third, those where one boards the train to transact some business of his own entirely foreign to, and having no connection with, the duty owed by the carrier to the passenger. These three classes are illustrated by the following cases:

1. In *Southern Railway Company v. Patterson*, the plaintiff was assisting an old woman who was taking passage on one of the trains of the defendant. He informed the conductor of her need of assistance, and the conductor, with knowledge that the plaintiff was not to become a passenger, requested the plaintiff to assist her. The plaintiff assisted the woman to her seat in the car, but before he had had time to return to the platform, the train started. In getting off the moving train, the plaintiff was injured. The court, in holding the railroad liable for plaintiff's injuries, said that, as defendant's agent knew of the plaintiff's intention in boarding the train, it became the duty of the defendant to use due care for the plaintiff's safety, which included a reasonable time to alight after giving the assistance; and as there had been a breach of that duty, by a failure to give time, which was the proximate cause of the injury, the carrier was liable.

2. The case of *Louisville & Nashville Railroad Company v. Crunk*, was one in which the plaintiff was assisting a sick man who had to be carried onto the train on which he was taking passage. Notice of such purpose was given to the servants of the carrier before the plaintiff entered the train. He was not given a reasonable time in which to complete his task and leave before the train started, and in getting off he was injured. The court held that under these circumstances the carrier "owed plaintiff the same duties while rendering assistance and leaving the car that it would owe to any of its passengers for hire."

This is the leading case on the proposition that under special circumstances the carrier owes the same duty to the person assisting that it owes to any passenger, and this opinion is recognized by other cases and authorities.

However, this statement of the law has been held to be extreme and has been criticized by some authorities. Others have

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8 148 Ala. 77.
9 119 Ind. 542.
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held that under certain circumstances it was reasonable and have applied the rule. "There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger, and there are cases which seem to hold that such person is a passenger. We are unable to assent to this doctrine as broadly held by some of the cases, for it seems to us that the extraordinary duty of the carrier to a passenger, is not, as a general rule, owing to such a person, although we have no doubt that the railroad company owes to him the duty of exercising all reasonable care under the circumstances. There may possibly be cases where a person assists a passenger on a train, as, for instance, where the passenger is ill, feeble, too young to care for himself or the like, where it is proper to hold that the person rendering the assistance is a passenger, but where there is no reason for rendering assistance, the person giving it can not, as we believe, be regarded as a passenger."

3. In McElvane v. Central of Georgia Railway Company, McElvane, for the purpose of collecting a debt owing to him from one who was a passenger thereon, boarded a train while it was making its usual stop at the station to unload and take on passengers. A demurrer was sustained to the declaration and the plaintiff appealed. The Supreme Court of Alabama, affirming the ruling of the trial court, said that there was no liability. "Under the facts averred in the complaint," the court said, "the plaintiff can but be regarded as a trespasser, and as such the duty of the carrier to him was not wilfully or wantonly to injure him . . . after discovery of peril."

From all of the cases on the subject it is clear that it is necessary that the carrier have notice of the person's intention merely to assist and not to become a passenger before any duty arises to exercise care for the safety of the person boarding the train. Where there is an absence of notice, the carrier owes no duty to the person on the train except not willfully or wantonly to injure him. But notice to the carrier may be actually or constructively given by the person entering the train. In the case of

12 170 Ala. 525.
13 Atlantic Coast Line R. Co. v. Watson, 215 Ala. 254.
International & Great Northern Railway Company v. Satterwhite, the court held that the circumstances of a man boarding a train late at night with an elderly lady, leaving another woman on the platform, was constructive notice of his intention not to be a passenger and was sufficient to raise the duty upon the carrier to allow him a reasonable time to aid the passenger and then leave the train. But in the case of Berry v. Louisville & Nashville Railroad Company, it was said that it is not the duty of a conductor to listen to conversations of persons about to take passage on the train; and in the absence of proof that the conductor heard or knew of the plaintiff's intention not to take passage, no duty arose for the carrier to exercise care in giving him a reasonable time to alight after rendering the assistance.

In one of the most recent cases on the subject, Kohler v. Pennsylvania Railroad Company, the court stated that a railroad company owed no duty to ascertain the purpose of those entering the train, nor did the railroad owe the plaintiff the duty of having someone at hand to whom notice of the intention could be given.

From the cases referred to heretofore, we may draw some conclusions as to the principles governing cases of this sort. In the first place, there was not any duty to permit a person to go onto the cars, but out of convenience to the passengers and as a good business policy for the carrier, this has become an almost universal practice. Where one goes to the station to assist a passenger onto a train and notifies the servants of the carrier of his intention not to take passage, he enters the cars under an implied invitation from the carrier. The implied invitation or permission is given for the performance of a duty owed by the carrier to the passenger; and the carrier owes the one giving the aid to the passenger certain duties, one of which is to allow him a reasonable time to perform his mission and to depart from the train.

In the principal case under discussion, plaintiff entered at the implied invitation of the defendant carrier to assist his party in finding a seat and to deliver the ticket and baggage check. Permission was given to do these acts for the defendant. After this task was performed, under the permission given to him, the carrier owed him the further duty to give him a reasonable time in which to leave the train in safety. But the court held that the duty did not cease here: "We think that with notice of plain-

17 109 Ky. 727.
18 305 Pa. 249.
tiff's relation to defendant's passengers, and his intention to
depart before the scheduled leaving time of the train, the duty
was owing him to give the statutory signals for departure and
an opportunity thereafter to leave the train." Can it be said
that he was doing anything for the defendant, for which the
carrier permitted him to board the cars, by remaining and talk-
ing for fifteen minutes? After he has finished his work, is he in
any better position than one there merely on his own business,
as in the case of Coleman v. Georgia Railroad & Banking Com-
pany, to whom no duty was owed except not wilfully or wan-
tonly to injure him?

In the case of Whaley v. Louisville & Nashville Railroad Com-
pany, the evidence showed that plaintiff merely entered the
train to talk to her aunt, who was to be a passenger, and to keep
her company until the train departed. The court held that, al-
though such presence was suffered without objection, the de-
fendant was under no duty to look out for her safety, that she
was a trespasser, or at best a mere licensee and the only duty
owed was to use due care to avoid injuring her after the train-
men discovered her position of danger, and also not wilfully or
wantonly to injure her.

The plaintiff Davis, after giving the assistance and having had
time to leave the train safely, had used his license, or in other
words had done all he had been given permission to do by the
carrier. Thereafter he remained on the train merely to talk to
his family and to keep them company. His relation now cannot
be said to be any better than the plaintiff in the Whaley case,
and hence no more care was due him than was due the plaintiff
there.

The authorities referred to and cited show that the exercise
of ordinary care by the carrier for the safety of one assisting a
passenger signifies a reasonable time for performing the services
and leaving the train. Granted that the question as to whether
or not a reasonable time was given is one of fact for the jury,
the fifteen minutes between the time plaintiff boarded the train
and the time when it started is clearly a "reasonable time."
This charge of negligence—failure to give a reasonable time—
is not borne out by the very facts of the case as stated in the
opinion.

It is necessary now to consider the second charge of negligence
—failure to give the statutory signals—in order to find a basis

19 84 Ga. 1.
20 186 Ala. 72.
for allowing any recovery in this case. This is predicated on
the theory that the defendant owed plaintiff the duty of giving
the statutory signals and that the failure to give the signals was
negligence which rendered the railroad liable for the damage
sustained as the proximate result. In considering this phase of
the principal case the court said: "Section 9952, Code, requires
the engineer to 'blow the whistle or ring the bell immediately be-
fore, and at the time of leaving such station or stopping place.'
It is said that this regulation is obviously for the 'benefit of the
traveling public, and others who have a right to be warned of
approaching trains,' but 'that cases may possibly occur, where
passengers, or other persons permissively on a train, are entitled
to have such signals given, as a warning to hasten their depart-
ure from a train immediately before leaving a depot or stopping
place, as the statute required to be done.'"

The court said further that the claim of want of opportunity
given him to leave would include the time necessary after the
giving of the starting signals if they were due him, and that,
as a matter of fact, such signals were due him.

The whole statute must be considered in an effort to determine
the fundamental purpose and meaning and thus to draw limita-
tions concerning the persons entitled to receive notice by the
statutory signals. Section 9952 of the Alabama Code is as fol-
low: "The engineer or other person having control of the run-
ing of a locomotive on any railroad, must blow the whistle or
ring the bell at least one-fourth of a mile before reaching any
public road crossing, or any regular station or stopping place
on such railroad, and continue to blow the whistle or ring the
bell at short intervals, until it has passed such crossing, or
reached such station or stopping place. He must also ring the
bell or blow the whistle immediately before, and at the time of
leaving such station or stopping place; and also immediately be-
fore entering any curve crossed by a public road, where he can-
ot see at least one-fourth of a mile ahead, and must approach
and pass such crossing at such speed as to prevent accident in
the event of an obstruction at the crossing. He must also blow
the whistle or ring the bell, at short intervals, on entering into,
or while moving within or passing through any village, town, or
city. He must also, on perceiving any obstruction on the track,
use all the means within his power, known to skillful engineers,
such as applying brakes and reversing engine, in order to stop
the train.'"

In the case of Southern Railway Company v. Norwood,22 the
Supreme Court of Alabama was called upon to construe this

22 186 Ala. 49.
same statute. The court stated that it would not undertake to define with exactitude the restrictions to be placed upon the application of this statute as to passengers, or to persons lawfully attending them on the trains. In conclusion the court said: "It will suffice to say that it is entirely clear that it was not intended for, and cannot be applied to the case of, those passengers who, having reached their destination, and having been accorded ample time for alighting, neglect to do so and remain on the train without permission of those in charge."

The case of *Lacey-Buek Iron Company v. Holmes*\(^{23}\) was another in which the same statute was construed. The plaintiff was in the employ of the defendant and while at work was knocked from the top of a car. It was claimed that there was a failure to give the signals which amounted to negligence entitling plaintiff to recover. The court, held that, under the facts alleged, the statute did not apply to the plaintiff, since it was enacted for the safety of the public and those likely to be on the right of way.

In *Central of Georgia Railway Company v. Martin*,\(^{24}\) also, an attempt was made to invoke the statute. This action was brought for injuries resulting from a collision between two trains. One train was stationary and the one on which plaintiff was riding came around a curve without giving signals and struck the other. The court held that the statute was not applicable to such a set of circumstances.

Again, in the case of *Lewis v. Southern Railway Company*\(^{25}\) this statute was construed and its purpose stated. In holding it inapplicable the court said that its purpose was "to warn and protect persons who, at a public crossing, pass across and directly on the track, and who would be in danger of being struck and run over by a passing train."

An attempt was made to apply this same statute in the case of *Louisville & Nashville Railway Company v. Markee*,\(^{26}\) for the benefit of a section foreman who was struck by a train coming around a curve. No signals were given and the plaintiff claims that this was a breach of duty owed to him for which he is entitled to recover. The court held that the statute was not applicable for his benefit.

The leading case in Alabama on this proposition is *Alabama Great Southern Railway Company v. Hawk*.\(^{27}\) The court said

\(^{23}\) 164 Ala. 96.
\(^{24}\) 138 Ala. 531.
\(^{25}\) 143 Ala. 133.
\(^{26}\) 103 Ala. 160.
\(^{27}\) 72 Ala. 112.
in this case: "These precautions, so far as applicable to persons, are intended obviously for the benefit of the traveling public, and others who have a right to be warned of approaching trains, for their personal protection against injury. Passengers, who are on the trains, are not ordinarily included in the letter or spirit of the statute. They do not need such signals of warning for their protection, and they cannot therefore, be construed to be entitled to them. . . . It may be proper to add that cases may possibly occur, where passengers, or other persons permissively on a train, are entitled to have such signals given, as a warning to hasten their departure from a train immediately before leaving a depot, or stopping place, as the statute requires to be done."

That part of the opinion in the Davis case regarding the necessity for giving the statutory signals was based on the Norwood and Hawk cases—both Alabama cases—and upon the case of Doss v. Missouri K. & T. R. Co.—a Missouri case. In the former, the court expressly refused to define the restrictions to be placed on the application of the statute to passengers or those assisting them. The Hawk case comes the closest to supporting the decision of the Davis case, but the statement therein was mere dictum. No attempt was made to state the law as it is, but as was said, "cases may possibly occur, where passengers, or other persons permissively on a train, are entitled to have such signals given, etc." It therefore clearly appears that there is no authority upon which to base a decision that such signals should be given to one on board a train for the purpose of assisting a passenger.

The statute was obviously enacted to protect persons who might be crossing upon and over the tracks and might be struck and run over by passing trains. To extend this statute by making it applicable to persons upon trains would require legislative enactment and not judicial law-making, as is here attempted. It is likewise worthy of note that in the numerous cases in Alabama involving injuries to passengers, or to persons assisting passengers on the train, liability of the railroad had never been based on a violation of the statute requiring notice to be given for the plaintiff's benefit, although the statute had been in force there for a number of years. The plaintiff in the Davis case was not in the class of persons for whose benefit the statute was enacted and hence should not have been allowed to avail himself of its violation as a basis for his action.

In conclusion, we may again consider the two charges of negligence on the part of the railroad company: first, failure to give plaintiff a reasonable opportunity to alight, and, second, failure
to blow the whistle or ring the bell before leaving the station. From the facts of the case, the plaintiff was given a reasonable time in which to alight after performing his duties. From a construction of the statute it is clear that the railroad company owed him no duty to give the signals. Because there was a failure of proof of the two breaches of duty alleged to be owed by the defendant to the plaintiff there should be no recovery unless plaintiff was wilfully or wantonly injured by the defendant. The facts in regard to the failure to allow plaintiff a reasonable time do not show that the injury was wilfully or wantonly inflicted, and the failure of the engineer to observe the requirements of the statute, if they were owed, is an act of simple, but not wanton, negligence.²⁸

This decision, in allowing a recovery under the facts, unwarrantedly extends the doctrine laid down in the adjudged cases on the subject.

BILL IN EQUITY TO COMPEL POLICE TO SURRENDER RECORDS OF FINGERPRINTS.—In February, 1928, Frank Bartletta filed a bill for injunction against the Commissioner of Public Safety, and the Chief of Police to compel them to surrender to him the photographs, Bertillon measurements, and fingerprints of the complainant which had been made by police officers. The facts of the case, Bartletta v. McFeeley,¹ are briefly these: Mr. Bartletta was arrested following a raid by police officers on the printing and publishing company of which he was president and principal stockholder. The raid had resulted in the seizure of tickets, plates, and other matter pertaining to lotteries in violation of the crimes act of New Jersey. Immediately after his arrest he was photographed and fingerprinted, being forced to submit to both under protest. The photographs and fingerprints were made by the officer who customarily made them, acting under instructions of the inspector whose duty it was to make these records. The plaintiff was an old resident of the community, prominent in business and political affairs of the city. The defendant, at that time Commissioner of Public Safety, in charge of the police department, was present when the photographs and fingerprints were taken but did not interfere in behalf of the accused, although the two men had been friends and at one time political allies. The fact that their personal relations were at this time unfriendly and that they had become bitter opponents

²⁸ Central of Georgia Ry. Co. v. Freeman, 134 Ala. 354; Louisville & Nashville R. Co. v. Loyd, 186 Ala. 119.
¹ 107 N. J. Eq. 141.
politically is significant, in that the question of malice was raised on the trial. The complainant contended that the photographing and fingerprinting before conviction without his consent was unlawful.

The duty of preserving the peace, of preventing crime, of detecting and arresting offenders lies with the chief of police and subordinate officers to whom authority to discharge this duty has been delegated. To do this efficiently, and to accomplish the larger purpose of protecting the public welfare, it becomes necessary for police officers to do many acts that are incidental to those specifically prescribed by statute or established by custom. The selection and employment of the means that best effect the work of its officers is an administrative question to be determined by the department of police at its discretion.

The police records in all large cities for the past century have included photographs of criminals. The existence of these records, commonly known as the Rogues' Gallery, has been recognized by police authorities as a valuable aid in identifying habitual criminals, and in effecting arrest or recapture. Such galleries include not only photographs of those charged with crime in local courts, but records of criminals from the country at large, for it has been customary to send pictures and measurements of the criminals of a community to be filed for use in police departments in the various large cities of the United States. The power of the police to compile and circulate such records has been questioned in numerous recent cases in which the complainants have charged that police officers have exceeded their authority in taking photographs of alleged criminals and making them a part of permanent police records. The complainants in these cases alleging that police officers have exceeded their authority, claim injury to character and reputation, and ask that the records be destroyed or that all copies thereof be delivered to complainant. Whether a bill in equity will lie against the chief of police and other municipal authorities to compel them to surrender to the complainant the photographs, Bertillon measurements, and fingerprints of the complainant made by the police, has become a question of interest.

There are two phases of this question to be considered. First, does the taking of complainant's photograph, measurements, and fingerprints by police officers create a cause of action? Second, assuming that a cause of action arises, has complainant a remedy.

2 Owen v. Partridge, 82 N. Y. S. 248.
3 Bartletta v. McFeeley, 107 N. J. Eq. 141.
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...to compel the delivery of such records to him? The determination of the first phase involves the question of the power of the police to photograph and measure a criminal.

The case of *Mabry v. Kettering*\(^4\) recognizes as accepted authority the rule that police officers act within their rights in photographing, for the purpose of identification, persons in their custody charged with crime. *Shaffer v. United States*\(^5\) holds that such records may be made for the purpose of furnishing evidence, and may be used on the trial to aid in identification by a witness.\(^6\)

The right to photograph after conviction, a right generally recognized, is illustrated in *In re Molineux*.\(^7\) The complainant was convicted of murder and confined in the penitentiary awaiting execution. During his imprisonment he was photographed, and his Bertillon measurements and fingerprints were taken by authority of a statute requiring it to be done "to facilitate identification of criminals and to aid in recapture after escape." A new trial resulted in acquittal. His bill, asking that the Superintendent of State Prisons be compelled to deliver the records to him, was dismissed. The court held that such photographs and measurements were public records, beyond the control of the defendant except for safekeeping and use; and, further, that the custodian of a public record cannot give it up without authority from the same source which required it to be made. An act was passed to cure the situation arising in cases similar to *In re Molineux*.\(^8\)

That the New York courts, prior to the enactment of this statute, considered the relief asked in the Molineux case as beyond the jurisdiction of equity is shown in a further statement from the opinion, that it would be a "usurpation of power for an officer to surrender the records or for the court to direct him to do it."

In the absence of express statutory authority, the right to photograph before conviction has been denied in some jurisdictions as a violation of the personal rights of the accused. The

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\(^4\) 89 Ark. 551.
\(^7\) 177 N. Y. 395.
\(^8\) The statute provided that "Upon determination of criminal proceedings against a person in his favor, every photograph and plate taken, and all duplicates shall be returned on demand by the police officer."
case of *Gow v. Bingham* holds the photographing of accused before conviction to be unlawful, basing its decision on the ground that such act is a violation of the right of personal liberty, a natural right of every individual, shielded by the constitution from interference by any department of government. Conceding that this individual right is not absolute, but must at times yield to the public good, the court says that any invasion of the individual's right of liberty is not to be determined by the police as an incident of their discretionary power to act for the public protection, but that the sole power to declare what those invasions of natural rights are to be, rests with the legislature.

On the contrary, a number of recent decisions hold the photographing of alleged criminals before conviction to be lawful. In *Mabry v. Kettering*, the complainant was photographed while in the custody of Federal officers. The photographs were taken before conviction. Complainant's bill was filed to restrain the development of the photographic plates. Relief was denied, the court stating, "Public officers charged with the enforcement of criminal laws, and having in their custody individuals charged with crime, may use photographs for the purpose of identifying the individual accused."

Photographing before conviction was held lawful in *State v. Clausmier*. The court there pointed out that such act was analogous to searching a prisoner for articles to be used in evidence, and to prevent his escape. *Shaffer v. United States* is in accord with these cases. *Bartletta v. McFeeley*, the principal case, recognizes no distinction between the right to photograph after conviction and the right to photograph those in custody before trial and conviction. The court says: "If the police have no right to fingerprint and photograph a person before conviction, they would seem to be equally without right after conviction. By conviction of crime, the convict becomes liable only to the punishments which are prescribed by law. No statute and no rule of common law imposes as part of the penalty that the convict must submit to be photographed and fingerprinted."

9 107 N. Y. S. 1011.
10 89 Ark. 551.
11 154 Ind. 599.
13 107 N. J. Eq. 141.
14 The same view is expressed in *Downs v. Swann*, 111 Md. 53.
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The case of *Owen v. Partridge*\(^{15}\) raises the question whether police officers may lawfully photograph a person arrested on suspicion only. The complainant was there suspected of being implicated in a larceny. He was photographed and his fingerprints taken. When he was released from the charge, he demanded that the records be destroyed. They were, however, kept on file at police headquarters, and three years later his photograph appeared in a newspaper with a statement that the picture was in the Rogues' Gallery. By this means the complainant was identified as being implicated in a swindle, and was arrested. His bill asked that the publication of his photograph, etc., be restrained, and for mandatory injunction to compel the officers to destroy the negatives and copies. The case does not decide that the police have a right to photograph a person merely suspected of a crime, but does decide that where the suspicion is well founded, the right exists; but where the arrest is on hearsay only, photographing a suspected criminal is an interference with personal rights.

The decision in *Schulman v. Whitaker*\(^{16}\) is put on this ground, holding that publishing an innocent man's photograph in the Rogues' Gallery gives rise to sufficient grounds to sustain an injunction. These cases, however, are to be distinguished from the Bartletta case where complainant was photographed immediately after arrest, but where arrest was on sufficient evidence to establish his guilt.

The cases that hold for the plaintiff, on the ground that photographing is in violation of the right of privacy, are in the minority. A line of recent decisions repudiate the doctrine of the right of privacy as a ground for relief in equity. This right is defined in *Mabry v. Kettering*\(^{17}\) as "the right of an individual to invoke the jurisdiction of chancery to restrain the use of his photograph without his consent." *Owen v. Partridge*\(^{18}\) in considering the right of privacy in connection with the power of police officers to photograph alleged criminals, cites, as repudiating the doctrine, the case of *Roberson v. Rochester Folding Box Company*\(^{19}\) where it is stated, "An examination of the authorities leads us to the conclusion that the so-called right of privacy has not yet found an abiding place in our jurisdiction, and as we view it, the doctrine cannot now be incorporated with-

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\(^{15}\) 82 N. Y. S. 248.
\(^{16}\) 117 La. 704.
\(^{17}\) 89 Ark. 551.
\(^{18}\) 82 N. Y. S. 248.
\(^{19}\) 171 N. Y. 538.
out doing violence to settled principles of law by which the profes-
sion and the public has long been guarded."

Whether the taking of photographs and fingerprints is a viola-
tion of the plaintiff's constitutional rights was considered in
Shaffer v. United States. There it was held that such photo-
graphing does not violate the provision that a person cannot
be required to testify against himself, or to furnish evidence
be used against him where no excessive force or illegal dure
is employed in taking the picture. State v. Miller is autho
for the proposition that the condition on which photographs
and fingerprints are admissible in evidence is that the defend-
ant has not been forced to contribute them involuntarily so as
to cause him to serve as a witness against his will. The ques-
tion whether the police can lawfully fingerprint a person with-
out his consent was raised in State v. Cerciello and State v.
Zdanowicz. Neither case, however, decides that such evidence
even though forcibly obtained is inadmissible.

The conclusion to be drawn from these cases is that it is
within the power of police officers to photograph and take Ber-
tillon measurements and fingerprints; the power is discretion-
ary; and it may be exercised as well before as after conviction.

It is clear, however, that the right must be exercised in good
faith, and strictly confined to the purposes for which it was
given; i.e., for identification, to prevent escape and to facilitate
recapture, and to furnish evidence at the trial. An abuse of dis-
cretion under circumstances that give rise to an inference of
malice, or any willful misuse of the power actuated by improper
motives, constitutes the police officer an offender against the
rights of the accused.

That a cause of action exists where the acts of the defendant
are unlawful or oppressive is conceded in all the cases in which
the question has been raised. The case of Gow v. Bingham holds
that the photographing and measuring of a criminal is an
assault, and it has frequently been held that these acts consti-
tute a libel. In both classes of cases the remedy asked was an
injunction. In Francis v. Flinn the court says, "In the ab-
sence of special statutory authorization, a court of equity has
no jurisdiction to restrain a libel." The case of Willis v. O'Con-

21 71 N. J. Law 527.
22 86 N. J. Law 309.
23 69 N. J. Law 619.
24 107 N. Y. S. 1011.
25 118 U. S. 385.
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noll26 states the rule to be, "And yet, for the protection or vindication of his good name the citizen must be remitted to his remedy at law—to a civil action, or criminal prosecution, or both. This must be so, for a court of chancery in this country has never had the power to enjoin the commission of such a wrong [libel]. . . . 'Courts of equity will not restrain publication of libels, or words of a libelous nature, even though such publications are calculated to injure the credit, business, or character of the person aggrieved, and he will be left to pursue his remedy at law.'"

In Kearney v. Laird27 the court speaks of the jurisdiction of equity to enjoin police officers from performing their duties in the exercise of general police powers: "It would seem that a sound public policy forbids the courts should interpose by injunctive process to hamper or thwart the power and discretion of the police touching the performance of the duties which the law casts upon them . . ." In City of Chicago v. Wright,28 injunction against the police was denied, the opinion stating, "Was it ever before heard of that it was within the province of a court of equity to overrule the policy of the state . . . and thus shackle the hands of state officers whose functions relate to the preservation of peace and security? . . . The administration of justice, the preservation of public peace and the like, although confided to local agencies, are essentially matters of public concern."

The case of Delaney v. Flood29 states the underlying reason for the seemingly harsh rule "that an innocent person, upon accusation of crime may be arrested and ruined in his character and property, and the damage he sustains is 'damnum absque injuria' unless the case is such that he can maintain an action for damages at law," to be that "he is exposed to the risks of such damage by being a member of an organized society, and his compensation for such risks may be found in the general welfare which society is organized to promote."

The decision in the principal case here reviewed, as well as the cases and authorities supporting it, establish a rule well founded in reason and promotive of a policy intended to effect a greater and more efficient protection against crime. The consistent refusal of courts of equity to interfere by injunction with acts of police officers which tend to make effective an organized system of identification will do much to lessen opportunities of criminals to evade detection and escape trial and punishment.

26 231 Fed. 1004.
28 69 Ill. 318.
29 183 N. Y. 323.