171 N.Y. 538

Court of Appeals of New York.

ROBERSON
v.
ROCHESTER FOLDING BOX CO. et al.
June 27, 1902.

PARKER, C. J.

(Brief legal history omitted)

The complaint alleges that the Franklin Mills Company, one of the defendants, was engaged in a general milling business and in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold, and circulated about 25,000 lithographic prints, photographs, and likenesses of plaintiff, made in a manner particularly set up in the complaint; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, 'Flour of the Family,' and below the portrait, in large capital letters, 'Franklin Mills Flour,' and in the lower right-hand corner, in smaller capital letters, 'Rochester Folding Box Co., Rochester, N. Y.'; that upon the same sheet were other advertisements of the flour of the Franklin Mills Company; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons, and other public places; that they have been recognized by friends of the plaintiff and other people, with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name has been attacked, causing her great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell, and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of $15,000. The complaint prays that defendants be enjoined from making, printing, publishing, circulating, or using in any manner any likenesses of plaintiff in any form whatever; for further relief (which it is not necessary to consider here); and for damages.

It will be observed that there is no complaint made that plaintiff was libeled by this publication of her portrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize. Indeed, her grievance is that a good portrait of her, and therefore one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of

defendants' impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but, as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and, as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of $15,000. There is no precedent for such an action to be found in the decisions of this court. Indeed, the learned judge who wrote the very able and interesting opinion in the appellate division said, while upon the threshold of the discussion of the question: 'It may be said, in the first place, that the theory upon which this action is predicated is new, at least in instance, if not in principle, and that few precedents can be found to sustain the claim made by the plaintiff, if, indeed, it can be said that there are any authoritative cases establishing her right to recover in this action.' Nevertheless that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a 'right of privacy'; in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law; nor, so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness, and no inconsiderable ability, in the Harvard Law Review (volume 4, p. 193) in an article entitled 'Rights of a Citizen to His Reputation.' The so-called 'right of privacy' is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other, for the principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances. If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the

feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme, and therefore unjustifiable, application of an old principle. The court below properly said that: 'While it may be true that the fact that no precedent can be found to sustain an action in any given case is cogent evidence that a principle does not exist upon which the right may be based, it is not the rule that the want of a precedent is a sufficient reason for turning the plaintiff out of court,' provided (I think should be added) there can be found a clear and unequivocal principle of the common law, which either directly or mediately governs it, or which, by analogy or parity of reasoning, ought to govern it. It is undoubtedly true that in the early days of chancery jurisdiction in England the chancellors were accustomed to deliver their judgments without regard to principles or precedents, and in that way the process of building up the system of equity went on, the chancellor disregarding absolutely many established principles of the common law. 'In no other way,' says Pomeroy, 'could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions.' Pom. Eq. Jur. § 48. In their work the chancellors were guided not only by what they regarded as the eternal principles of absolute right, but also by their individual consciences; but after a time, when 'the period of infancy was passed, and an orderly system of equitable principles, doctrines, and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and 'the conscience,' which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles, and limited by established doctrines to which the court appeals, and by which it tests the conduct and rights of suitors,--a juridical, and not a personal, conscience.' Pom. Eq. Jur. § 57.

The importance of observing the spirit of this rule cannot be overestimated; for, while justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system, which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts. So, in a case like the one before use, which is concededly new to this court, it is important that the court should have in mine the effect upon future litigation and upon the development of the law which would necessarily result from a

step so far outside of the beaten paths of both common law and equity, assuming--what I shall attempt to show in a moment--that the right of privacy, as a legal doctrine enforceable in equity, has not, down to this time, been established by decisions. The history of the phrase 'right of privacy' in this country seems to have begun in 1890, in a clever article in the Harvard Law Review,--already referred to,--in which a number of English cases were analyzed, and, reasoning by analogy, the conclusion was reached that, notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction, in reality such prevention was due to the necessity of affording protection to thoughts and sentiments expressed through the medium of writing, printing, and the arts, which is like the right not to be assaulted or beaten; in other words, that the principle actually involved, though not always appreciated, was that of an inviolate personality, not that of private property. This article brought forth a reply from the Northwestern Review (volume 3, p. 1) urging that equity has no concern with the feelings of an individual, or with considerations of moral fitness, except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property, and that the English authorities cited are consistent with such view. Those authorities are now to be examined, in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

The first case is Prince Albert v. Strange, 1 Macn. & G. 25; Id., 2 De Gex & S. 652. The queen and the prince, having made etchings and drawings for their own amusement, decided to have copies struck off from the etched plates for presentation to friends and for their own use. The workman employed, however, printed some copies on his own account, which afterwards came into the hands of Strange, who purposed exhibiting them, and published a descriptive catalogue. Prince Albert applied for an injunction as to both exhibition and catalogue, and the vice chancellor granted it, restraining defendant from publishing, 'at least by printing or writing, though not by copy or resemblance,' a description of the etchings. An examination of the opinion of the vice chancellor discloses that he found two reasons for granting the injunction, namely, that the property rights of Prince Albert had been infringed, and that there was a breach of trust by the workman in retaining some impressions for himself. The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property.

(Court's discussion of other cases in which this "right to privacy is omitted)

An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. I do not say that, even under the existing law, in every case of the character of the one before us, or, indeed, in this case, a party whose likeness is circulated against his will is without remedy. By section 242 of the Penal Code any malicious publication by picture, effigy, or sign, which exposes a person to contempt, ridicule, or obloquy, is a libel, and it would constitute such at common law. 'Malicious,' in this definition, means simply 'intentional

and willful.' There are many articles, especially of medicine, whose character is such that using the picture of a person, particularly that of a woman, in connection with the advertisement of those articles, might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published. The manner or posture in which the person is portrayed might readily have a like effect. In such cases both a civil action and a criminal prosecution could be maintained. But there is no allegation in the complaint before us that this was the tendency of the publication complained of, and the absence of such an allegation is fatal to the maintenance of the action, treating it as one of libel. This case differs from an action brought for libelous words. In such case the alleged libel is stated in the complaint, and, if the words are libelous per se, it is unnecessary to charge that their effect exposes the plaintiff to disgrace, ridicule, or obloquy. The law attributes to them that result. But where the libel is a picture, which does not appear in the record, to make it libelous there must be a proper allegation as to its character.

The judgment of the appellate division and of the special term should be reversed, and questions certified answered in the negative, without costs, and with leave to the plaintiff to serve an amended complaint within 20 days, also without costs.

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