

ROBERSON

v.

ROCHESTER FOLDING BOX CO. et al.

June 27, 1902.

64 N.E. 442 (N.Y. 1902)

PARKER, C. J.

The appellate division has certified that the following questions of law have arisen in this case, and ought to be reviewed [and decided] by this court: (1) Does the complaint . . . state a cause of action [at law for damages, or] (2) a cause of action [in equity for injunctive relief?]

The complaint alleges that . . . 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 . . . ; that 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 . . . . [The complaint requested the defendants be enjoined from making or using in any manner any likenesses of plaintiff and requested damages of \$15,000.00.]

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 . . . .

There is no precedent for such an action to be found in the decisions of this court. . . . Nevertheless [the court below] 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 . . . does its existence seem to have been asserted prior to about the year 1890, when it was presented . . . in the Harvard Law Review . . . .

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. . . .

If such a principle be incorporated into the body of the law through [judicial precedent], 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. . . . [The stated problems] 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 [harm] 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. . . .

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 [similar] to it in the essential facts. So, in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind 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, [because] the right of privacy, as a legal doctrine . . . has not . . . 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 [when deciding cases involving publication] the principle actually involved, though not always appreciated, was that of an inviolate personality, not that of private property. . . .

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*. . . . 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 [judge] 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 [judge] 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.

[Similarly, other English cases cited in the Harvard article do not support a common law action for invasion of privacy] In not one of these cases, therefore, was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust, or that plaintiff had a property right in the subject of litigation which the court could protect.

An examination of [American] 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. [However,] even under the existing law . . . a party whose likeness is circulated against his will [has a remedy under the Penal Code] for 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. . . . [W]here 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 [is] reversed, and the questions certified answered in the negative.

GRAY. J. (dissenting). . . These defendants stand before the court, admitting that they have made, published, and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves; that these portraits have been conspicuously posted in stores, warehouses, and saloons in the vicinity of the plaintiff's residence, and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her, and to render her ill; and yet claiming that she makes out no cause of action. They say that no law on the statute books gives her a right to action, and that her right to privacy is not an actionable right at law or in equity.

[In a case cited by the majority, the court stated,] 'that courts have power, in some cases, to enjoin the doing of an act, where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no 'property' as that term is usually used, is involved in the subject.' That the individual has a right to privacy, which he can enforce, and which equity will protect against the invasion of, is a proposition which is not

opposed by any decision in this court, and which, in my opinion, is within the field of accepted legal principles. . . .

If the right of privacy exists, and this complaint makes out a case of its substantial violation, I think that the award of equitable relief by way of an injunction preventing the continuance of its invasion by the defendants will not depend upon the complainant's ability to prove substantial pecuniary damages, and, if the court finds the defendants' act to be without justification, and for selfish gain and purposes, and to be of such a character as is reasonably calculated to wound the feelings and to subject the plaintiff to the ridicule or to the contempt of others, that her right to the preventive relief of equity will follow, without considering how far her sufferings may be measurable by a pecuniary standard.

The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. This common law regarded his person and property as inviolate, and he has the absolute right to be let alone. . . . The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mold of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence if equity were powerless to extend the application of the principles of common law or of natural justice in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social or commercial conditions.

[It has been] observed of equity that it is an agency 'by which law is brought into harmony with society,' and that it is one of the factors which operate in judicial evolution. It succeeds . . . those judicial assumptions through which a rule of law is modified in its operation, and it precedes legislation. . . . Equity has neither fixed boundaries nor logical subdivisions, and its origin . . . was that there was a wrong for which there was no remedy at law.

Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form [at the invitation of] their owner. . . . But if it is to be permitted that the portraiture may be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement

as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

. . . . Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it . . . .

I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions. . . . [i]f her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. Judge Colt, of the United States court, in . . . a case involving the same question of an invasion of the right of privacy, with respect to the publication of a printed likeness . . . expressed the opinion that: '. . . I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property, as well as a personal, right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk.' . . .

The right to grant the injunction does not depend upon the existence of property which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person.

It would be, in my opinion, an extraordinary view, which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained and made use of for commercial purposes. . . .

O'BRIEN, CULLEN, and WERNER, JJ., concur with PARKER, C. J. BARTLETT and HAIGHT, JJ., concur with GRAY, J.

Judgment reversed, etc.

N.Y. 1902