Abigail M. Roberson, an Infant, by Margaret E. Bell, her Guardian ad Litem, Respondent, v. The Rochester Folding Box Company et al., Appellants

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

171 N.Y. 538; 64 N.E. 442; 1902 N.Y. LEXIS 881

February 13, 1902, Argued

June 27, 1902, Decided

1. [The defendant demurred] to the complaint … upon the ground that the complaint does not state facts sufficient to constitute a cause of action. [The courts below overruled the demurrer.]

2. [We must decide] whether whether the complaint … can be said to show any right to relief either in law or in equity. [We hold that it does not hold any right to relief.]

3. The complaint alleges that the Franklin Mills Co., one of the defendants, was engaged … 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…; 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 Co.; 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 [***9] 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 [*543] great distress and suffering both in body and mind….

4. [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, [***10] therefore, one easily recognized, has been used to attract attention [**443] 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… 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.

5. There is no precedent for such an action to be found in the decisions of this court…. 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 … in an article entitled, "The Right of Privacy."

6. 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 [***12] 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….

7. If such a principle be incorporated into the body of the [*545] law through the [process of judicial precedent], the attempts [***13] 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 [through judicial precedent], 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. [Thus, a] vast field of litigation … would necessarily be opened up should this court hold that privacy exists [***14] as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

8. 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 … necessarily [constrained] by precedents….

9. 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, assuming -- what I shall attempt to show in a moment -- that the right of privacy as a legal doctrine enforceable [***17] in equity has not, down to this time, been established by decisions.

10. 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 … an inviolate personality, not that of private property.

11. … 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.

12. The first case is *Prince Albert v. Strange (1 Macn. & G. 25;* [*548] *2 De G. & 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 … a description of the etchings. [The] vice-chancellor … found two reasons for granting the injunction, namely, that the property rights of Prince [***19] 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….

13. [In similar ways, the English cases cited in the Harvard article do not actually support a common law cause of action for invasion of privacy.] In not one of these cases, therefore, was it the basis of the [*550] decision that the [***22] 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….

14. [Of the American cases offered in support of a common law right to privacy, none actually does so when the decisions are examined in detail.] An examination of the authorities [thus] 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. [Thus, there is no common law right of privacy in New York.]

15. [That does not mean] 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 [**448] is circulated against his will is without remedy. By section 245 of the Penal Code any malicious publication by picture, effigy or sign which exposes [*557] [***35] 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 [items], especially of medicine, whose character is such that using the picture of a person … in connection with the advertisement of those [items] 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….

16. The judgment of the Appellate Division and of the Special Term [is] reversed…

DISSENT:

17. 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, yet, claiming that she makes out no cause of action. They say [*559] that no law on the statute books gives her a right of action and that her right to privacy is not an actionable right, at law or in equity.

18. 1Our consideration of the question thus presented has not been foreclosed by the decision in *Schuyler v. Curtis, (147 N. Y. 434).* In that case, it appeared that the defendants were intending to make, and to exhibit, at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, … conspicuous in her lifetime for her philanthropic work, to typify "Woman as the Philanthropist" [***39] and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the "Representative Reformer." The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to restrain them from carrying out their intentions as to the statue of Mrs. Schuyler; upon the grounds, in substance, that they were proceeding without his consent, … or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler's memory associated with principles, which Miss Susan B. Anthony typified and of which Mrs. Schuyler did not approve. His right to maintain the action was denied and the denial [**449] was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime and that, whatever her right had been, in that respect, it died with her. The existence of the individual's right to be protected against [***40] the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. "It may be admitted," Judge Peckham ob-

served, when delivering the opinion of the court, "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, [*560] 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*."…

19. [The majority misinterprets both the English and the American precedents.] Security of person is as necessary as the security of property; [***47] 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.

20. [*564] Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases …; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of … legal principles…. I think that such a view is unduly restricted, too, by a search for some property, which has been invaded by the defendants' acts. 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…. It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches…. 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. The right would be conceded, if she had sat for her photograph; but if her face, or her portraiture, has a value, the value is hers exclusively; until the use be granted away to the public….

21. 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…..