

ROBERSON v. ROCHESTER FOLDING BOX CO.

171 N.Y. 538, 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 by this court: (1) Does the complaint herein state a cause of action at law against the defendants, or either of them? (2) Does the complaint herein state a cause of action in equity against the defendants, or either of them? These questions are presented by a demurrer to the complaint, which is put upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

. . . 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 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.

Pollard v. Photographic Co., 40 Ch. Div. 345, is certainly not an authority for granting an injunction on the ground of threatened injury to the feelings, although it is true, as stated in the opinion of the appellate division, that the court did say in the course of the discussion that the right to grant an injunction does not depend upon the existence of property; but the decision was, in fact, placed upon the ground that there was a breach of an implied contract. The facts, briefly stated, were that a photographer had been applied to by a woman to take her photograph, she ordering a certain number of copies, as is usual in such cases. The photographer made copies for himself, and undertook to exhibit them, and also sold copies to a stationer, who used them as Christmas cards. Their action was restrained by the court on the ground that there was an implied contract not to use the negative for any other purpose than to supply the sitter with copies of it for a price. During the argument of plaintiff’s counsel the court asked this question: “Do you dispute that, if the negative likeness were taken on the sly, the person who took it might exhibit copies?” Counsel replied, “In that case there would be no consideration to support a contract.”

In *Gee v. Pritchard*, 2 Swanst. 402, B. attempted to print a private letter written him by A., and he was restrained on the ground that the property of that private letter remained in A., B. having it only for the qualified purpose for which it was sent to him; the basis of the decision, therefore, being the idea of plaintiff’s property in the thing published as being the product of his mind, written by him, and put into the hands of B. for a limited purpose only. The same judge—Lord Eldon—also granted the injunction in *Abernethy v. Hutchinson*, 3 Law J. Ch. 209, restraining the publication in the *Lancet* of lectures delivered at a hospital by the plaintiff. The court expressed a doubt in that case whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground that it was a breach of confidence on the part of a pupil who was admitted to hear the

lectures to publish them, inasmuch as they were delivered for the information of the pupils, and not for sale and profit by them.

Mayall v. Higbey, 1 Hurl. & C. 148, was also a case where an injunction was granted and nominal damages awarded on the ground that plaintiff had a property right in certain photographic negatives which he had loaned to a person, who subsequently became insolvent, and whose assignee, without right, sold them to defendant who printed copies from them, which he published and sold.

In *Duke of Queensbury v. Shebbeare*, 2 Eden, 329, the Earl of Clarendon delivered to one Gwynne an original manuscript of his father's "Lord Clarendon's History." Gwynne's administrator afterwards sold it to Shebbeare, and the court, upon the application of the personal representatives of Lord Clarendon, restrained its publication on the ground that they had a property right in the manuscript which it was not intended that Gwynne should have the benefit of by multiplying the number of copies in print for profit.

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 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. . . .

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.

GRAY, J. (dissenting).

* * *

. . . Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. 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.

. . . 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. *Woolsey v. Judd*, 4 Duer, 399; *Gee v. Pritchard*, 2 Swanst. 402; *Abernethy v. Hutchinson*, 3 Law J. Ch. 209; *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901. 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 set for the 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. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. . . .

* * *

A careful consideration of the question presented upon this appeal leads me to the conclusion that the judgment appealed from should be affirmed.

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

PITT v. YALDEN

4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767)

Mr. Sarjeant Nares and Mr. Dunning shewed cause, yesterday, "why the attorney for the plaintiff should not pay the debt and costs;" for not having declared against the defendant within two terms; by the omission whereof the defendant obtained his discharge. They disputed the meaning of the rule made in Tr. 2 G. 1, 1716; and also the attorney's being charged with the debt

in this summary way: it ought, at least, to be left to a jury, to judge of the quantum of the damage the plaintiff may have sustained.

Sir Fletcher Norton and Mr. Selwyn, contra, for the plaintiff.

The point of law, they said, is fully settled, “that the term in which the arrest was made, is to be considered as one of the two terms.” For which, they cited *Pullen* versus *White*, which case is reported ante, vol. 3, p. 1448. They also cited a case of *Russel* versus *Stewart*, in C. B. lately; where, in an action against Mr. Palmer, attorney for the plaintiff Russell, a verdict with £500 damages was given against Palmer, for his ignorance of or mistaking this very rule. Therefore they argued, that no attorney can now defend himself under ignorance of it, or mistaking the meaning of it: for all practisers are now bound to take notice of it; and must answer it to their clients, if they neglect it.

And the remedy may be had by their clients against them, either in a summary way; or by way of reference to the Master, “to see what damage the plaintiff has suffered;” or it may be sought by an action, if the plaintiff chooses that method.

Note. It was said, that in *Palmer’s case*, the Lord Chief Justice of the Common Pleas, on the first trial, directed the jury to find the whole in damages: but he was afterwards satisfied that he should have left the quantum of the damages to the jury. And upon this mis-direction, a new trial was granted: and on the new trial, the jury gave £500 damages only; and this, upon the foot of a crassa negligentia.

Lord Mansfield.—That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity: and they ought to be protected where they act to the best of their skill and knowledge. But every man is liable to error: and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client from the person who stands indebted to him.

A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged with the debt. The counsel indeed is honorary in his advice, and does not demand a fee: the attorney may demand a compensation. But neither of them ought to be charged with the debt for a mistake.

Not only counsel, but Judges may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable, in cases of reasonable doubt.

Here, I think it is not a clear case enough for the Court to proceed in a summary way. In some cases the Court may certainly do so: but in this case, the plaintiff ought to be left to his action.

The attornies* are far from having been guilty of any gross misbehaviour. It does not appear to me, that they were grossly negligent, or grossly ignorant, or intentionally blamable: they were country attornies and might not, and probably did not know that this point was settled here above. The words of the Act are not so explicit as to direct them clearly: and they might act innocently. Therefore we ought not to proceed against them in a summary way.

Mr. Justice Yates.—The practice upon the rule of Trin. 1716, 2 G. 1, is settled, “that the term in which the defendant is arrested, is reckoned as one of the two terms: and that if the defendant be not charged with a declaration before the end of the second term, he shall be discharged out of custody on filing common bail, with out giving notice to the plaintiff or his attorney.

And though the words of 4 & 5 W. & M. may favour the plaintiff; yet that does not make the rule inconsistent with the Act.

Every Court may modify its own rules of practice, if not inconsistent with the law. And this rule of Court is clear and plain, “that the defendant shall be discharged, unless he be charged with a declaration within the two terms.”

But we ought not, in that case, to entertain an application for a summary proceeding: it ought to be left to a jury, as to the quantum of damages. The whole of the debt might not be recoverable: there may be favourable circumstances; and these are so. The real debt is not ascertained, nor the quantum of it.

Palmer’s case was stronger than the present. There, the defendant was in execution. The whole debt there was £3000. Palmer, the Master, was reminded by his clerk, “that he should charge the defendant in execution:” and there were other circumstances. The expectation of a compromise, which had been urged as an excuse, appeared to be only a pretence, when it came to be examined into.

Therefore I think this rule ought to be discharged; but not with costs.

Mr. Justice Aston and Mr. Justice Hewitt concurred in the same opinion.

Per Cur’ unanimously.

* There were two partners; (Mr. Wightwick and Mr Hudson).