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# EDITORIAL

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## COMMENT.

### AN ACTIONABLE RIGHT OF PRIVACY? ROBERSON V. ROCHESTER FOLDING BOX CO.

Within the past few years, there has arisen an increasing demand for the recognition by the courts of what has been termed the "Right of Privacy." It has been pointed out with much force how great annoyance and even injury may be done to-day by the unwarranted use of one's name or picture to advertise, for example, a particular brand of cigars, or a certain patent pill, or Dr. X's Sanitary Underwear. It has been argued that, as a protection against such injuries made possible by the inventions and conditions of modern society, equity should recognize as a judicial doctrine that the individual has a right to protect his privacy as inviolate and that its wanton invasion can be restrained. This feeling that what has been called the "right to be let alone" ought to be recognized as absolute, that equity should afford a remedy when the privacy of the individual has been unwarrantedly invaded, his feelings outraged, and his peace of mind disturbed by impertinent use of his name or picture, has been increasingly reflected in the decisions of the courts. The celebrated case of *Pollard* v. *Photographic Co.*, 40 Ch. Div. 345, gave color to the contention that equity could enjoin an act unwarrantedly invading another's privacy. In that case, an injunction was sought by a woman to restrain a photographer from

selling copies of her picture. While the court deemed the breach of an implied contract, to sell to the plaintiff only, a sufficient ground for an injunction and the existence of a right of privacy was not argued, it is apparent that the threatened injury to the plaintiff's feelings was an influence not without its effect on the result. In the case of *Schuyler* v. *Curtis,* 147 N. Y. 434, where it was sought to restrain the erection of the bust of a woman no longer living, it was decided that the right of privacy was strictly personal; but the court strongly intimates that Mrs. Schuyler could have herself maintained the action if living. That a private person can restrain the unauthorized publication of his photograph was distinctly affirmed in *Corliss* v. *Wilker,* 64 Fed Rep. 280, and in *Marks* v. *Jaffa,* 6 Misc. Rep. 290, where the publication of a portrait was restrained, the court declares that the individual shall be secure in his "right to be alone."

But in the most recent case upon this question, *Roberson* v. *Rochester Folding Box Co.,* 64 N. E. 442, the highest court in New York denies that there is any right of privacy upon which an action can be based. In this case, popularly known as the "Flour of the Family" case, the issue of an actionable right of privacy was for the first time squarely presented. The plaintiff sought to recover for "her great distress and suffering both in body and mind," occasioned by the defendants printing and displaying in public places a lithographic photograph of herself, as part of an advertisement for a certain flour and sought an injunction against further injury. The facts set forth and the undoubted injury to the plaintiff are admitted by the defendants in their demurrer. But the majority of the court hold that the right of privacy "does not exist in law and is not enforceable in equity." The court acknowledges that the case before it is "concededly new," but declares that "the conscience" has become merely a metaphorical term in equitable jurisprudence and that recovery in equity, as in law, is to be strictly limited by the established principles and precedents; that it has become well established that civil property is the subject matter of equity jurisdiction and that a court of equity will not attempt to guard the peace of mind or the feelings of an individual against a sentimental injury, independent of a wrong to person or property. After reviewing the authorities upon which the right of privacy is said to rest, reaching the conclusion that in each case the decision was grounded upon breach of trust or the violation of some propery right, they conclude, "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 fact that this decision is in reality the opinion of four judges, directly overruling the conclusions of eight others, three of whom dissent from the final judgment, can scarcely be overlooked in

considering this case. Nevertheless, the ultimate fact that in a case so clearly presenting the issue, the majority of the highest court of New York has unequivocally declared that there is no right of privacy such as can, independent of damage to person or property rights, support an action, must make the successful outcome of any suit brought on that ground extremely doubtful. The contention of the court that to admit the principle of an absolute right of privacy as a judicial doctrine "would necessarily result not only in a vast amount of litigation but in litigation bordering upon the absurd" is undoubtedly sound. And in emphasizing the many sides on which modern privacy is to-day menaced and in calling attention to the need of legislative action, the court has clearly done a great service.

As a matter of law, the criticism most to be urged against this case is that there was in fact a sufficient property right involved to warrant its recognition and protection by the court. Property to-day must be considered to include more than mere physical objects, even rights in themselves intangible may be regarded as property. *Woolsey* v. *Judd,* 4 Duer 379. The use of this young woman's portrait for advertising in itself affirms that it had a more or less definite value for that purpose. Once it be admitted that the use of this picture had a money value, questions of property right are immediately involved. Certainly, whenever unusual beauty of face or form makes the exhibition of one's portrait profitable, the right to the commercial value of that portrait must vest in the original of the picture rather than in indifferent third persons. As the unauthorized use of her picture by the defendants would tend to lessen, if not destroy its value for advertising purposes, to assert that they might continue such use without restraint, making no compensation whatever, is, in the words of the minority opinion, "as repugnant to equity as it is shocking to reason."

If we must accept this decision as meaning that "the conscience" of equity has now become so hardened and that great remedial system in its turn become so bound by precedent, that the law affords no relief to admittedly just demands because the case is "concededly new" and "no precedent for such action is to be found," then our system of precedent has become a barrier rather than an aid to justice. The very existence of the courts can be defended only by their ability to uphold rights and relieve wrongs. If the great principles of natural justice upon which our law is founded are not in themselves broad enough to permit the courts to adapt themselves to new conditions and grant relief against injuries made possible by the inventions and changing conditions of society, then it is a signal reproach to our jurisprudence.

There is another aspect of this case which the court in its regard for "precedent" does not seem to have considered. The sweeping character of this decision greatly strengthens the claim, advanced by the sensational press of to-day, of a right to pry into and grossly display before the public matters of the most private and personal

concern. The tendency has become marked in much of our journalism to treat the freedom of the press as meaning an almost unlimited license. To uphold by force of law the very tendencies which are to-day, more than any other, leading to disregard and contempt for newspaper statement and criticism, must further the decline in the press of its power to lead and guide public opinion. A precedent whose undeniable effect must be to cheapen the standards of a press already none too high and thereby of the ever increasing public which reads that press, by giving the right to so cheapen it, cannot but be regarded as, in that respect at least, unfortunate.

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### STARE DECISIS AND SPECIAL LEGISLATION IN OHIO.

The Supreme Court of the State of Ohio, which by its recent decisions caused an upheaval in the laws of the state and necessitated a special session of the legislature to enact legislation to meet the emergency, has very emphatically repudiated the doctrine of *stare decisis* in the case of *State* v. *Yates,* 64 N. E. 570. Justice Davis in his opinion utters this very trenchant language: "We do not feel bound by previous decisions of this court when they do not commend themselves to us by essential soundness; and this is especially so when constitutional limitations are involved. No amount of wrong adjudication can justify a practical abrogation of the constitution." And in closing he deals this blow to the past decisions of the court: "We are satisfied at all events that the loose construction of the constitution in which this court has indulged is, in part, responsible for the abnormal condition of things shown above, and we feel disposed to distinctly and finally repudiate it now." The legislature which had passed numerous special salary bills declared by the court to be unconstitutional, is left with the problem to work out as to what special or local legislation is constitutional. *State* v. *Yates* overrules a long line of decisions from *Cricket* v. *State,* 18 Ohio St. 9, to *Pearson* v. *Stephens,* 56 Ohio St. 126, 46 N. E. 511. The completeness of the change in policy in the Supreme Court on the subject of special legislation has caused a condition of affairs well worth the study and attention of the legislators of other states, where haphazard and ill-considered laws are annually placed on the statute books. In *Cincinnati* v. *Trustees,* 64 N. E. 420, the court has rendered void an act of the legislature conferring special corporate powers upon the City of Cincinnati for the building of a hospital, as repugnant to the clause of the constitution forbidding the legislature from passing any special act conferring corporate powers. In *State* v. *Jones,* 64 N. E. 424, and *State* v. *Beacom,* 64 N. E. 427. the court practically reversing its settled policy of the last fifty years, declares that acts designed to confer powers on single cities by their classification and division of classes into grades, are ineffectual to designate classified recipients of corporate power and repugnant to the above clause of the constitution. The case of

*State* v. *Jones* is interesting as vitiating the special legislation enacted by the party in power, designed especially to curtail the power of "Golden Rule" Jones, mayor of Toledo, and to prevent him from carrying out his ideas of municipal reform.

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## DIVISION OF SURPLUS ACCUMULATIONS AS BETWEEN THE LIFE BENEFICIARY AND THE REMAINDER-MAN.

The right to dividends as between the life-tenant and the remainder-man is a subject on which the authorities are in irreconcilable conflict. This question arises most frequently under wills. As to whether cash and stock dividends, declared after the death of the testator, belong to income or should go to swell the corpus of the estate, there are in this country two widely diverging lines of decision, known respectively as the Massachusetts rule and the Pennsylvania or American rule, one of which most of the courts have adopted in whole or in part.

According to the Massachusetts doctrine, every cash dividend goes to the life-tenant, and every stock dividend belongs to the remainder-man, if accumulated from the earnings of the company, irrespective of whether such accumulation was made before or after the testator's death. This rule, so far as it applies to cash dividends, prevails in England, Maine, New York, Kentucky and Georgia; as applied to stock dividends, it prevails in England, Connecticut and Rhode Island, and it has been adopted by the United States Supreme Court. The Massachusetts doctrine seems to be a rule of convenience, easy and simple of application, but its justice and fairness may seem to be open to question. The leading Massachusetts case is *Minot* v. *Paine*, 99 Mass. 101; authorities in conformity with this decision are *Davis* v. *Jackson*, 152 Mass. 58; *Richardson* v. *Richardson*, 75 Me. 570; *Bouch* v. *Sproule*, L. R. 12 App. 385; *Brinley* v. *Grou*, 50 Conn. 66; *Gibbons* v. *Mahon*, 136 U. S. 549.

The Pennsylvania rule is that dividends of earnings made before the testator's death belong to the corpus of the estate, but that dividends earned since testator's death are income and go to the life-tenant, no matter whether such dividends be in cash, or scrip, or stock. The leading authority is *Earp's Appeal*, 28 Pa. St. 368; see also *Moss' Appeal*, 83 Pa. St. 264; *Smith's Estate*, 140 Pa. St. 340; *Van Doren* v. *Olden*, 19 N. J. Eq. 176; *Simpson* v. *Moore*, 30 Barb. 637; *Hite* v. *Hite*, 93 Ky. 264.

In view of the conflict over this subject a recent Mississippi case is of much interest by reason of facts, which present a new phase of the question. *Simpson* v. *Millsaps*, 31 So. 912. In that case the will directed that the income of the corpus of the estate be paid to certain beneficiaries for life. After testator's death the corporation, in which testator owned stock, withheld part of its earnings, which it set aside as a surplus fund; by so doing the value of its stock was increased. The trustees for the life beneficiaries sold this stock at

a price greater than was its value at testator's death. It was here held that this increased value of the stock was income, and belonged to the life beneficiaries.

The chancellor, whose decision is here reversed by the supreme court, approved the Pennsylvania doctrine, but held that this case went beyond it, in as much as the corporation had declared no dividend, for it has been universally acknowledged that a corporation may declare a dividend or not, as it in good faith elects. His reasoning that earnings may not be distributed, so long as the corporation still holds them, and that the increased value of the stock consequently was not dividends, seems cogent, if not entirely convincing. The supreme court criticises the Massachusetts doctrine, and adopts the Pennsylvania rule, but enlarges its application, holding that "whenever earnings are distributed, the life men are entitled to them, and whenever the trustees sell stocks, enhanced in value by these undistributed dividends, the enhancement, above the value at the testator's death, is, in law and equity, the property of the life beneficiaries."

There seems to be not a single decision involving the exact point here at issue. The case is decided on grounds of fairness and justice, and is so far consonant with the Pennsylvania doctrine. The court does not avow any intention of going beyond the Pennsylvania rule, but seems to think that it has simply applied that rule to a new set of facts, and that its decision is fully in accord with the principles on which that rule is based. The hardship that might be occasioned in the application of the Massachusetts rule is fully recognized; the court says: "We decline to indorse the doctrine that the question of corpus to the remainder-men, or income to the life-men, depends on the schemes of corporations or the will of their boards of directors. They may withhold dividends from stockholders and from life beneficiaries under wills to swell surplus, but they cannot adjudicate their eventual right to the dividend passed to surplus. The courts only can do this."

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### OBSTRUCTION TO SURFACE WATERS.

An irreconcilable difference of opinion has exhibited itself in the decisions of the courts in the United States in regard to the rights and duties of adjoining proprietors of land. Two radically different rules may be said to prevail—the civil law rule and the common law rule—as to surface waters. The subject does not seem to have received the attention of the courts until a comparatively recent date. *Bowlsby* v. *Speer,* 31 N. J. L. 351. In England in 1855 in *Rawstrom* v. *Taylor,* 11 Exch. 369, the question of rights in surface waters appears to have been discussed for the first time. This difference of opinion may be traced to the great importance attached by the courts on one side to the maxim, *"sic utere tuo ut alienum non laedas,"* whilst those adopting a contrary view seem

disposed to give unlimited effect to the maxim, *"cujus est solum ejus est usque ad coelum,"* and therefore leave every proprietor to take care of himself except where living streams are concerned. Under the common law rule the proprietor may occupy and improve his land in such manner and for such purposes as he may see fit and any damage he may cause adjoining proprietors is unactionable. *Gannon* v. *Hargadon,* 10 Allen 106. This rule prevails in the larger number of states. On the contrary, by the rule of the civil law, the proprietor may not obstruct by any means the natural flow of the surface water to the injury of his neighbor. *Kauffman* v. *Griemer,* 26 Penn. St. 411. Both of these rules work injustice in many cases, and are, on the whole, unsatisfactory. The recent case of *City of Franklin* v. *Durgee* (N. H.) 51 Atl. 911, is commended as stating by far the most satisfactory basis. It is the reasonableness of the use to which the adjoining proprietor puts his land that determines, and not the right to unfettered control that a party has of his own land, nor the mere consideration of injury to the adjacent owner. Thus the reasonableness of the use is a question of fact which may be adapted to the circumstances of each case free from the inflexibility of the old common law rule. A very few decisions have adopted this doctrine, but the trend of all the latest cases seems to be in this direction. *Little Rock R. R. Co.* v. *Chapman,* 39 Ark. 473, 17 Am. & Eng. R. Cas. 51; *Waldrop* v. *Greenwood,* 28 S. C. 163, 34 Am. Eng. R. Cas. 204.