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## SCHUYLER AGAINST CURTIS AND THE RIGHT TO PRIVACY.

The case of *Schuyler* v. *Curtis*,[1] is of so novel a character that in spite of the numerous comments which were made upon it both in the legal periodicals and the daily newspapers, when the final decision was rendered two years ago by the Court of Appeals, I shall venture, even at this late date, to discuss just how far that decision went and particularly what the opinion of Judge Peckham did not decide. Indeed, such a discussion seems especially useful, since the scope of the opinion in the Court of Appeals has been often misunderstood.

*Schuyler* v. *Curtis* was a suit brought by Philip Schuyler, the nephew and stepson of Mary Hamilton Schuyler and the authorized representative of all her immediate relatives, against the "Woman's Memorial Fund Association," a voluntary unincorporated association, to enjoin the members of it from making a statue of Mary Hamilton Schuyler or from causing it to be exhibited at the World's Fair. The avowed object of

[1] 147 N. Y. 434.

the association was the completion of two statues to honor "Woman as the Philanthropist" and "Woman as the Reformer" at the Columbian Exposition in 1893.

The association solicited subscriptions to promote this object, and employed Hartley, the sculptor, to make an ideal statue of Mrs. Schuyler as "The Typical Philanthropist." The association had also undertaken a statue of Susan B. Anthony to be designated "The Representative Reformer," and had announced the intention of placing the statue of Mrs. Schuyler on exhibition as a companion piece to it, although Mrs. Schuyler took no interest in the woman's rights movements, had no sympathy with them, and would have objected to having her name coupled with that of Miss Anthony.

Neither the art association nor any of the members of it had ever asked any of the relatives of Mrs. Schuyler for permission to make or exhibit an ideal statue representing her. Upon learning of the proposed statue her relatives at once objected to it, and in a polite letter by Philip Schuyler, requested the association to abandon the project. Mr. Schuyler wrote:

"Mrs. Schuyler, though taking her share with others in the philanthropic work of her day, is in no sense the typical philanthropist, and to place her in such a position is to invite public criticism of a sort which has already been made in the press.

"In behalf of her family, whose sentiment on this subject is conveyed in this letter, I respectfully request that the project, so far as she is concerned, be abandoned."

The association formally refused to abandon the project of the statue in an official letter to Mr. Schuyler, and denied the right of Mrs. Schuyler's relatives to be consulted in the matter. The point of view of the association is perfectly illustrated by extracts from this extraordinary document. In speaking of Mrs. Schuyler the letter says:

"Her character, her work, her life, belong to those who sympathize with culture, with art, philanthropy and reform. In so joining 'the choir invisible whose music is the gladness of the world' she belongs to all who live after her. As our poet Halleck says of one dead: 'For these are freedom's now

and fame's . . .' As Emerson says of a famous character: 'Having neither wife nor child, father or mother, every one who thinks is his child, and every one who receives his inspiration is his descendant.'

"For these reasons we cannot believe it is our duty to the public, to the cause of free art education, or to ourselves to comply with the request to have the project to memorialize Mary M. Hamilton Schuyler abandoned.

"We therefore will continue our efforts and ask subscriptions from all who are in sympathy . . ."

How far the contention that Mrs. Schuyler ever became a public character was from the truth can be seen from the following testimony (given at the trial) of those who knew her best:

"She was a singularly sensitive woman; and while quite willing to do good deeds, she was of a very retiring nature and was most anxious to keep her name, as many people of course are, from the public prints.

". . . She was a woman of great charm and a woman of great ability; everybody respected her; everybody loved her; she was in no sense a woman before the public; she was interested in her charities just as hundreds of other ladies are, and she gave a part of her life to them."

Mr. Justice Morgan J. O'Brien, who granted the injunction *pendente lite* against the making or erecting of a statue, stated the real facts of the case when he said:

"It has not been shown that Mrs. Schuyler ever came within the category of what might be denominated public characters.

"She was undoubtedly a woman of rare gifts and of a broad and philanthropic nature; but these she exercised as a private citizen in an unobtrusive way."

The trial court made the injunction permanent and used the following language in its findings: "That the acts of the defendants . . . have exposed the name and memory of Mary M. Hamilton Schuyler to adverse comment and public criticism of a nature peculiarly disagreeable to her relatives, and have caused disagreeable notoriety for which they are in no way responsible . . . That annoyance

and pain have been caused thereby to the plaintiff and to the immediate relatives of the said Mrs. Schuyler, and that he and they have been and are greatly distressed and injured thereby and by the notoriety incident thereto; and that such notoriety and adverse comment and criticism are wholly due to the unauthorized acts of the defendants.

"That the acts of the defendants . . . constitute and are a continuing injury to the plaintiff and to the . . . relatives of . . . Mary M. Hamilton Schuyler; that they have no adequate remedy at law for the redress of the injuries and wrongs complained of . . . and that great and irreparable injury will be caused to the memory of . . . Mrs. Schuyler and to her surviving relatives unless the defendants be enjoined from the further prosecution of the acts so complained of . . ."

The court found as conclusions of law:

First: That the acts of the defendants were an unlawful interference with the right of privacy.

Second: That the surviving relatives of Mrs. Schuyler were specially injured thereby.

Third: That the plaintiff was entitled to judgment perpetually enjoining the defendants from making a statue of Mrs. Schuyler in any form or from causing it to be exhibited.

The judgment of the trial court was affirmed by the Supreme Court at General Term, and when the case came before the Court of Appeals the merits had been passed upon by six justices of the Supreme Court. Three of them had written careful opinions in which the merits of the plaintiff's right were fully discussed, and all had, without hesitation, held that the plaintiff's right of privacy had been infringed and supported the injunction.

In the Court of Appeals, however, the judgment was reversed and the injunction dissolved. Fortunately for the Schuyler family, the World's Fair had long passed, and there was no practical danger that the defendants would ever erect a statue of Mrs. Schuyler. Judge Peckham, who wrote the opinion in the Court of Appeals, stated the grounds upon which the court based the reversal in his own characteristically forceful terms:

"Whatever right of privacy," he says, "Mrs. Schuyler had, died with her. Death deprives us all of rights in the legal sense of that term, and when Mrs. Schuyler died her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living alone. It is the right of privacy of the living which it is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, not that of the dead, which is recognized . . .

"We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants propose on the ground that, as a mere matter of fact, his feelings would be thereby injured. We hold that in this class of cases there must in addition be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy nor the result of a supersensitive and morbid mental organization dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy . . . A proposed act which a court will enjoin because it would be a violation of a legal right must, among other conditions, be of such a nature as a reasonable man can see, might and probably would cause mental distress and injury to any one possessed of ordinary feeling and intelligence situated in like circumstances as the complainant, and this question must always to some extent be one of law. If the circumstances be such that it is to a court inconceivable that the feelings of any sane and reasonable person could be injured by the proposed act, then it is the duty of the court to say so and to refuse an injunction which would prevent its performance.

". . . We think that so long as the real and honest purpose is to do honor to the memory of one who is deceased and such purpose is to be carried out in an appropriate and orderly manner by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not

necessary and they have no right to prevent for their own personal gratification any action of the nature described."

Judge Gray wrote a dissenting opinion and said among other things:

"I must emphatically dissent from the decision of this court that there was no ground shown in this case for the equitable relief which was granted below. That a precisely analogous case may not have arisen heretofore in which the peculiar power of a court of equity to grant relief by way of injunction has been exercised, furnishes no reason against the assumption of jurisdiction . . .

"It seems to me clear that the jurisdiction of equity is not made to depend upon the existence of corporeal property, and that it is exercised whenever the complainant establishes his claim to the possession of exclusive personal rights and their violation in definite ways for which an action at law cannot afford plain and adequate redress. That is the case here . . .

"However opinions may differ with respect to the substantial injury to the feelings of Mrs. Schuyler's relatives, *we have the finding that it was in fact caused* and we should not say that it was merely fanciful. The theory of the case which calls for equitable relief is not that of a mere protection to wounded feelings, but the protection of a right which those who represent the deceased have to her name and memory as a family heritage and which had not become the public property. Why is that not a legal and exclusive interest and why are its possessors not entitled to be protected by the law from a notoriety which invites public criticism of the memory and reputation of the deceased relative?"

I have given a very full statement of the facts of *Schuyler* v. *Curtis* because a knowledge of them is necessary to a proper understanding of the attitude taken by the Court of Appeals and the real scope of Judge Peckham's opinion.

From these facts and the opinion, I think it is not an exaggeration to say that the decision of the Court of Appeals enunciates no legal principle whatever. The six judges in the court below had decided that the plaintiff had a right of privacy and that the conduct of the defendants was such as to

cause annoyance and pain to the plaintiff and to invade that right of privacy. The Court of Appeals did not deny the existence of the right, but simply held that they had the power as an ultimate question to decide whether the conduct of the defendants had really been sufficiently annoying to the plaintiff to deserve judicial attention. The court answered the question in the negative and in spite of the solemn finding of six judges of the Supreme Court, evidently concurred in by Judge Gray to the effect that the defendants had subjected the name of Mrs. Schuyler to public comment and disagreeable notoriety, and had caused annoyance and pain to her relatives, nevertheless held that it was "inconceivable that the feelings of any sane and reasonable person could be injured by the proposed act."

It is thus evident that the Court of Appeals, whatever dicta it may have indulged in, really reversed the case, not because of any theoretical difficulty with the plaintiff's claim, but because of the triviality of his grievance. "*De minimis non curat lex*" was the real ground of the decision.

The state of the law then seems to be this: The Supreme Court of New York has asserted the existence of a right to privacy in three well considered opinions.[1] Judge Gray has strongly reaffirmed the existence of such a right in his dissenting opinion in the Court of Appeals when the injunction in *Schuyler* v. *Curtis*[2] was dissolved by that tribunal and the majority in the Court of Appeals, while refusing to pass upon the general principle which the plaintiff in that suit sought to maintain, has in no wise, either directly or by implication, denied the existence of a right to privacy.

There is, so far as I have discovered, no decision against the existence of the right to privacy unless it be *Murray* v. *Lithographing Co.*,[3] decided by the Special Term of the Court of Common Pleas of New York City, which was a decision by a single judge of a court of inferior jurisdiction.

[1] Schuyler *v.* Curtis, O'Brien, J., 15 N. Y. Supp. 787; Schuyler *v.* Curtis, Van Brunt, P. J., 64 Hun. 594; Schuyler *v.* Curtis, Ingraham, J., 24 N. Y. Supp. 509.

[2] 147 N. Y. at p. 452.

[3] 49 Alb. L. J. 287.

The case of *Corliss* v. *Company*[1] has no direct bearing on the question in *Schuyler* v. *Curtis* because the suit was there by the relatives of a famous inventor, and it was held that a public character surrendered his right to privacy.

So far then as the few cases go which are directly in point, there is a right to privacy possessed by every one. The question remains whether these cases are sufficiently consonant with the principles of the common law to be generally followed.

I could not hope, within the limits of this article, to discuss the various legal analogies invoked on behalf of the plaintiff in the Schuyler case in order to establish the right to privacy. Many of them were borrowed from the able article by Messrs. Warren and Brandeis, entitled "The Right to Privacy," published in the *Harvard Law Review*, Vol. IV, p. 193. Indeed, the authors of that article may flatter themselves with having pointed the way for both court and counsel in the Schuyler case. Their position has been controverted by Mr. Herbert Spencer Hadley in the *Northwestern Law Review*, Vol. III, p. 1, in a careful and logical article which doubtless carries complete conviction to some minds. If one is inclined to be very strict in adherence to the letter of the law, and as it seems to me, with all due deference to Mr. Hadley, somewhat technical and narrow, Mr. Hadley's article will be convincing.

A great argument of those who deny the existence of a right to privacy is always based on expressions found in some of the cases that an injunction will only issue to protect property. But such expressions are misleading. The confusion arises, it is believed, from a misconception as to what is the real legal nature of *property*. Judge Selden defined the meaning of property very accurately, as follows:

"Property is the right of any person to possess, use, enjoy and dispose of a thing. The term, though frequently applied to the thing itself, in strictness means only the *rights of the owner* in relation to it.[2]

This distinction between the object itself and the legal rights

[1] 57 Fed. Rep. 431; *Ib.* 64 Fed. Rep. 281.

[2] *Wynehamer* v. *People*, 13 N. Y. 433; *Eaton* v. *R. R. Co.*, 51 N. H. 511.

pertaining to it is referred to in the opinion of the learned referee, in *Matter of Beekman Street*, as follows:

"The dividing line between property as a thing objectively appropriated by a person, and a personal right as subjectively belonging to a person, is not always entirely distinct:"[1]

In other words, the only scientific conception of property is not that of a horse, or a piece of land, or any object; but it is that of a bundle of legal rights—"indefinite in point of use, unrestricted in point of disposition, over a determinate thing," as Austin puts it.[2]

It is certain that equity will protect numerous rights which are not sufficiently extensive to be denominated property; for example, the rights of a sender of a letter do not fulfill the conditions of the definition of property just given; for they are neither "indefinite in point of user," nor "unrestricted in point of disposition." Indeed, there can, strictly speaking, be no property in a letter as such. It has been held that an indictment will not lie for larceny of a letter: *Payne* v. *People*, 6 Johns. 103; that private letters are not assets in the hands of an executor which he may liquidate: *Eyre* v. *Higbee*, 35 Barb. 502; that the writer of a letter cannot retain it even if he have got it back fairly; but the receiver may maintain *detinue* for the paper: *Oliver* v. *Oliver*, 11 C. B. U. S. 139; and that the writer of a letter cannot compel the recipient to give it up: *Grigsby* v. *Breckinridge*, 2 Bush (Ky.), 480. In short, the only right recognized in the sender of a letter is to prevent its publication. Equity will protect that right, because there is no way in which it can be adequately protected at law.

That equity will protect the single right to prevent publication in the case of letters shows conclusively that the courts recognize the absurdity of refusing to protect one right, because the person asking for relief has not others accompanying it, or because that right is not related to the ownership of a tangible object.

The things which ordinarily need protection are, undoubt-

[1] 4 Bradford, New York Surrogate, Appendix, p. 516.

[2] Jurisprudence, Lect. 47.

edly, even nowadays, *physical objects* capable of ownership. In early times nothing else was protected, because nothing else was understood or valued. But as civilization has advanced, the Court of Chancery has kept pace with the needs of the time, and always has protected a real *substantial right*,—oftentimes calling it *property*, because, ordinarily, subjects of litigation were tangible objects, in which there was a right "indefinite in point of user;" but, yet, never failing to give relief, however far the right in the particular case might be from the full ownership of a *physical object*.

It is thus evident, as the learned authors of "The Right to Privacy" say, that:

"The legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are . . . but instances of a general right of privacy, which, properly understood, afford a remedy for the evils under consideration."

It is undoubtedly, however, still frequently said that a court of equity can interfere by injunction only where a right of property has been invaded. Mr. Hadley, in the able article already mentioned, made this very point one of his two principal reasons for denying the existence of the right to privacy for which I am here contending.

In disagreeing with him I am not consciously, at least, explaining the results reached in the decisions by my own reasons, and disregarding the language of the judges, or, to use the words of a learned legal critic, "treating the rulings of the court as the utterances of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed." It cannot be denied that in a few cases the champions of the right to privacy have claimed that the court, in allowing an injunction on the ground that a right of property was involved, has reached the right result by wrong reasoning. But in numbers of cases the judges have allowed an injunction where they have either emphatically declared, or tacitly admitted, that the right infringed was not a property right within the usual meaning of that term.

Particularly has this been true in the cases where a person

has been allowed to enjoin the mutilation or removal of the body of a deceased relative, or to sue at law for the consequent damages. These cases certainly go to show that an invasion of a property right is not the test of equitable interference, for there is at common law no property in a dead body.[1]

In fact, the principal difficulty in establishing the existence of the right to privacy really lies not in the mere belief than an injunction must operate upon property rights, but upon the half conscious further belief that all legal rights must operate upon tangible objects and be readily measurable in dollars and cents. Two recent decisions answer most conclusively this fallacious idea. Both these cases were actions at law by a wife for the dissection of the body of her deceased husband by physicians, without her consent, and in both, in accordance with the settled law of this country, an injunction would have been granted to protect the wife's legal right of sepulture.

The following language of Justice Mitchell, in *Larson* v. *Chase*,[2] the first of the two cases I have referred to, throws light upon the whole subject discussed in this article and shows an instance where mental annoyance and distress are the sole basis of a right of action:

"There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. . This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering as a distinct element of damage is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act . . . But where the wrongful act constitutes an infringement on a legal right mental suffering may be recovered

[1] *Matter of Beekman Street*, 4 Bradford (N. Y.), 503-532; *Mitchell* v. *Thorne*, 134 N. Y. 536; *Foley* v. *Phelps*, 1 App. Div. 551; *Snyder* v. *Snyder*, 60 How. Pr. (N. Y.) 368; *Weld* v. *Walker*, 130 Mass. 422; *Pierce* v. *Proprietors*, 10 R. I. 227; *Wynkoop* v. *Wynkoop*, 42 Pa. 293.

[2] 47 Minn. 307.

for if it is the direct, proximate and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, as, for example, an assault without physical contact. So, too, in actions for false imprisonment where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment."

And Justice Patterson of the New York Supreme Court uses similar language in the still more recent case of *Foley* v. *Phelps*.[1]

"But we are not disposed to put the right of the plaintiff to maintain this action on the ground of a property right in the remains of her husband, nor do we think that the discussion is properly placed when it is rested exclusively upon that proposition. Irrespective of any claim of property, the right which inhered in the plaintiff as the decedent's widow, and in one sense his nearest relative, was a right to the possession of the body for the purpose of burying it; that is, to perform a duty which the law required some one to perform, and which it was her right by reason of her relationship to the decedent to perform. . . . . If this right exists, as we think it clearly does, the invasion or violation of it furnishes a ground for a civil action for damages. It is not a mere idle utterance, but a substantial legal principle, that wherever a real right is violated a real remedy is afforded by the law. A right to vote can in no sense be called a pure right of property; it is merely a personal right; yet who would now contend that a person obstructing a voter's right or preventing his voting would not be, irrespective of any statutory enactment, liable, even if the candidate of the choice of the person thus obstructed was elected."

To hold in the face of these decisions that there can be no invasion of the right to privacy, because no right of property in the strict sense of the term is in dispute, and that consequently no injunction can issue to prevent repeated and

[1] 1 App. Div. 551.

continued violations of such legal right, seems, to say the least, technical aud conservative.

To answer briefly, then, the objection of Mr. Hadley that an injunction cannot be granted to prevent the invasion of the right of privacy, because no right of property is involved, I would say that a legal right of property is not a *sine qua non* to the granting of an injunction. To answer the general objection that mental distress is never a ground for an action, I would deny the truth of such an assertion. If no legal right is infringed, mental suffering will not support an action, but neither would physical suffering. The question is simply —is there a legal right to privacy? If there is, the objections as to the mode of protecting it disappear.

Mr. Hadley further says that no remedy by injunction should be given for invasion of privacy, because, where the invasions of privacy have gone so far as to get into the field of libel, they cannot be enjoined. The question as to whether a libel could be enjoined long remained open in England owing to conflicting decisions, until finally the present statute was passed, authorizing an injunction in certain cases. But the whole subject of libel is, for historical reasons, *sui generis*. English history is filled with attempts by one political faction to use the action of libel as an engine of oppression to the other. Hence there has been a constant tendency in that action in every Anglo-Saxon jurisdiction to protect the defendant and to restrict the remedies of the plaintiff in a way that can only be explained upon *historical grounds peculiar to libel itself*.

Moreover, there is an adequate remedy for invasions of privacy which are libellous, by means of the civil and criminal actions for libel. The interposition of chancery is, therefore, in these cases unnecessary, and, for the purely historical reasons already mentioned is, in some jurisdictions at least, without warrant. No reason can be given why chancery should refuse to protect the privacy of individuals in cases where the invasion is not libellous, because it cannot protect it where the invasion is libellous, unless it be to preserve the symmetry of the law at the expense of the very ends for which

every civilized system of law works. It is submitted that the historical, and, as it were, piecemeal growth of the common law, has naturally, if not necessarily, produced many inconsistencies in the system, and that inconsistency with some other branch of the law is, therefore, not a conclusive argument against a result practically very desirable. In fact the inability of a court of equity to enjoin a libel seems exceptional and inconsistent, and the protection given to the right to privacy by the court in the Schuyler case, whereby alone that right can be of any real avail, natural and sensible.

The practical desirability of recognizing and protecting the right to privacy is so well shown by the learned writers in the *Harvard Law Review*, already mentioned, that I quote what they have written without further comment. They say:

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person and for securing to the individual what Judge Cooley[1] calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .

"Of the desirability—indeed the necessity—of . . . protection (of the right to privacy) there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life attendant upon advancing civilization have rendered necessary some retreat from the

[1] Cooley on Torts, 2d Ed. p. 29.

world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury."

If, then, the protection of the privacy of the individual is practically so desirable, why should the law hesitate to give that protection? I believe it appears from the foregoing considerations that excellent legal analogies can be invoked in support of such a right and none of the arguments against it are at all convincing. In view of these facts I cannot but confidently look to see the principles laid down by the lower courts in *Schuyler* v. *Curtis*, generally followed.

The limits of a right which has been so little defined by judicial decision are at present of course vague, and it can only be said that the limits of this right, like the right of personal liberty, of which it is an extension if not a part, must be determined by the relative demands of individual freedom and public convenience or necessity.

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