SUPREME COURT

Appellate Division---First Department.

60

FELICITE S. RIDDLE,

Plaintiff-Respondent,

against

BERNARR A. MAC FADDEN and LUTHER S. WHITE,

Defendants.

BERNARR A. MAC FADDEN,

Defendant-Appellant,

CASE ON APPEAL.

HENRY M. EARLE,
Attorney for Defendant-Appellant,
1 Nassau Street,
New York City.

RUFUS L. WEAVER.
Attorney for Plaintiff-Respondent,
229 Broadway,
New York City.

COWING, WHITE & WAIT,
Attorneys for Defendant White,
49 Wall Street,
New York City.

THE REPORTER CO., WALTON, N. Y.
N. Y. Office, Charles Watson Russell,
253 Broadway, Room 205, Telephone 1352 Cort.

Index.

TESTIMONY.

PLAINTIFF'S WITNESSES:

EXHIBITS.

PLAINTIFF'S EXHIBITS:

DEFENDANT'S EXHIBITS:

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT.

FELICITE SKIFF RIDDLE,
Plaintiff-Respondent,

against

BERNARR A. MACFADDEN,
Defendant-Appellant,

and

LUTHER S. WHITE,
Defendant.

Statement Under Rule 41.

The above-entitled action commenced by the service of the summons and complaint on each of the defendants, on October 7th, 1905.

The plaintiff served an amended complaint on the attorneys for both defendants on November 1st, 1905. The separate answers of the defendants, Bernarr MacFadden and Luther S. White, to the amended complaint were served on December 31st, 1906.

The names of the parties appear in full above and there has been no change.

Rufus L. Weaver, Esq., has appeared throughout as the attorney for the plaintiff.

Cowing, White & Wait, Esqs., have appeared throughout as attorneys for the defendant, Luther S. White.

Charles P. Rogers, Esq., originally appeared for the defendant, Bernarr MacFadden, but was succeeded by Henry M. Earle, Esq., who was duly substituted as counsel for such defendant after the notice of appeal was served.

There has been no other change of attorneys.

4 **Notice of Appeal.**

SUPREME COURT,

NEW YORK COUNTY.

FELICITE S. RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN and
LUTHER S. WHITE,
Defendants.

5 Sirs:

Please take notice, that Bernarr A. MacFadden, one of the above named defendants, hereby appeals to the Appellate Division of the Supreme Court, First Department, from the final judgment of the Supreme Court, New York County, in favor of the plaintiff, Felicite S. Riddle, against the said defendant, Bernarr A. MacFadden, for the sum of $3,198.69, entered herein in the office of the Clerk of this Court, and of the County of New York, on the 19th day of June, 1908, upon a verdict in favor of the plaintiff and against the said defendant, and also from an order denying the said defendant's motion to set aside the verdict and for a new trial, entered herein in the office
6 of the Clerk of this Court and of the County of New York, on the 19th day of June, 1908, and from each and every part of said judgment and order as well as the whole thereof; and that the appellant intends to bring up for review on such appeal the interlocutory judgment in favor of the plaintiff and against said de-

fendant, entered in this action in the office of the Clerk of this Court and of the County of New York, on the 22d day of May, 1908. 7

Dated, July 18, 1908.

Yours, &c.,

CHARLES P. ROGERS,

Attorney for Defendant-Appellant MacFadden,

20 Broad Street,

Borough of Manhattan,

New York City.

To:

Rufus L. Weaver, Esq.,

Attorney for Plaintiff,

229 Broadway, New York City.

Peter J. Dooling, Esq., 8

Clerk of the County of New York.

Summons.

SUPREME COURT OF THE STATE OF NEW YORK,

TRIAL DESIRED IN THE COUNTY OF NEW YORK.

FELICITE SKIFF RIDDLE,

Plaintiff,

against

BERNARR A. MACFADDEN and LUTHER S. WHITE,

Defendants. 9

To the above named defendants and to each of them:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on plaintiff's attorney within twenty days after the serv-

10 ice of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York City, August 12th, 1905.

RUFUS L. WEAVER,
Plaintiff's Attorney,
Office & P. O. Address:
No. 229 Broadway,
Borough of Manhattan,
New York City, N. Y.

Amended Complaint.

11

SUPREME COURT,

COUNTY OF NEW YORK.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN and LUTHER S. WHITE,
Defendants.

The plaintiff, by Rufus L. Weaver, her attorney, for her amended complaint, shows to the Court, on information and belief:

12

That the defendant, Bernarr A. MacFadden, is, and at all times herein mentioned was, doing business under the name of Physical Culture Publishing Company, and at said times was the owner and publisher of certain magazines, among them being those known as "Beauty and Health" and "Physical Culture."

2. That defendant White at all said times was, and is, a photographer residing and doing business as such in New York.

3. That on or about the 15th day of December, 1904, the plaintiff called on defendant White at his place of business and, as his customer, procured him to take a picture or portrait of plaintiff and paid him an agreed price therefor. That said picture or portrait and all copies of the same to be taken were specifically understood and agreed to be for plaintiff's exclusive use and subject to her orders only. 13

4. That from or about the month of February, 1905, the defendant White has used and is using said portrait or picture of plaintiff, a living person, within the State of New York and elsewhere, for advertising purposes and for the purposes of trade in advertising a book entitled as "New Hair Culture," and to procure or increase the sale of said book. 14

5. That defendant White used said picture as aforesaid without first obtaining the consent, written or otherwise, of the plaintiff. That defendant White knowingly used plaintiff's said portrait or picture in the manner as aforesaid without plaintiff's consent or knowledge and continued its use against plaintiff's protest and so used it in such manner as is forbidden or declared to be unlawful by chapter 132 of the laws of 1903 of the State of New York.

6. That from or about the month of February, 1905, the defendant MacFadden has used and is using said portrait or picture of plaintiff, a living person, within the State of New York and elsewhere, for advertising purposes and for the purposes of trade in advertising a book of which he is the author and known or entitled as "New Hair Culture" and for the purpose of procuring or increasing the sale thereof. 15

7. That the defendant MacFadden so used plaintiff's portrait or picture without first obtaining the consent, written or otherwise, of the plaintiff. That defendant MacFadden knowingly so used plaintiff's portrait or picture in the manner aforesaid without

16 plaintiff's consent or knowledge, continued such use against her protest and so used it in such manner as is forbidden or declared to be unlawful by chapter 132 of the laws of 1903, of the State of New York.

8. That said portrait or picture of plaintiff was so used by the defendants, as heretofore alleged, acting jointly, and was so published by them jointly in the State of New York and elsewhere, in periodicals known as "Physical Culture" and "Beauty and Health," and in other magazines and publications which were by them sent or caused to be sent broadcast over the State of New York, the United States and foreign countries.

17 9. That said picture of plaintiff was thus used by defendants to deceive the public and to represent that the plaintiff's hair was luxuriant and beautiful as a result of treatment or care thereof as directed in said book, that such representation was false, as is well known to the defendants.

10. That said picture or portrait was by defendants so used and displayed as an advertisement in magazines and publications which contained many sparsely clad and even of nude pictures of men and women, both in the body of the reading matter thereof and in the advertising matter, and that by reason of the premises the plaintiff has been subjected to the taunts and gibes of acquaintances and others, annoyed greatly thereby,
18 caused to suffer great bodily and mental anguish, held up to public contempt and approbrium and has suffered in her good name and reputation, all to her damage in the sum of fifteen thousand dollars.

Wherefore, plaintiff demands judgment against the defendants as follows:

I. That the defendants, and each of them, be forever restrained and enjoined from publishing, displaying or in anywise using plaintiff's picture, portrait

or likeness for advertising purposes or for the purpose of trade in any publication. 19

II. That the defendants be directed and ordered to deliver to plaintiff all wood cuts, electrotypes, negatives or other apparatus for making copies of said picture and all magazines or other publications containing said picture or a copy thereof of which they have possession or control.

III. That the plaintiff have judgment for fifteen thousand dollars, her damages herein.

IV. That plaintiff have such other and further relief as is just and proper.

RUFUS L. WEAVER,
Attorney for the Plaintiff, 20
229 Broadway, Manhattan,
New York City, N. Y.

County of New York, ss.:

Rufus L. Weaver, being duly sworn, says: That he is the attorney for the plaintiff herein and that the foregoing amended complaint is true to the knowledge of the deponent, except as the the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Deponent makes this affidavit for the reason that plaintiff is not now within either of the counties where deponent resides or where he has his office and capable of making this affidavit. 21
The grounds of deponent's belief as to the statements of the amended complaint is that it is substantially the same as the complaint in deponent's possession and sworn to by plaintiff, besides deponent has had several interviews with plaintiff.

RUFUS L. WEAVER.

Sworn to before me this
November 17th, 1905.
Martin J. Earley, Jr.,
Notary Public,
N. Y. County.

22 **Answer.**

SUPREME COURT,

COUNTY OF NEW YORK.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN and LUTHER S. WHITE,
Defendants.

23 The defendant, Bernarr A. MacFadden, answering the amended complaint herein, by his attorney, Charles P. Rogers, alleges, on information and belief:

I. Denies each and every allegation in the amended complaint contained.

Wherefore, the defendant MacFadden demands judgment against the plaintiff, that the amended complaint be dismissed with costs.

CHARLES P. ROGERS,
Attorney for Defendant MacFadden,
Office and Post Office Address:
20 Broad Street,
Borough of Manhattan,
New York City.

24 (No vertification.)

Answer of Defendant White, to Amended Complaint.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN and LUTHER S. WHITE,
Defendants.

The above named defendant, Luther S. White, answering the amended complaint of the plaintiff herein, by Cowing, White & Wait, his attorneys, shows to the Court, and alleges:

FIRST: That he denies each and every allegation in the complaint contained.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT, WHITE, FURTHER SHOWS THE COURT AND ALLEGES:

SECOND: That the plaintiff at the times mentioned in the complaint, was an actress and that she applied to this defendant to take her portrait.

THIRD: That it is a custom of the photographic business in the City of New York, and also the custom of the theatric profession, to which the plaintiff belonged, that actors and actresses having their portraits taken have the work done and the photographs delivered at special rates, which are less than the rates paid by others, not belonging to said profession, for the same work, and that in consideration of such reduced

rates the actor or actress so photographed relinquishes and gives to the photographer the right to make copies of any such photograph or photographs and to sell or give the same away as he may se fit.

FOURTH: That at or about the time or times mentioned in said complaint, the plaintiff, as an actress, entered into an agreement with the defendant, Luther S. White, by the provisions of which the defendant, White, agreed, subject to the said custom, to take certain photographs of the plaintiff at special or reduced rates and upon the special agreement usually made with actors and actresses, with reference to their photographs and pursuant to such custom, by which agreement it was understood and agreed by the plaintiff that in consideration of the reduced price at which the defendant, White, was to furnish her copies of her said photographs, that the defendant, White, should have the right to make, print, give away, or sell a copy or copies of any of the photographs so taken of the plaintiff, for advertising purposes or for the purposes of trade, or otherwise, and at that time the plaintiff specifically requested the defendant, White, to give such publicity as might be to her said photographs, in order to make her better known both to the theatre going and non-theatre going public, and thereby to increase the demand for her services as an actress by theatrical managers.

FIFTH: That thereupon and in pursuance of such custom and special contract, this defendant took a number of photographs of the plaintiff in various fancy and other costumes, some of which portrayed the plaintiff clad in night clothes, and others in fancy short skirts, and generally in theatrical poses intended to display the beauty and grace of the plaintiff in her profession as an actress.

SIXTH: That the defendant, White, never took or caused to be taken any photograph or photographs of

the plaintiff, excepting pursuant to such customs of photographers and actors and actresses and pursuant to the custom and special contract and agreement above referred to as between the plaintiff and the defendant, White. 31

SEVENTH: That the said contract or agreement between the plaintiff and this defendant was a special contract and agreement duly executed and carried out in all its terms by this defendant, whereby there became and was vested in him and he became the owner of the sole and exclusive right to make, print, vend, sell, publish, display, reproduce by wood cuts or electrotypes, or otherwise use or dispose of any of the photographs of the plaintiff so taken by him, in pursuance of the said contract, and that such contract or agreement being a special one, it does not come within nor is it affected by the provisions of Chapter 132 of the Laws of 1903, as alleged in the complaint, nor can the defendant, White, be deprived of his property rights therein. 32

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT, WHITE, FURTHER SHOWS THE COURT AND ALLEGES:

EIGHTH: He reiterates and re-alleges all the allegations contained in the first separate and distinct defense, hereinbefore contained, with like force and effect as though the same were again repeated at length. 33

NINTH: That Chapter 132 of the Laws of 1903 of the State of New York is unconstitutional, null and void for the following reasons:

a. In that it impairs the validity of the contract between the plaintiff and the defendant, White.

b. In that it deprives, or attempts to deprive, the defendant, White, without due process of law, of his

property right acquired in the protraits or photographs of the plaintiff taken by him, pursuant to such contract.

c. In that it gives, or purports to give, to the plaintiff the right to enjoin the defendant, White, from exercising his rights and privileges pursuant to the terms of the said contract.

Wherefore, it is prayed that the complaint herein be in all things dismissed, with costs.

COWING, WHITE & WAIT,
Attorneys for Defendant, Luther S. White,
Office & P. O. Address:
49 Wall Street,
Borough of Manhattan,
The City of New York.

Affidavit of Luther S. White.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE, Plaintiff, against BERNARR A. MACFADDEN and LUTHER S. WHITE, Defendants.	Affidavit.

State of New York, County of New York, } ss.:

Luther S. White, being duly sworn, deposes and says:

That he is one of the defendants in the above entitled action. 37

That this action is brought to recover damages for an alleged use, by the defendant, of a portrait of the plaintiff, contrary to the provisions of Chapter 132 of the laws of 1903, which use, as it is alleged in the complaint was "in such manner as is forbidden or declared to be unlawful by Chapter 132 of the Laws of 1903, of the State of New York."

Section I of the said Statute makes such use of the plaintiff's portrait a misdemeanor. Section II of the Act, under which this action is brought, provides for a civil remedy and punitive damages.

That this defendant, under the provisions of law in reference thereto, is privileged from testifying as a witness concerning the denials contained in the said answer, for which reason the said answer is served without verification, as is permitted by Section 523 of the Code of Civil Procedure. 38

LUTHER S. WHITE.

Sworn to before me this 31st
day of December, 1906.
O. R. Houston,
Notary Public,
New York County.

39

40 **Decision.**

SUPREME COURT,

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN and
LUTHER S. WHITE,
Defendants.

41 The issues of law and fact raised by the separate answers of the above named defendants on which the plaintiff based her right to equitable relief duly coming on to be tried by this Court at a Special Term, Part V thereof, held by the undersigned without a jury, and the allegations and proofs of the respective parties having been heard, and the Court having at the close of plaintiff's case granted a motion to dismiss the complaint as to the defendant White, without costs,

As to the issues raised by the answer of the defendant MacFadden, I decide and find as follows:

Findings of Fact.

42 I. That the defendant MacFadden during March, April and May, 1905, and for sometime prior and subsequent thereto, was engaged in business at No. 33 East Nineteenth Street in the Borough of Manhattan, the City of New York, as an editor and publisher of two certain periodicals entitled "Physical Culture" and "Beauty and Health," respectively, and was doing business there under the name and style of "Physical Culture Publishing Company."

II. That the defendant MacFadden is the author and at the time this action was begun and for some time prior thereto was the publisher of a certain book entitled "New Hair Culture."

III. That the defendant MacFadden at the time when this action was begun and for sometime prior thereto was using, exhibiting, displaying and publishing in the City of New York and elsewhere pictures or photographs of the plaintiff for the purpose of advertising the said book called "New Hair Culture," in said periodicals "Physical Culture" and "Beauty and Health," and to acquire a larger sale for said book by such use, exhibition, display and publication.

IV. That the plaintiff, at the time of said use, exhibition and display of her said picture or photograph was of the age of twenty-one years and upwards.

V. That the plaintiff has never consented to the use, exhibition or display of her picture or photograph for advertising purposes or for purposes of trade.

VI. That the plaintiff has suffered damages by the defendant's use of her picture or photograph as above set forth.

Conclusions of Law.

I. The plaintiff is entitled to an interlocutory judgment, permanently preventing and restraining the defendant MacFadden, his agents, servants and representatives from using plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising and providing for an assessment of damages against the said defendant by a jury at a Trial Term Part II of this Court, to be held in and for the County of New York, at the County Court House in said County on the 25th day of May, 1908, or as soon thereafter as counsel can be heard, with costs and further

46 providing that on the return of the assessment of damages by said Jury final judgment shall be entered herein for the amount of the damages so ascertained again the defendant MacFadden together with the costs of said assessment of damages.

II. The defendant White is entitled to a judgment dismissing the complaint herein as to him without costs.

And I direct judgment accordingly.

J. W. G.,
J. S. C.

Interlocutory Judgment.

47

SUPREME COURT,

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN and LUTHER S. WHITE,
Defendants.

48 The issues in this action on which the plaintiff based her claim to equitable relief having been regularly brought on for trial before Mr. Justice Goff, at a Special Term, Part V of this Court, held on the 10th, 13th and 14th days of April, 1905, at the County Court House in this County, and the Court having heard the allegations and proofs of the parties and the argument of counsel, and having at the close of plaintiff's case granted a motion to dismiss the complaint as to the defendant White, and having after due deliberation fully made and filed on May 19, 1908, a decision on the

issues raised on the answer of the defendant MacFadden in favor of the plaintiff containing a statement of the facts found and conclusions of law and directing an interlocutory judgment for the plaintiff permanently preventing and restraining the said defendant MacFadden, his agents, servants and representatives from using plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising, with costs, and further providing that the damages to be awarded plaintiff be assessed by a Jury at a Trial Term, Part II of this Court, to be held in and for the County of New York at the County Court House in said County on the 25th day of May, 1908, or as soon thereafter as Counsel can be heard, and that on the return of the assessment of said damages by such Jury final judgment shall be entered herein for the amount of the damages so ascertained together with the costs of said assessment,

Now on motion of Rufus L. Weaver, attorney for the plaintiff herein, it is

Ordered, Adjudged and Decreed that the defendant MacFadden, his agents, servants and representatives, be forever enjoined, prevented and restrained from using the plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising; it is further

Ordered, Adjudged and Decreed that the damages herein be assessed by a jury at a Trial Term, Part II of this Court, to be held in and for the County of New York at the County Court House in said County on the 25th day of May, 1908, or as soon thereafter as counsel can be heard, and that on the return of the assessment of said damages by such Jury final judgment shall be entered herein for the amount of the damages so ascertained, together with the costs of said assessment. It is further

Ordered, Adjudged and Decreed that the plaintiff recover of the defendant MacFadden herein for costs. It is further

52 Ordered, Adjudged and Decreed that on the return of the finding of assessment of damages by such jury final judgment shall be entered herein for the amount of the damages so ascertained together with the costs of said assessment, and on motion of Cowing, White & Wait, attorneys for the defendant White, it is further

Ordered, Adjudged and Decreed that the complaint herein be dismissed as against said defendant White, but without costs.

Enter,

J. W. G.,
J. S. C.

53

Extract From Minutes

SUPREME COURT,

TRIAL TERM, PART II.

June 17th, 1908.

Present: Hon. Charles W. Dayton, Justice.

FELICITE S. RIDDLE,

against

54 B. A. MACFADDEN.

I hereby certify that this cause was on the 16th and 17th days of June, 1908, tried by the Court and jury and a verdict rendered therein for the plaintiff for the sum of $3,000.00.

Motion for a new trial denied.

Thirty days stay of execution after notice of entry of judgment, sixty days to make a case.

PETER J. DOOLING,
Clerk.

Judgment.

55

SUPREME COURT,

NEW YORK COUNTY.

FELICITE S. RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN, and
LUTHER S. WHITE,
Defendants.

An interlocutory judgment after trial at Special 56
Term, having been on May 22nd, 1908, duly entered in this action and filed in the office of the Clerk of New York County, which dismissed the complaint as to defendant White and which granted an injunction with costs of the action against defendant MacFadden and ordered that the damages herein be assessed by a jury at Trial Term, Part II of this Court, that on the return of the assessment of said damages by such jury final judgment shall be entered herein for the amount of the damages so ascertained with the costs of said assessment and pursuant to said order the special issues for the assessment of damages having regularly come on for trial at a Trial Term, Part II of the Supreme Court, New York County, before Mr. Justice Charles W. Dayton, and a jury, the plaintiff there 57
appearing by Rufus L. Weaver, her attorney and Thomas E. O'Brien, Esq., of counsel, and the defendant MacFadden appearing by Charles P. Rogers, Esq., attorney and counsel and the same having been tried on June 16th and 17th, 1908, and said damages having been assessed and the said jury having duly rendered their verdict for the plaintiff and against the defendant Bernarr A. MacFadden for the sum of

58 $3,000 damages and plaintiff's costs allowed by judgment at Special Term having been taxed at $162.44 and the costs of said assessment of damages having been taxed at $25.25,

Now on motion of Rufus L. Weaver, attorney for plaintiff it is

Ordered and adjudged, that plaintiff, Felicite S. Riddle, do recover of defendant Bernarr A. MacFadden, the sum of $3,000 her damages as assessed together with $197.69 her costs taxed as aforesaid and $1.00 interest to date and amounting in all to $3,198.69 and that plaintiff have execution therefor.

Judgment entered June 19th, 1908.

PETER J. DOOLING,
Clerk.

59

Order Denying Motion for New Trial.

At a Term Term, Part II of the Supreme Court, held at the County Court House in the Borough of Manhattan, City of New York, on the 19th day of June, 1908.

Present: Hon. Charles W. Dayton, Justice.

60 FELICITE S. RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN & another,
Defendants.

The issues in the above entitled action having, pursuant to the judgment herein entered on the 22nd day of May, 1908, been duly tried before the Hon. Charles

W. Dayton, and a jury at a Trial Term, Part II of 61
this Court on the 16th and 17th days of July, 1908, and the jury having rendered a verdict in favor of the plaintiff for the sum of $3,000 her damages against the defendant Barnarr A. MacFadden, and the attorney for the said defendant having thereupon and at the same term moved upon the minutes of the justice presiding at the trial to set aside the said verdict so rendered, and for a new trial upon the exceptions and upon the ground that the said verdict was contrary to law and contrary to the evidence and to the weight of evidence, and upon all the grounds mentioned in Section 999 of the Code of Civil Procedure except as to insufficiency of damages and after hearing Charles P. Rogers, Esq., of counsel for said de- 62
fendant in support of the motion and Thomas E. O'Brien, Esq., of counsel for plaintiff in opposition thereto, and due deliberation having been had, it is

Ordered, that the said motion be, and the same hereby is in all respects denied.

Enter,

C. W. D.,
J. S. C.

63

64 **The Case.**

NEW YORK SUPREME COURT,

TRIAL TERM, PART II.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN, and
LUTHER S. WHITE,
Defendants.

65 Pursuant to the interlocutory judgment herein the assessment of damages was tried before Mr. Justice Dayton, and a jury on the 16th day of June, 1908.

Appearances:

Mr. Rufus L. Weaver, attorney for plaintiff, Mr. O'Brien, of counsel.

Mr. Charles P. Rogers, attorney for defendant MacFadden.

A jury was duly impaneled and sworn.

Mr. O'Brien opened the case to the jury on behalf of plaintiff.

66 EMIL PHILIP FRENZ, called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

Direct-examination by Mr. O'Brien:

I reside in Long Island City. My business is publisher. In March, 1905, I was employed at the office of the Physical Culture Publishing Company. I know the defendant Bernarr A. MacFadden. I was employed by him in March, 1905. I was employed previous to March, 1905. I entered Mr. MacFadden's

employ in February, 1903, and left it in April, 1905. 67
At the time I was with Mr. MacFadden, he was editor and publisher of the Physical Culture magazine. He was also the editor and publisher of the magazine called Beauty and Health.

Q. I show you two books bearing on the cover the words Beauty and Health, and ask you whether you know what these books are?

Mr. Rogers: They speak for themselves, of course; it has been proved below that they were published by MacFadden.

Mr. O'Brien: It is admitted that the magazine Beauty and Health, the two copies of which I now offer in evidence on this assessment, were published by the defendant Mac- 68
Fadden.

Mr. Rogers: We object to the issue of June, 1905, upon the ground that it appears that it was published without the State of New York, and therefore does not come within the statute upon which this action is based.

Mr. O'Brien: I will withdraw the issue of June, 1905.

One copy marked Plaintiff's Exhibit 1.

Mr. O'Brien: I understand counsel for the defendant admits that the magazine now offered in evidence called Physical Culture for March, 1905, April, 1905, and May, 1905, were published by the defendant MacFadden. 69

Mr. Rogers: For the purpose of this hearing, without a binding admission in the record that may go against us upon an appeal from the interlocutory judgment, I only want to make that exception, we admit that it was so held by the Court below, or by Judge Goff on the Equity side of the Court.

Received and marked Plaintiff's Exhibits 2, 3 and 4.

70 I recognize the picture appearing on the 6th page of Plaintiff's Exhibit 1. As having seen it before. I saw a picture like it before it was made into a cut. I saw this particular picture in the previous trial here on which I was a witness. I had connection with the obtaining of the original of that picture while an employee of the defendant MacFadden.

Q. Will you state just what that connection was, including any conversation you may have had with the defendant MacFadden prior to obtaining the original?

Mr. Rogers: I object to the question as incompetent, immaterial and irrelevant, and not binding upon the defendant, and particularly as
71 to any conversation had with the defendant before the act complained of.

Objection overruled. Exception.

A. Mr. MacFadden asked me to go to the photograph gallery of White, 1261 Broadway, and obtain a photograph of a girl with long hair to be used in the advertisement of the Hair Culture book. I went to White's gallery and obtained a photograph there and brought it to Mr. MacFadden and told him where I had obtained this picture.

Mr. Rogers: I object to this conversation or statement unless they produce something that he got from White.

72 By the Court:

Q. You brought a picture of which this is a copy, did you? A. I did, your Honor.

By Mr. O'Brien:

Q. I call your attention to the picture appearing in Plaintiff's Exhibit 2, and ask you if that is the same picture? A. Yes, that is the same picture.

Mr. Rogers: It is conceded they are all the same, and it is a matter for the jury to determine, any way. 73

The Court: They are all in evidence.

Mr. Rogers: They are all alike, as far as I know.

Q. Did you obtain a picture of which that is a duplicate original from White? A. I did.

Q. And bring it back to the defendant MacFadden? A. I did.

Q. What did you say when you delivered it to him?

Mr. Rogers: To that I object as incompetent, immaterial and irrelevant, not within the issue or the pleadings.

Objection overruled. Exception. 74

A. Why, I showed the photograph to Mr. MacFadden and he thought it would do very nicely, and I cautioned him that I had not got permission—

Mr. Rogers: I move to strike out the word "cautioned."

Strike it out.

Q. State what you said? A. I told him that I had no permission from the photographer nor from the girl to use that picture, and he said, "Oh, that will be all right, the girl is probably an artist's model or an actress and will be very glad of the advertising, and we will use it anyhow, and that is the last I saw of the picture until it appeared in print. 75

CROSS-EXAMINATION by Mr. Rogers:

My business now is publisher. I publish plays and pamphlets. Under different titles. I do business as the Entertainment Publishing Company, incorporated under the State laws of New York. I am an officer of the Entertainment Publishing Company. I hold the office of president and treasurer.

76 Q. And a stockholder in the company? A. Is it necessary to answer this, your Honor?

The Court: I don't think you have a right to go into his private affairs, unless you propose to impeach him.

Mr. Rogers: I will take your Honor's ruling on it.

The Court: I sustain the objection.

Exception by defendant.

I was employed by Mr. MacFadden in March, 1905, and sometime prior thereto. I left Mr. MacFadden's empoly in April, 1905. I am quite sure of the date. I have not been in his employ since that time, to my knowledge. When I left Mr. MacFadden's employ
77 I was next employed by the Vim Publishing Company, which published the Vim magazine. The Vim Publishing Company was not necessarily a rival of Mr. MacFadden. I should not consider it a rival. It was a different class of magazine. They may have had rivalry in their columns, and made attacks upon each other. I don't believe there are any names mentioned. I don't recollect, as a matter of fact, that they had attacked each other in the columns of their respective magazines. It is so long since. I have no recollection on the subject whatever. I was employed by Mr. MacFadden as his assistant. His assistant manager. I did not have anything to do with the advertising. He has an advertising manager. I
78 looked after the printing of the publication. I did not have anything to do wth the editorial work, except some proof reading, I don't remember that I did any writing for the magazine. I never read a magazine proof; I refer to book proofs. I have nothing to do with the reading of the magazine. I did not have any negotiations with the Vim Publishing Company while I was yet in the employ of Mr. MacFadden. I did have such negotiations with Mr. Palmer, one of its members, its managers. Looking towards a con-

nection with them. I was not discharged by Mr. 79
MacFadden as a result of that. I said in regard to the leaving of the Physical Culture Publishing Company, that I did not choose to go down there to Spotswood. I now say that I left of my own free will and accord. When my salary was not forthcoming, I thought it was time to quit. I do not think I got paid up to the time I left the Physical Culture Publishing Company, I don't recollect. I do say that I left the Physical Culture Publishing Company because my salary was not paid. There was due me when I left that company a portion of a contract that I had not worked out. I don't remember what was due me on the 1st of April. I don't remember whether I was paid to the first day of April.

Q. Were you paid up to the day you left the company? A. My attorney can tell you; he wrote you on the subject. My attorney does not think for me. It is not my attorney's recollection that I take. But he would have a recollection of the transaction. I have no recollection of the matter. After I left Mr. MacFadden's employ of my won free will, I consulted an attorney in the matter, and I believe he wrote you one letter. He didn't write to Mr. MacFadden to my knowledge. I never saw a letter of this attorney that I employed, that he had been employed by me to bring suit for the first day of January following, the balance of a year's contract. I have no recollection of its existence. I did not so instruct my attorney. I did not, to my recollection so testify before Judge Goff 81
in this trial downstairs. My recollection is so poor that I cannot remember two or three weeks sometimes. I have a very bad memory. I am very sure of the matters that I testified to in answer to the plaintiff's counsel. I am very sure of that one point. About getting this photograph. I am sure of the conversation that I had with Mr. MacFadden.

Q. That you have testified to; that is all you can recollect, isn't it? You can't remember any of these

82 other things about your own personal affairs that I have asked you? A. No, because I have tried to forget them.

Q. Don't volunteer, answer my questions? A. I am trying to see. When I got the photograph that I have testified to from Mr. White, I did not know whose photograph it was. When I took it back to Mr. MacFadden, I did not know whose photograph it was. I did not know at that time that it was the photograph of any living person. I did not know whether the person was alive or dead, at that time. In the month of March, the time complained of, I did not know whether the original of the photograph was a living or a dead person. I didn't know whether it was a photograph of a living person or not. To my

83 recollection, the publication of the magazine was moved to Spotswood, New Jersey, in May sometime. I am not sure of it. It had not moved when I left. I left about the middle of April. I stayed with the Vim Publishing Company about six months. At the time that I employed an attorney to bring suit against Mr. MacFadden, I claimed that I had a contract for a year. My year could not begin on the first of January, 1905, and end on the first of January, 1906, because I entered his employ in February, so I could not have made any such contention. My year began in February. I entered his employ February 13th, 1903. I was under the belief that I had a contract from February 13th, 1905, to February 13th, 1906.

84 Q. Now, didn't you employ your attorney to bring suit for the balance of that year at the time that you left? A. I don't remember the exact transaction, Mr. Rogers.

Q. Well, isn't that in substance the fact? A. But you can get the copies of the correspondence and documents from him.

Q. You are not here to advise me what I can do? A. But I don't remember, sir.

Q. Answer the question? A. I don't remember.

Q. Will you say that that is the best answer that you can give? A. Yes, sir. 85

Q. And will you now positively swear that you did not testify before Judge Goff within two or three months that you did employ an attorney to bring suit for the balance of the year from April, the time you left, until February? A. I will swear to that, Mr. Rogers, that I don't remember.

Q. Answer the question, please? A. I don't remember.

Q. Now, what did you employ him to bring suit for, then? A. Why, I wanted Mr. MacFadden to carry out the contract.

Q. For the year? A. For the balance of the year.

Q. For the balance of the year? A. That is my recollection. 86

Q. Why didn't you say that when I asked you that same question a moment ago and you said you could not remember? A. (No answer.)

Q. Now, if you employed an attorney to bring suit for the balance of the year as you have testified to, please tell the jury how it was that you could do that when you have testified that you left the plaintiff's employ of your own free will and accord? A. I left him because I found another situation and I thought it would be much better to take money that came after working for it than suing on a contract that a man did not want to make good.

Q. Is that the best answer you can give to the question? A. Yes, sir. 87

Q. Can't you answer the question? A. I am answering it.

Q. That is not an answer? A. I don't want any money I have not actually worked for.

Q. I did not ask you that. You stated that you left Mr. MacFadden's employ of your own free will? A. I did.

Q. And went to work for another company? A. I did.

88 Q. That while you were in Mr. MacFadden's employ you were in negotiation with the manager of this other company to go into it? A. One Saturday afternoon, after business hours, Mr. Rogers—

Q. That is a fact, is it? A. Yes.

Q. If that be a fact, tell me and this jury how you could bring suit for the balance of a year's contract when you left of your own free will and accord? A. I don't know perhaps I was ill advised by the lawyer.

RE-DIRECT EXAMINATION by Mr. O'Brien:

I was subpoenaed to attend here, I wish I had not been.

89 *RE-CROSS EXAMINATION by Mr. Rogers:*

I was not subpoenaed by Mr. Rogers. I was subpoenaed by the plaintiff's attorney, Mr. Weaver.

By Mr. Rogers:

The first time I saw the plaintiff, I presume that lady sitting there, was in the court room before Judge Goff. I did not see her in the office of Bernarr MacFadden, while I was there in his employ.

FELICITE SKIFF RIDDLE, the plaintiff herein,
90 called in her own behalf, having been duly sworn, testified as follows:

Direct-examination by Mr. O'Brien:

That is my picture. I posed for the original of that picture in December, 1904. At a photographer's by the name of White. It is one of the original pictures delivered to me by the photographer on my order after that posing.

Mr. O'Brien: I offer it in evidence. 91

Received and marked Plaintiff's Exhibit 5.

I first heard of the publication of my picture by the defendant MacFadden in March, 1905. The beginning of March. With reference to it, when I heard of it, I went down to Bernarr MacFadden's place of business and asked to see him. I was directed by a party by the name of Miss Gans to a representative whom I do not know. When I went down there I was directed to the representative, and I was very much excited and nervous about it—

Mr. Rogers: I want to warn the witness not to give any conversations and I move to strike out that answer.

The Court: You want to say as nearly as you 92 can what you said to him.

Mr. Rogers: I must object to any conversations; no connection has been made with any person that she talked to with this defendant; I don't know who it was, if she had any talk.

Witness continued: I went to East 19th Street. There was a sign over the place. I don't recollect how it was. I was looking for the Physical Culture Company. There was something in the building that directed me. To my best recollection the sign was Physical Culture Publishing Company. When I went in a young lady came from the typewriter, Miss Gans. There was a large open space, and this young lady 93 came forward to the door, and I asked to see Mr. MacFadden, and she directed me to the representative in the corner—

Q. Did she say that? A. Yes, she said, I will direct you to his representative.

Mr. Rogers: Object to the question. Move to strike out the answer, as not connected with this defendant.

Motion denied. Exception.

94 In accordance with her direction, I entered another room. My recollection is there was no name on the door of that room. But there I saw a young gentleman; one was typewriting and the other one was sitting at a desk. One was inside the office, and one was outside of the room. The room had an opening to my best recollection, and I saw this gentleman; what his name was I do not know.

Q. And what did you say to him?

Mr. Rogers: I object to the conversation as incompetent, immaterial and irrelevant, upon the ground that the person to whom she spoke or who spoke to her has not been connected with the defendant MacFadden and is not bind-
95 ing upon him.

The Court: Objection overruled. You can move to strike it out unless it is connected.

Exception by defendant.

A. I asked him to please take it out, under any consideration.

Q. What did you say to him first?

Mr. Rogers: I make the same objection.

Objection overruled. Exception.

A. I said to him that I came in reference to a photograph that was printed in his papers and I showed it to him, and he recognized it, and said that it was very good and all of that sort, and I said to him to
96 please take it out as quickly as possible from any more publications, and he said if Mr. MacFadden was there he would certainly do it, and this is the best I can tell you his conversation with me, and that I asked him how it could be, how I would know that he would have it out of the publication. Well, he said he would let me know in a day or so. I never heard a word from the defendant after that date.

I never signed any paper consenting to the use of my photograph by anybody. I have never consented

orally to the use of my photograph by anybody at any time. I saw it published several times. It was in the month of March, right after the publication, that I made this visit. That was the first date I heard of it. I have seen it in several copies of the Physical Culture magazine, or the magazine called Beauty and Health after that. After I left the place, I went to the photographer and reprimanded him. At the time this photograph was published for the first time, I was keeping company with my present husband. I was not engaged to him yet, because I was waiting for this thing to get out of the book. I was engaged after, in March, 1905. March 13th. The first time I saw this picture I was not engaged. 97

Q. Where did your husband's folks live? 98

Mr. Rogers: Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. In Michigan, City of Detroit. In June soon after the first publication of this picture, and after I was engaged, I went to Detroit. A lady friend of mine accompanied me on this trip. A married woman with two children. She was the only one who went with me.

Q. What was the purpose of your visit to Detroit? 99

Mr. Rogers: I object to that as incompetent, immaterial and irrelevant, and not within the issues in the pleadings.

Objection overruled. Exception.

A. I was intending to get married at Detroit. At that time, I was not married then. I intended to get married in June.

Q. You made all arrangements?

Mr. Rogers: What is the object of this, if your Honor please? How is it competent here under my objection?

100 The Court: I do not know, but I can imagine a great deal; I don't know.

Mr. Rogers: I object to the testimony and move that it be stricken out.

Objection overruled. Exception.

A. With my husband, yes, sir.

Q. You say you were not married? A. No.

Q. Why not?

Mr. Rogers: I object to that as incompetent, immaterial and irrelevant, not within the issues, no special damage alleged for failure to get married on time.

The Court: You do not have to have special damages alleged because the jury may give ex-

101 emplary damages.

Mr. Rogers: They cannot give exemplary damages until they show that the defendant knowingly published this photograph, which they have not done yet.

Objection overruled. Exception.

A. We postponed it.

Q. Why did you postpone it?

Mr. Rogers: I object to that.

The Court: Has it anything to do with this picture?

Mr. O'Brien: Yes, it has a whole lot to do with this picture.

102 Objection overruled. Exception.

A. My husband's folks asked me to postpone it.

Mr. Rogers: I move to strike out the answer.

Motion denied. Exception.

Q. Did they state why?

Mr. Rogers: I object to the question.

Objection overruled. Exception.

A. They did not.

Mr. Rogers: I move to strike out the answer. 103
Motion denied. Exception.

Q. Did your husband ask you to postpone the marriage? A. No, my husband's father did.

Q. Your husband's father asked you to postpone the marriage? A. Yes.

Q. Did he state any reason for asking it?

Mr. Rogers: I object to the question as incompetent, immaterial and irrelevant, and not within the issues.

Objection overruled. Exception.

A. He asked me to wait—no, he did not state any reason exactly.

Q. You say "exactly"? A. Not exactly this photo- 104
graph.

Q. He did not at that time? A. No.

Q. Did your husband say anything to you at that time with reference to the postponement of your marriage and this publication of the photograph?

Mr. Rogers: I object to the question as incompetent, immaterial and irrelevant, upon the ground that the witness has already testified that he did not.

Objection overruled. Exception.

A. Not while I was in Detroit.

I agreed to postpone the marriage for a few months. The marriage did not take place until August 5th, 105
1905. In the meantime I had no communication with his folks. I was subsequently married in New York on August 5th, 1905. I went back to Detroit in October. I remained there from October until September 24th, the next year, the following year. That is, I went there in October, 1905, and remained until September, 1906.

Q. During that time were you on intimate terms with your husband's folks?

160 Mr. Rogers: I must again renew my objection; that is entirely too remote from this case.

Q. After you came back to New York did the man who is now your husband, say anything to you with regard to this photograph?

Mr. Rogers: I again renew the objection; it is too remote from the time and not within the pleadings. This is a year and a half afterward he is asking about now.

Mr. O'Brien: No, this is immediately after her return from Detroit.

Mr. Rogers: Even then it is too remote.

The Court: If the publication of this photograph had any effect upon Mr. Riddle's mind,
107 if he knew of it before the marriage, it seems to me it was all overcome when they got married.

Mr. O'Brien: It was, so far as Mr. Riddle was concerned; we do not contend for a minute that the publication made any difference in Mr. Riddle's attitude toward Mrs. Riddle.

Mr. Rogers: I withdraw my objections on the statement of counsel.

Mr. O'Brien: I expect to show that she lived within a stone's throw of the home of her husband's parents and that they cut her openly when they met her.

Mr. Rogers: This is not a proper statement before this jury and I ask that a juror be with-
108 drawn; she has testified she never had a word with her husband's folks about it.

The Court: Have you any more to ask this witness?

Mr. O'Brien: Yes.

The Court: I deny your motion.

Exception by defendant.

Mr. Rogers: I ask that the jury be now instructed to disregard the statement of counsel.

The Court: Yes, the statement made by counsel for the plaintiff as to what the effect of this picture was upon her relations with her husband's family must be entirely disregarded by you until there is some evidence on that subject, and if you (addressing Mr. O'Brien) do not connect this witness's testimony with something of that sort, I shall strike it all out. 109

Q. Answer the question? (Question repeated)? A. Yes, sir.

Q. What did he say?

Mr. Rogers: Objected to as incompetent, immaterial and irrelevant.

The Court: I will allow it. Exception. 110

A. He told me that his folks were very much opposed, very much upset and opposed to the photograph, told me how angry they were with him, that he was disgracing his family, and that I was not any fit wife for him, and of course he said there was different language used in regard to my character.

By the Court:

Q. When was that talk, Mrs. Riddle, you have just spoken about? A. We had several talks on that in Detroit; that is the reason I left, and when we came back to New York.

By Mr. O'Brien:

Q. Do you remember the particular language your husband used? A. Not to my recollection. 111

Q. Did he say anything about your being a public character?

Mr. Rogers: I object to this man's testifying all the time, as incompetent, immaterial and irrelevant, and leading.

Objection sustained.

112 Q. What did he say? A. He said his father said that I must be a public character, that no woman would allow herself to be photographed in a magazine of that sort unless she was some public character.

Mr. Rogers: Now I move to strike that answer out as not relevant, giving the statement of a third person to another person to her, and it is not competent or relevant.

The Court: I think in this class of case it is admissible.

Objection overruled. Exception.

Q. When you were in Detroit did your husband's folks call upon you there? A. They did not call on me until after my baby boy was born; that was Octo-
113 ber 9th.

Q. What year? A. 1906.

Q. How far from your husband's folks did you live in Detroit?

Mr. Rogers: I object to this question as incompetent, immaterial and irrelevant and too remote.

Objection overruled. Exception.

A. I should say about six or seven blocks.

Q. Did you ever meet any of them in the street while you were in Detroit? A. I did, but they snubbed me.

Mr. Rogers: I move to strike that out.

Mr. O'Brien: I consent.

114

Q. What did they do?

Mr. Rogers: I object to the question as incompetent, immaterial and irrelevant, and calling for a conclusion and not within the issues.

Objection overruled. Exception.

A. You mean his folks or any relation at all?

Q. Yes, his immediate family, his brothers and sisters? A. They passed me right by in the street just as if I was not anybody at all.

Q. No sign of recognition? A. None whatever. 115

Q. And where was your husband employed at this time? A. He had an office with his father.

Q. Did you occasionally go to see him at his office? A. I did, sir.

Q. Were you ever in his father's office with him when any of his immediate family came in? A. I was; the offices connected—

Q. Yes or no? A. Yes.

Q. When? A. I used to be in there quite often, sometimes twice a day, sometimes three times a day, and every day.

Q. Did his father, your husband's father speak to you on those occasions?

Mr. Rogers: I object to the question as incompetent, immaterial and irrelevant and not within the issues. 116

Objection overruled. Exception.

A. He did.

Q. What did he say?

Same objection, ruling and exception.

A. He talked about the weather and things like that.

Q. Never exchanged confidences of any kind with you? A. None.

Mr. Rogers: I object to the question as calling for a conclusion, and as incompetent, immaterial and irrelevant. 117

Objection overruled. Exception.

Q. Did any of the other members of your husband's family come in while you were there? A. They did.

Q. Did they speak to you? A. No, sir.

Q. None of them? A. No.

Q. How many members of your husband's family were there? A. There were two brothers and two sisters, a mother and there were three aunts and an uncle.

118 Q. All lived at the same household? A. No, lived at different households, but they used to come in there frequently.

Q. Did any of the other members of your husband's family—had you met any of the other members of your husband's family frequently while you were in Detroit? A. Introduced to me, you mean?

Q. No, had you seen them? A. Yes, I had seen them often, but they never recognized me.

Mr. Rogers: I move to strike out the answer. Motion denied. Exception.

Q. Are you on cordial or intimate terms with your husband's folks at the present time?

119 Mr. Rogers: I make the same objection. Objection overruled. Exception.

A. We are friendly now.

Q. Since when? A. Since—after the birth of the baby.

Q. Did your husband ever report to you any conversation held by him with his folks, any of the members of his own immediate family, with reference to you and your picture?

Mr. Rogers: Objected to as incompetent, immaterial and irrelevant and not within the issues.

Objection overruled. Exception.

120 A. He used to bring several conversations home to me which at the present moment, I do not recollect.

Q. Did you make many friends while you were in Detroit?

Mr. Rogers: I object to that as incompetent, immaterial and irrelevant.

The Court: Objection sustained. This witness has not yet said that any of her husband's

family spoke to her about this portrait or that anybody else has spoken to her about it except her husband. 121

Mr. O'Brien: That is all. I have to call her husband naturally to connect the conversations held by him to which the plaintiff was not a party, but nevertheless conversations reported by the husband to the plaintiff.

Question withdrawn.

Q. Did you have any friends in Detroit at the time you went there?

Mr. Rogers: I make the same objection.

Objection sustained. Exception.

122

CROSS-EXAMINATION by Mr. Rogers:

I sat for this photograph, or had it taken, in December, 1904. At White's Studio. A young lady went with me to White's. Miss Minerva Walton. My business or profession at this time was, I was performing in a show. I was engaged with the Baroness Fiddlesticks Musical Comedy. My position with this company was in the chorus, and appearng upon the stage. At the Casino Theatre, New York. The company closed the same month. It was only in existence about two months. I was with them during that period of time. My friend, Miss Minerva Walton was also a young lady employed in the chorus in the same company. She had her pictures taken before I 123 did. I saw her pictures, and that is the way I got mine taken. I did not know that White, the photographer, was known as a theatrical photographer. I did not know anything about the theatrical profession at all or the photographers about the theatrical profession—pertaining to the theatrical profession. I knew he was a photographer—well, I saw them in the windows.

124 Q. You knew that many of the photographs taken by Mr. White of actors and actresses were published, didn't you, in various publications? A. I did not know that they advertised them free, of their own free will.

Q. You knew that they were published in various magazines did you not? A. I had seen magazines with photographs of actresses in them.

Witness continued: I knew that Miss Minerva Walton had her photograph taken in White's published in the Standard and Vanity Fair. (Plaintiff's Exhibit 1 shown witness). I did not say anything about objecting to this photograph as not being a good likeness. It is a good likeness. A good representation of the photograph. I had eighteen different poses of which
125 photographs were taken at White's at this time. One hundred of these poses were ordered. Of the particular photograph complained of, I ordered ten. Mr. Weaver has most of them. He has them all except one, I believe. That one, I believe, is in Michigan. I recall testifying before Judge Goff in regard to one of these likenesses that I gave to my attorney. About his giving one of these photographs to the newspapers. I testified at that trial that I supposed the photograph was lost, because when I gave it to the newspaper it never came back. My counsel told me that he gave a copy of this photograph to the New York Journal.

Q. Now I ask you to look at page 5 of the New York American under date of Wednesday, January 31, 1906, and state whether the photograph on that
126 page is a reproduction of the photograph which your counsel had and gave to the Journal? A. I guess it must be so. I recognize it as such.

Page 5 of the Now York American offered in evidence, dated January 31, 1906.

Marked in evidence Defendant's Exhibit A.

Witness continued: That must have been after I brought this suit. I don't recollect the date on which I brought this suit. I brought this case to Mr. Weaver

about August, 1905. That was after I was married, but before the time I left for Detroit. I don't think my husband's folks objected to me because of my connection with the stage before this publication of the photograph had ever taken place, as they had relatives of their own on the stage. I do not recall testifying before Judge Goff that they had raised some objections to me as the intended wife of my husband before that time and by reason of my connection with the stage. I do not recollect testifying about that at all before Judge Goff. I do not recall testifying in substance that my husband's relatives had made some objections to me before this photograph was published in the Physical Culture. When I became engaged I was not on the stage. I left the stage immediately after that. They had raised no objection to me as the intended wife of my present husband by reason of my connection with the stage or any other way. Before I became engaged, my husband never said anything like that, that his people had any objections to me. 127 128

Q. Then do I understand you to say that your husband afterwards told you that his people objected to you that you would not make him a fit wife because your photograph had been published in this magazine? A. Something to that effect. They did not say that I would not make him a fit wife because I had had connection with the stage. I cannot recall that in my connection with the Baroness Fiddlesticks my photographs appeared in the bill-boards or in the lobby or anywhere. I don't think there was any group photographs of the chorus in the lobby. I don't know where they were. I have seen some. It is my recollection that I don't know whether they were used in advertising the play. They may have been. No one ever knew me. I don't think they were used to advertise the play. I say there were pictures of the chorus girls taken, but I did not see any of them exposed. I don't know whether they were or not. When I went to White's I had some pictures taken at that time in 129

130 costume. In the costume that I wore in the Baroness Fiddlesticks Company. I posed for these photographs in costume in the studio. And cuts were taken from them.

Sixteen photographs shown to witness and identified by her as having been posed by her at White's, and received in evidence and marked Defendant's Exhibits B to P inclusive.

I ordered a hundred of the various photographs in all. I sent them to my husband. I sent one on the 10th of December after—that was the only one I could get finished by Mr. White; that was the first one, I think that they have there. (Referring to Defendant's Exhibit B). I did not send him at any time Defend-
131 ant's Exhibit D. I only had one of that. I did send him some of the others. I think Mr. Weaver has the one I sent him in the case, the exact one, with the frame. I don't know if it was this one or that one; he has it in the gold frame, as I sent it for Christmas, 1904. (Referring to Defendant's Exhibits G and H), those are two different poses, one is a smile and one is serious. This is a costume I used in the Baroness Fiddlesticks play. One of the costumes. I cannot remember whether that was in a "good night" scene. The costume is not *"robe de nuit."* It is a matinee or a tea gown. My husband was living in Detroit at that time, with his parents. He did not say anything about his parents objecting to that costume. He
132 never mentioned it to me. I was corresponding with my husband in December, 1904. And that led to an engagement in March, 1905. After the publication. After the publication complained of in the March issue of Physical Culture.

Q. So that that did not prevent your becoming engaged to him? A. Well, I was engaged before that.

Q. You were only re-engaged then? A. Re-engaged because I intended to stop this.

Q. When were you first engaged to your husband? 133
A. December 25th.

Q. So that your statement to your counsel was a mistake, that you were not engaged until March? A. No, it was not a mistake. We were really engaged—the set date was the 13th of March, 1905.

Q. Well, you mean that there was some formal engagement party or something of that kind? A. Well, my husband had the ring made for that day.

Q. But you were secretly engaged, if I may so put it, without intending to reflect? A. Yes.

Q. In December, 1904? A. Yes.

Q. So that the engagement then was not broken after this publication appeared, but was renewed? A. Renewed.

Q. And that was followed in the summer by the 134
marriage to your husband? A. It was.

Q. And you lived happily with him and have ever since, have you not? A. Yes, sir.

Q. Now, your husband's parents live in Detroit? A. They do.

Q. And you are now on good terms with them? A. In a way, yes, sir.

RE-DIRECT EXAMINATION by Mr. O'Brien:

The engagement in the Baroness Fiddlesticks Company, the actual appearances on the stage in public, lasted, I think, from November until the middle of 135
December. That was my only engagement. On the stage.

Q. What was the character of that performance? Describe the costumes of the chorus in that performance, the chorus of which you were a member?

The Court: Well, that was a reputable play was it not?

Mr. O'Brien: A respectable play, yes.

136 Mr. Rogers: We concede that your Honor certainly; we do not make any claim about it.

Witness continuing: There was nothing immodest about the costumes or lines of the play.

Q. Defendant's counsel asked you with reference to a picture of Minerva Walton which you knew had been advertised. Did you say anything to the photographer about the picture? A. I did.

Q. At the time with regard to which Mr. Rogers examined you?

Mr. Rogers: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

137 A. I said that the photographer should not dare to use my photograph in that way—never use my photograph for any advertisement whatsoever.

The photograph with my hair loosened was suggested by the photographer himself, and my mother asked me to have it taken that way. To have it taken with my hair down. The fifteen photographs which defendant's counsel has offered in evidence were taken at different times. The costumes—they were a few heads and costumes; the costumes and the heads, the laughing heads, were taken at my first sitting. At the time those photographs were taken, I had decided to leave the stage. I obtained the costumes in which
138 these pictures were taken from the wardrobe mistress of the company. I was employed by the company at that time. When I speak of a reengagement in March, 1905, I mean that it was made public on that day. I do not think the fact that I had been connected with the stage had anything to do with the objection of my husband's folks to me, because they had relations of their own on the stage. Very close relations. Cousins. Cousins of my husband's folks. They are on terms of cordiality and intimacy with my husband's folks. At the first posing I had for White,

the photographer, one hundred photographs were ordered. I ordered one hundred but I wanted one as soon as possible; they could not finish them all because it was a very busy time of the year, December, and being before Christmas, the holidays. I did not want one hundred for distribution. I took them not because I wanted them myself, because there were eighteen poses and to have the eighteen poses that I had, it cost me almost as much as if I had the one hundred taken, so to benefit by that, I took the one hundred. Of that one hundred, I disposed of some amongst my friends and to my intended husband. Very few were distributed to my friends. Mostly the heads, that was all. To the best of my recollection, about a dozen and a half, I should say. I don't think there were more than eighteen. I still have the balance of them. I knew nothing about the fact that the New York American was about to publish my picture prior to this publication. I first learned about this publication through Mr. Weaver. When I came back to New York. That was September 25th, 1906. My counsel, or attorney rather knew that I was in Detroit at the time of this publication. 139 140

Mr. O'Brien here read the article in the Journal to the Jury.

Witness continued: Immediately after the publication of this photograph, I moved from the neighborhood I had been living in. I lived in East 58th Street and I moved to 142nd Street on the west side. More than half of the eighteen poses,—more than nine, as a matter of fact, went to my husband in Detroit, after my engagement. 141

I identify Defendant's Exhibits, P. O, B, H, G, F and E, and then he had the three street costumes.

By Mr. Rogers:

Q. Your counsel has read to the jury the following: "Macfadden and White have used my portrait to

142 deceive the public and to represent my hair as luxurious and beautiful as the result of an advertised treatment. This representation is false." Now that is in quotation marks. That was not said by you to the Journal representative, was it? A. I was not here; I did not know anything about it.

Q. None of this is anything you said, is it? A. I don't know anything about it.

Q. You sued the photographer White, didn't you, in this action? A. I think we did.

Q. And that action has been dismissed, hasn't it? A. Yes, sir.

Q. This action was brought August 12th, wasn't it, the date of this summons, 1905? That is the right date, isn't it? A. I guess so.

143

Mr. Rogers: I move to strike out all of the testimony of the witness of things that were said to her in Detroit subsequent to the date of August 12th, when she brought this action as not within the pleadings and not within the issues, and as improper, incompetent and irrelevant.

Motion denied. Exception.

BERNARR A. MacFADDEN the defendant herein, called in his own behalf, having been duly sworn,

144 testified as follows:

Direct-examination by Mr. Rogers:

I am the defendant in this action. I do not know the plaintiff, Mrs. Riddle, I have never seen her before to my knowledge. Until this moment. I did not see her in my office in or about the month of March, 1905, at 19th Street. I did not know of her being in my office at that time. (Plaintiff's Exhibit B, Physical Culture for March, 1905, shown witness.) At the time of that publication, I did not know whose

photograph it was. At that time I did not know that 145
the photograph was of any living person, I knew nothing about it. I knew nothing about the name. It first came to my attention that there was an objection to the photograph or that picture, when I received a letter from Mrs. Riddle or some one connected with her. I have forgotten who it was. I don't remember the date. I have no remembrance of the date. But as a result of the communication I immediately ordered that it be taken out of the magazine, and it has never been published since, to my knowledge. Outside of the one that was in the press. I discharged Mr. Frenz.

CROSS-EXAMINATION by Mr. O'Brien: 146

I haven't the faintest recollection of the date I received that letter. It would be impossible for me to remember the date that I received a letter. I am willing to sit here on the stand and swear that I immediately gave orders that it be discontinued. Yes, sir.

Q. Do you remember, sir, swearing to an affidavit that was served with your answer in this case, that you feared to incriminate yourself?

Mr. Rogers: I object to that, and if this is continued, I am going to renew my motion, because he has made no such affidavit. The affidavit was made by me, and if he wants to know if I was afraid of incriminating myself, 147
let him put me on the stand.

Immediately prior to the moment when I entered the Court room I was in the hall waiting. I have been in town all day at my office. In communication with my counsel. During the trial of this action before Judge Goff I think I was in New York. I don't remember. I think I stayed at my usual place of abode. I don't remember exactly; I have several places of

148 abode. Sometimes I live in Newark, and sometimes I live in New York, sometimes at Battle Creek, sometimes at Physical Culture City; I live wherever my business takes me. Yes, I have a fixed place of abode. I have a home. When I am in New York, I live in a hotel, usually. I am not in New York but a very small part of the time. I have not the faintest remembrance where I was on the 10th, 13th and 14th of April, 1905. I think I was in New York at the time this action was being tried before Judge Goff at Special Term, I don't remember definitely. That is the Physical Culture magazine for July, 1905. Published by me. The date of publication, I think, is stated on there, July, 1905. It was not published in July, 1905, the publication date is a few days previous;
149 I think it was the 24th or 25th of June, something like that. I had considerable circulation for these magazines in the City and State of New York. It is hard to tell how large a circulation in the State of New York; I would have to look at my books to find out exactly. It would be pretty hard to make a guess at anything like that; that I don't know much about, without looking up. I have been a fairly successful Physical Culture business man. I should think 5,000 copies of Physical Culture were published in the State of New York. I think 10,000, I really cannot state definitely just how many there are published. I should not say there were 5,000 of Beauty and Health published in New York. I suppose there were 2,000. That is—that is a mere guess; I don't know exactly.
150 The books of the Physical Culture Publishing Company which now owns the business, are here in New York City. I don't know whether the books are here that have to do with the business at that time; I don't know. I had a general oversight over what went into my magazine; all the different departments. I can hardly say that an advertisement or photograph went into my magazine without my knowing of it. Of

course, they followed my instructions, but every ad- 151
vertisement that went into the magazine did not al
ways pass through my hands.

Q. Do you remember whether this one did?

The Court: That would be assumed; he is responsible for it.

Q. Had you any doubt at the time this photograph was published that that was a photograph of a living person? A. Why, I knew nothing at all about it; we were in the habit of buying photographs from Mr. White; we bought from him actresses who wanted to be advertised and wanted their photographs used, and that was one of them.

Mr. Rogers: You do not offer this in evi- 152
dence, as I understand it, the July number?

Mr. O'Brien: I will now offer in evidence the copy of Physical Culture for July, 190-

Mr. Rogers: Before it is received I would like to ask a question regarding it.

By Mr. Rogers:

Q. Was this published at Spotswood, New Jersey? A. Yes, sir.

By Mr. O'Brien:

Q. Was it circulated in the City and State of New York? A. Well, not from New York, no, sir. Of course, there was some circulation in New York, but 153
it was published and circulated from Spotswood, New Jersey.

Mr. Rogers: I object to it as not coming within the statute.

Objection overruled. Exception.

Received and marked Plaintiff's Exhibit 6.

By Mr. Rogers:

Advertising forms on the magazine for July were closed 30 days previous to publication. It would be between the 25th of May and the first of June.

154 By Mr. O'Brien:

During the time of this publication, that is from March to July, 1905, I was connected with certain Physical Culture restaurants in the City of New York. I was a member of the Company, as one of the interested persons. I think these magazines were on sale there, but I am not sure of that. I don't remember how many restaurants we had in the City of New York at that time, three or four, or two or three. I guess something like that; I did not have them; the company had them; I was interested in the company. I was President of the company. I think that was all. I was a director of the corporation. I don't remember whether we had two or three, four, five or
155 six restaurants in the City of New York.

CASS B. RIDDLE, called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

Direct-examination by Mr. O'Brien:

I reside at 369 Edgecomb Avenue. I am the husband of the plaintiff. In March, 1905, I resided in Detroit, Michigan.

Q. Was anything ever said to you by any member of your family with reference to the exhibition of your wife's picture in Physical Culture and Beauty and
156 Health in March, 1905, or subsequent thereto?

Mr. Rogers: I object to the question as incompetent, immaterial and irrelevant, and not within the issues.

Objection overruled. Exception.

A. You mean after March, 1905?

Q. After March, 1905? A. Yes.

The Court: I think you ought to confine the conversation to some reasonable period after the time of publication.

Q. Within three months after March, 1905? 157

Mr. Rogers: I make the same objection.
Objection overruled. Exception.

A. Yes.
Q. What was said?

Mr. Rogers: I object to that as incompetent, immaterial and irrelevant.
Objection overruled. Exception.

A. My father said that any one that had any respect for themselves would not have their picture in such a book, and my mother said it was a disgrace to the family.

Mr. Rogers: I move to strike out the answer 158
as a conclusion, as characterizing a publication which is in evidence and which speaks for itself.
Motion denied. Exception.

Q. Were these conversations reported to your wife? A. I reported those, yes.
Q. When? A. When I came to New York the first time.
Q. When was that? In the first part of August, 1905.
Q. Did you notice at the time of reporting them whether or not they had any effect upon your wife?

Mr. Rogers: I object to that as incompetent, 159
immaterial and irrelevant.
Objection sustained. Exception.
The Court: He may state what she did or said when he told her that.

CROSS-EXAMINATION by Mr. Rogers:

I don't remember what day in August I came to New York. It was the first part; I would say

160 August 1st. I would say the first part of August. It was before the 5th of August any how that I was in New York. Yes, it was before the 5th.

Mr. Rogers: There is no denial that the plaintiff had no knowledge of the publication of her picture in the New York American until after it was published.

Plaintiff offered in evidence the interlocutory judgment, which was received and marked Plaintiff's Exhibit 7.

PLAINTIFF RESTS.

Mr. Rogers: The defendant rests with the testi-
161 mony of the defendant which was taken out of order.

I make a motion that the complaint be dismissed upon the ground that no damages have been shown, that no knowledge has been shown on the part of the defendant that he knowingly published the portrait of the plaintiff or of any living person, and that therefore no exemplary damages can be brought in by this Jury, and no damage having been proved, I move to dismiss the complaint.

Motion denied. Exception.

Mr. Rogers: Upon the grounds stated, I move that a verdict be directed for the plaintiff for six cents nominal damages.

162 Motion denied. Exception.

Case summed up by Mr. Rogers for the defendant, and by Mr. O'Brien for the plaintiff.

Judge's Charge.

163

DAYTON, J.: Gentlemen of the Jury. The plaintiff has brought this action to restrain the defendant MacFadden from using and publishing a picture of herself in his magazines for advertising purposes, and she also claims damages of $15,000 on the ground that such publication was unauthorized by her.

The issues in the action so far as they relate to the injunction, were disposed of by Mr. Justice Goff, and he found, as matters of fact, that the defendant MacFadden, at the time this action was begun and for some time prior thereto, was using and exhibiting a photograph of the plaintiff for advertising purposes in certain publications which have been brought before you; he also found, as a matter of fact, that the plaintiff, at the time of said use, exhibition and display of her picture or photograph, was of the age of twenty-one years and upwards, and he also found, as a matter of fact, that the plaintiff has never consented to the exhibition or display of her picture or photograph for advertising purposes or for purposes of trade, and he also found, as a matter of fact, that the plaintiff had suffered damages by the defendant's use of her picture or photograph as above set forth; and the learned Justice at Special Term who made these findings of fact, has sent the case here for you to say, in amount, how much she has suffered by way of damages.

164

The plaintiff has testified that when she ascertained the fact of the use of this photograph in these publications, she went down to the office of some one of these publications, the Physical Culture, I think, and saw somebody there, and objected to the use of the photograph. The witness Frenz, who has been an employe of the defendant, testified that when he brought this photograph to the defendant, having obtained it from the photographer White, he told the defendant that he had no authority from the girl—I

165

166 think that was the language he used, meaning the plaintiff, to use this picture, to which the defendant replied, that is all right, she is probably an actress or a model. On cross-examination the witness Frenz testified that he was not discharged by the defendant but that he left him of his own free will, and he also said on cross-examination that he did not then know whether this was a picture of a living or a dead person.

The defendant testified that the moment he heard that there was any objection to the use of this photograph, he directed its discontinuance in his publications, and he also said that he did discharge the witness Frenz from his employment.

The plaintiff has also testified, as I recall her evi-
167 dence, that when this photograph was brought to the attention of her husband and her husband's family, she was treated with considerable disdain, and the husband has testified here that his parents and his family in Detroit, spoke of the plaintiff in disparaging terms because this photograph had appeared in the defendant's publications.

The circumstances of the taking of this photograph were told by the plaintiff on cross-examination, that she went with a young lady friend of hers to this photographic establishment and posed for, I think, eighteen different positions, and ordered one hundred copies of the various negatives taken at that time. It also appeared that when she had these photographs taken and for a few weeks afterwards, or for some-
168 time afterward, she was a member of a Comic Opera Company in this city, as one of the chorus, and that the young lady who went with her there to the photographer was also a member of that chorus.

There is nothing in this case against the good character of this plaintiff. It must be assumed by you that she is a woman of excellent character and repute and was such at that time. The fact that she was a member of a theatrical chorus company is, of itself,

no blemish upon her reputation. There is nothing in 169
this case against the personal good character of the defendant, so you may assume that in all business and social relations he is a man of good repute.

Counsel for the plaintiff has urged that the articles in the magazines published by the defendant are of an unworthy grade or character, and therefore the publication of this photograph in a magazine of that character was highly prejudicial and injurious to the plaintiff. You may take those exhibits with you in the jury room and consider whether or not the articles are of the character defined by the counsel for the plaintiff, and if they are of such a character, certainly the picture of anybody of good repute published in a disreputable journal would be injurious; that goes 170
without saying.

Prior to 1903, it was the common law of this State that the use of the picture of a man or woman for advertising purposes of any kind was not unlawful. That opinion of the Court of Appeals created a great deal of comment, not only in this State but throughout the country, and as a result of that opinion, the Legislature, in 1903, passed this statute, being Chapter 132 of the Laws of 1903, the first section of which statute provides that the use for advertisement or for the purposes of trade of the portrait or picture of any living person without having first obtained the legal consent of such person is a misdemeanor. The second section is as follows: Any person whose name, portrait
or picture is used within this State for advertising 171
purposes or for the purposes of trade without the written consent first obtained as above provided, may maintain an equitable action in the Supreme Court of this State against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof, and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used

172 such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages.

Damages, in the ordinary legal use of the word, are the pecuniary compensation which the law affords for the commission of an injury. Exemplary or vindictive damages are the expenses in seeking the remedy as well as punishment for the injury.

Gentlemen, you are to say, within the range between six cents and $15,000 for you must find some verdict, in some amount, for the plaintiff, how much she has been injured, and what sum will compensate her for that injury, within those limits. I think it may fairly be said that it would be within the contemplation of
173 this statute that outraged or injured feelings are to be compensated for in damages for its violation.

Now, on this proof, will you say that this plaintiff's feelings have been so injured that she has suffered intensely, and therefore is entitled to those exemplary or vindictive damages? If she has, say so, and give her a reasonable sum. If you believe, in your best judgment, that the publication of this photograph, although unlawful, being without her consent, did not occasion her any mental agony or distress, if she has not suffered in her reputation, if she has not lost the associations which she previously enjoyed, or any similar circumstances, then, she will be entitled only to nominal damages.

You will take this case, gentlemen, without passion and without prejudice. This lady is entitled to your
174 full consideration, for her character stands unimpeached. The defendant is entitled to your full consideration because his character stands unimpeached, unless you find these publications are of an unworthy sort. You are reasonable men who are called upon to exercise a reasonable judgment, and I trust that the conclusion you reach will be a just and proper one.

Mr. Rogers: I desire to except to that part of your 175
Honor's charge in which you say that the jury must find a verdict for the plaintiff. I desire further to except to that part of your Honor's charge in which you say that the reputation of the defendant is at issue in determining the damages.

The Court: I will refuse to charge any of these requests, and give you an exception to each refusal.

The defendant's requests to charge are as follows:

1. That under the evidence and the statute sued on there is no proof upon which the jury may award exemplary damages.

2. That the jury in determining the damage, if any, must confine themselves to the mental anguish suffered 176
by plaintiff or shown by her own testimony.

3. That the defendant's reputation or character may not be considered in determining damages.

4. That there is no evidence that any mental anguish, suffered by the plaintiff was due to any matter published in the exhibits in evidence apart from the photograph complained of.

5. That the jury must not take into consideration any matter published in the magazines in evidence except the advertisement of New Hair Culture in determining the question of damages.

6. That the jury must not consider the character of the magazines in evidence in determining the ques- 177
tion of damages.

7. That the magazine of July, 1905, was published outside the State of New York and that there is no evidence of publication in the State of New York or any evidence bringing the publication within the provisions of the statute in question, and that the jury must not take into consideration the publication of Physical Culture of July, 1905.

178 8. That the jury must not take into consideration anything that occurred after the 14th day of August, 1905.

9. That the jury must not take into consideration any mental suffering or anguish of the plaintiff after August 14, 1905.

10. That there is no evidence of any wilful or malicious publication by defendant.

11. That there is no evidence of any damage to plaintiff's reputation or character.

12. That no damage has been proved except for mental anguish.

179 Each of said requests to charge is denied, with exception to defendant.

Mr. O'Brien: Will your Honor charge the jury that they may consider the extent of the circulation of these magazines within the State of New York?

The Court: Yes, gentlemen, the extent of the circulation of these magazines within the State of New York is a matter to be taken into consideration by you.

Mr. O'Brien: I ask your Honor to charge the jury that they may find exemplary damages although no actual damage was suffered.

The Court: The statute provides, gentlemen, that you may, in your judgment, find exemplary damages, although no special damages are proved.

Exception by defendant.

180 Mr. Rogers: I ask your Honor to charge the jury that under the evidence they may not find any exemplary damages.

The Court: I refuse to charge that because the statute directs otherwise.

Exception by defendant.

The jury retired.

The jury returned a verdict in favor of the plaintiff in the sum of $3,000.

The jury, by request of defendant's counsel, was polled and found unanimous. 181

Mr. Rogers: I move to set aside the verdict on the ground that it is contrary to the evidence and contrary to the weight of evidence, and contrary to law, and on the ground that it is excessive, and on all the other grounds mentioned in Section 999 of the Code of Civil Procedure.

Motion denied. Exception.

Mr. Rogers: We move for a new trial upon the same grounds.

Motion denied. Exception.

The foregoing contains all the proceedings and testimony at the trial before Mr. Justice Dayton.

182

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN,
Defendant.

It is hereby stipulated that the appeal herein in so far as it includes an appeal from the interlocutory judgment be withdrawn and that the review on appeal be limited to the review of the questions presented upon the assessment of damages at Trial Term before Mr. Justice Dayton and from the order of said Justice denying the motion of the defendant to set aside the verdict and for a new trial, and to the review of the final judgment entered thereafter or on June 19th, 1908. 183

Dated, New York, November 6th, 1908.

RUFUS L. WEAVER,
Attorney for Plaintiff-Respondent.
HENRY M. EARLE,
Attorney for DefendantAppellant.

184 **Stipulation as to Exhibits.**

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN,
Defendant.

It is hereby stipulated and agreed as follows:

185 1. That Plaintiff's Exhibit 1 admitted in evidence in the trial before Mr. Justice Dayton, is a copy of the magazine "Beauty and Health" for May, 1905.

2. That Plaintiff's Exhibits 2, 3 and 4, admitted in evidence at such trial, are copies of the magazine called "Physical Culture" for the months of March, April and May, 1905.

3. That Plaintiff's Exhibit 5, is a photograph of the plaintiff-respondent admitted in evidence upon said trial.

4. That Plaintiff's Exhibit 6, is the issue of the magazine called "Physical Culture" for the month of July,
186 1905.

5. That Defendant's Exhibit "A" received in evidence upon such trial is page 5 of the New York American, dated January 31st, 1906.

6. That Defendant's Exhibits "B" to "P" inclusive represent various photographs of the plaintiff-respondent.

It is further stipulated and agreed that the foregoing exhibits need not be printed in the case on ap-

peal but that the same may be produced by either party on the argument of the appeal herein. 187

Dated, New York, November 6th, 1908.

RUFUS L. WEAVER,
Attorney for Plaintiff-Respondent.
HENRY M. EARLE,
Attorney for Defendant-Appellant.

PLAINTIFF'S EXHIBITS.

Plaintiff's Exhibit 1.

Beauty and Health Magazine for May, 1905. (See stipulation respecting this exhibit at p. 62). 188

Plaintiff's Exhibit 2.

Physical Culture Magazine for March, 1905. (See stipulation p. 62).

Plaintiff's Exhibit 3.

Physical Culture Magazine for April, 1905. (See stipulation p. 62). 189

Plaintiff's Exhibit 4.

Physical Culture Magazine for May, 1905. (See stipulation p. 62).

190 **Plaintiff's Exhibit 5.**

Photograph of plaintiff-respondent. (See stipula-stipulation p. 62).

Plaintiff's Exhibit 6.

Physical Culture Magazine for July, 1905. (See stipulation p. 62).

---

191 **Plaintiff's Exhibit 7.**

Interlocutory judgment. This Exhibit is printed on page 16 of this record.

DEFENDANT'S EXHIBITS.

Defendant's Exhibit A.

Page 5 of the New York American, dated January 31st, 1906. (See stipulation p. 62).

---

192 **Defendant's Exhibits B to P.**

Photographs of plaintiff-respondent. (See stipulation p. 62).

Order Settling Case.

193

SUPREME COURT,

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE,
Plaintiff-Respondent,

against

BARNARR A. MACFADDEN,
Defendant-Appellant.

194

Upon the annexed consent, it is hereby ordered that the foregoing case be and it hereby is settled as above set forth and that the same or a printed copy thereof be and it hereby is ordered to be filed and annexed to the judgment roll.

Dated, New York, November 18 1908.

CHARLES W. DAYTON,
J. S. C.

It is hereby stipulated that the foregoing case on appeal be settled as above stated and that the same or a printed copy thereof may be filed and annexed to the judgment roll.

195

Dated, New York, November 17 1908.

RUFUS L. WEAVER,
Attorney for Plaintiff-Respondent.

HENRY M. EARLE,
Attorney for Defendant-Appellant.

196 **Stipulation Waiving Certification.**

SUPREME COURT,

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE,
Plaintiff-Respondent,

against

BERNARR A. MACFADDEN,
Defendant-Appellant.

197 Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated by and between the attorneys for the respective parties herein, that the foregoing printed papers constitute the record on appeal herein, and are true and correct copies of the judgment roll, case on appeal as settled, order denying motion for a new trial, and all papers used before the Court in the trial of this action now on file in the office of the Clerk of New York County, and that certification thereof be and the same is hereby waived and that a copy of the printed case on appeal herein be filed in lieu of an engrossed copy.

Dated, New York, November 17, 1908.

198 RUFUS L. WEAVER,
Attorney for Plaintiff-Respondent.
HENRY M. EARLE,
Attorney for Defendant-Appellant.

Affidavit of No Opinion.

199

SUPREME COURT

NEW YORK COUNTY.

FELICITE SKIFF RIDDLE,
Plaintiff,
against
BERNARR A. MACFADDEN,
Defendant.

City and County of New York, ss.:

200

Henry M. Earle, being duly sworn, says: I am the attorney for the plaintiff in the above action; that no opinion was given upon the decision of Mr. Justice Dayton denying the defendant's motion for a new trial.

HENRY M. EARLE.

Sworn to before me, this
17 day of Nov., 1908.
Lewis Earle,
Notary Public,
New York Co.

Order Filing Record in Appellate Division.

201

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, in the First Judicial Department.

Dated, November 18, 1908.

CHARLES W. DAYTON,
J. S. C.

4/2

APPEAL PRINTING CO., 32-34 VESEY ST., N. Y.

Argued by
Mr. Earle.

New York Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

FELICITE S. RIDDLE,
Plaintiff-Respondent,

against

BERNARR A. MACFADDEN,
Defendant-Appellant.

LUTHER S. WHITE,
Defendant.

Brief for Appellant Bernarr A. Macfadden.

This is an appeal from a judgment for $3,198.69 entered on the verdict of a jury rendered at Trial Term, Part II, for the plaintiff, against the defendant Bernarr A. Macfadden, for $3,000 damages, and from the order of Mr. Justice DAYTON who presided at said trial, denying the defendant's motion to set aside the verdict and for a new trial.

The action is one brought under the provisions of Chapter 132 of the Laws of 1903, entitled "An Act to prevent the unauthorized use of the name or picture of any person for the purposes of trade."

The action came to trial upon the issues raised by the amended complaint and the separate answers of the defendants before Mr. Justice GOFF at Special Term, Part 5, on the 10th, 13th, and 14th days of April, 1908. The complaint was dismissed as to the defendant Luther S. White, but Mr. Justice GOFF made his decision containing certain findings of fact in which he found in substance that the defendant Macfadden, the editor and publisher of the magazines called "Physical Culture" and "Beauty and Health," was using, exhibiting, displaying and publishing, the picture or photograph of the plaintiff in said magazines to advertise a book of which he was the author called "New Hair Culture" and that the plaintiff never consented to the use of her said photograph and that she suffered damages by reason of the use thereof by the defendant, Macfadden; said Justice also found as a conclusion of law that the plaintiff was entitled to an interlocutory judgment enjoining the future use by the defendant of such photograph and a direction that the case be sent to Trial Term, Part 2, for an assessment of the damages sustained by the plaintiff by reason of such use of the picture, by a jury at such Part, and directed an interlocutory judgment accordingly (Record, pages 14, 15 and 16). Pursuant to such decision an interlocutory judgment was entered which appears on pages 16, 17 and 18 of the Record.

The assessment of damages came before Mr. Justice DAYTON and a jury at Trial Term, Part 2, resulting in the rendering of the verdict and the judgment as before stated.

The errors assigned on behalf of the defendant, Macfadden, are as follows:

1. The Trial Court erred in the admission of evidence to the prejudice of the defendant.

2. The Trial Court committed error in its charge to the jury on the law of exemplary damages and further erred in refusing to charge as requested by defendant.

3. The damages awarded are excessive.

POINT I.

The Trial Court erred in the admission of evidence to the prejudice of the defendant.

It is claimed on behalf of defendant Macfadden, that the Trial Court erred in allowing, over the defendant's objection, the testimony of plaintiff as to statements made to her by her husband to the effect that her husband's family had "cut her"; also in allowing the testimony of the husband of what his family had told him concerning the publication of plaintiff's picture.

At folio 106 of the Record plaintiff's counsel asked her the following question referring to what occurred after the publication of the picture by the defendant.

Q. After you came back to New York did the man who is now your husband, say anything to you with regard to this photograph?

After an objection by defendant's counsel, plaintiff's counsel stated the purpose of the question as follows:

> "Mr. O'Brien: I expect to show that she lived within a stone's throw of the home of her husband's parents and that they cut her openly when they met her (fol. 107)."

Defendant's counsel then asked that a juror be withdrawn as such statement was improper. The Trial Justice denied the motion but said to the jury (fol. 109):

> "The Court: Yes, the statement made by counsel for the plaintiff as to what the effect of this picture was upon her relations with her husband's family must be entirely disregarded by you until there is some evidence on that subject, and if you (addressing Mr. O'Brien) do not connect this witness' testimony with something of that sort, I shall strike it out."

Here we have a statement of the Trial Justice of his intention to allow the testimony of statements of the plaintiff's husband to her to the effect that his family had openly cut her because of this publication of her picture.

Following this ruling of the Trial Court, the following testimony of plaintiff was admitted, the defendant's counsel interposing frequent objections to the line of testimony, which were overruled, and exceptions duly taken:

That plaintiff's husband had told her that they (his family) were very much upset and opposed to the photograph; how angry they were with him; that he was disgracing the family; that she was not a fit wife for him and "of course he said there was different language in regard to my character" (fol. 110). That she must be a public character (fol. 112).

Upon this same line, the plaintiff, under frequent objections by defendant's attorney which were overruled and exceptions taken, testified: that her husband's relations did not call on her until October 9th, 1906 (fols. 112, 113). That they passed her by in the street as if she was nobody at all, without sign of recognition (fols. 114, 115); that her husband's family consisted of the father, mother, two brothers and two sisters, three aunts and uncles (fol. 117). That she saw them often but they did not recognize her.

Plaintiff had previously testified that she married on August 5th, 1905, and that she lived in Detroit from October 5th, 1905 to September 24th, 1906

(fol. 105), a period of nearly a year and she further testified that her husband's folks lived only six or seven blocks from her in Detroit (fol. 113).

The husband, Cass B. Riddle, a witness for plaintiff, was also allowed to testify, under an objection on behalf of defendant to which exception was taken, of what his father and mother had said about the publication of the plaintiff's picture (fols. 155 158).

It is perfectly obvious that the testimony of both the plaintiff and her husband as above set out is but the most pronounced hearsay and that it was inadmissible upon any theory.

The wisdom of the rule excluding hearsay testimony has been so long and well established that the Courts are loathe to depart from the rule, except in the cases coming within the exceptions which are as well and clearly established as the rule itself.

The objectionable testimony under discussion does not come within any exception to the hearsay rule. Even if it had clearly appeared from the statements of the family to plaintiff's husband that they had shunned the plaintiff because of the publication, there would be no authority for allowing the testimony.

The defendant, Macfadden, cannot be held accountable for the estrangement of the family unless it was caused by the publication, and we, therefore, find the all-important fact of the cause of the estrangement to have been established by the *unsworn* statement of the family, with no opportunity of cross-examination by the defendant.

The fact that the plaintiff was on the theatrical stage prior to her marriage might well have been the cause of the unfriendly attitude of the family toward her. It is quite likely that they did not wish their son to marry a chorus girl and even after the wedding occurred that their feelings

toward her were none too friendly for that reason. It is reasonably apparent that the husband's family were strongly prejudiced against the plaintiff prior to the publication, as appears from the fact that they unequivocally condemned her, according to the husband's testimony, because of the publication of the picture. That the publication was unauthorized by the plaintiff, a fact which must have been brought to their attention by her husband, did not serve to prevent them from ignoring her for the period of a year, from which it may be inferred that their feelings toward her prior to the publication were of such a nature that they felt no charity toward her.

Yet as the case was allowed to go to the jury it was made to appear by evidence wholly hearsay, that the defendant's act was the cause of an estrangement between the plaintiff and her husband's family for nearly a year. This fact could not have helped influencing the jury in their determination of the amount of the verdict.

If it be argued by the defendant's counsel that the testimony of the plaintiff and her husband now under discussion was admissible to prove conversations which injured the plaintiff's feelings, it is sufficient to point to the statement of counsel of his purpose in introducing this testimony. It was expressly introduced and accepted to show that the estrangement was caused by the publication (fol. 107) and for no other purpose and must have been so considered by the jury.

POINT II.

The Trial Court committed error in its charge to the jury on the law of exemplary damages, and further erred in refusing to charge as requested by defendant.

Chapter 132 of the Laws of 1903, under which this action is brought is as follows:

> "*Section 1.* A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.
>
> "*Section 2.* Any person whose name, portrait or picture is used within this State for advertising purposes, or for the purposes of trade, without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this State against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant *shall have knowingly* used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this Act, the jury, in its discretion, may award exemplary damages."

The law evidently intends that exemplary damages may be awarded only in the event that the jury first finds that the name or picture is "knowingly" used and in the only reported case brought under the law, the Court has held:

> "Exemplary damages are expressly afforded by the statute if the defendant shall have 'knowingly' used the portrait or picture. Ob-

viously 'knowingly' means if the offender knows that the portrait or picture is that of a living person."

Rhodes v. Sperry & Hutchinson Co., 120 App. Div., 467, at p. 470.

The defendant Macfadden testified that he had never seen the plaintiff before the trial and that he did not know the picture used was that of a living person until he received a letter from the plaintiff and that the publication immediately ceased when he received this letter (fols. 144, 145).

There is no testimony in behalf of plaintiff to the effect that the defendant knew the picture to be that of a living person and defendant's testimony on this point stands absolutely uncontradicted.

The case was therefore not one where exemplary damages should have been awarded.

The Trial Justice in his charge did not instruct the jury as to the law on exemplary damages, further than is contained in the portion of the charge where the statute was read to the jury (fols. 171, 172). The question of fact, if there is one in the case, as to whether the picture was "knowingly" used by the defendant, was not presented to the jury in any part of the charge; but the Court did charge at the request of plaintiff's attorney as follows, to which exception was taken on behalf of defendant:

"Mr. O'Brien: I ask your Honor to charge the jury that they may find exemplary damages although no actual damage was suffered.

The Court: The statute provides, gentlemen, that you may, in your judgment, find exemplary damages, although no actual damage was suffered.

Exception by defendant (fol. 179).

The Court thus left it to the jury to find exemplary damages in their discretion whether or not

the picture was "knowingly" used and this is against the express wording of the statute.

Defendant's counsel made the following request to charge which was refused and an exception taken:

> "Mr. Rogers: I ask your Honor to charge the jury that under the evidence they may not find exemplary damages.
>
> The Court: I refuse to charge that because the statute directs otherwise" (fol. 180).

The defendant was entitled to have the jury charged as thus requested, since as has been before stated, the only evidence upon the point is the uncontradicted testimony of defendant that he did not "knowingly" use the picture.

POINT III.

The damages awarded are excessive.

The picture was published in the advertising sections of one issue of the magazine "Beauty and Health" and of three issues of the magazine "Physical Culture." Neither of these magazines had a large circulation. Both magazines may be called obscure.

The picture as published is a photogravure of the original photograph, much reduced in size. It is not a clear likeness of any person and from its appearance might be taken as a fancy portrait from no living model. How this picture could have been recognized by the acquaintances of the plaintiff as her likeness is hard to imagine. Yet she has been awarded $3,000.00 damages for its use.

The original of the picture is one of a number of photographs taken of the plaintiff by a theatrical photographer (fols. 122, 130, 131). There were about eighteen different poses at the time and one

hundred photographs were delivered to the plaintiff. Plaintiff was at the time a chorus girl in the Baroness Fiddlesticks Theatrical Company (fol. 122), and the different poses were taken in the different costumes used by her on the stage (fol. 131).

Her counsel evidently did not believe that she was averse to the appearance of her likeness in the public print, because at about the time the action was commenced he submitted to an interview by a reporter of the New York American and gave him a photograph for publication (fol. 125), which photograph was published by that newspaper and appears in evidence (Defendant's Exhibit A).

These facts are not mentioned to prove that the plaintiff was not of good character, but simply to show that the publication of her picture would not tend to produce such injury to her feelings, as might have occured, had she been the ordinary modest woman.

The plaintiff has not been injured in her character so far as the evidence discloses. The only injury is in the way of mental suffering, and under the circumstances, for this a verdict of $1,000 or even less would seem to be ample and sufficient.

LASTLY.

The judgment should be reversed with costs.

HENRY M. EARLE,
Attorney for Defendant-Appellant
Bernarr A. Macfadden.

HENRY M. EARLE,
JOHN INGLE, Jr.,
Of Counsel.

Lawyers Appeal Printing Co., N. Y. 'Phone 2511 Worth.

Argued by
Thomas E. O'Brien.

Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

FELICITE S. RIDDLE,
Plaintiff-Respondent,

against

BERNARR A. McFADDEN,
Defendant-Appellant.

Brief for Respondent.

This is an appeal from a *final* judgment in an action brought under Chapter 132 of the Laws of 1903, to restrain the use by defendant of plaintiff's photograph for advertising purposes and for damages for past use.

The statute is as follows:

An Act to Prevent the Unauthorized Use of the Name or Picture of Any Person for the Purposes of Trade.

Section 1. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor.

§2. Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this state against the person, firm or corporation so using his name, portrait or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages.

§3. This act shall take effect September first, nineteen hundred and three.

The notice of appeal (fol. 6) includes both an *interlocutory* judgment granting an injunction and directing an assessment of damages and the *final* judgment entered after an assessment of damages at $3,000, by a jury, pursuant to the terms of the interlocutory judgment, but by stipulation (fols. 182, 183) the appeal from the interlocutory judgment has been withdrawn and the review by this Court limited to the proceedings on the assessment of damages.

Statement of Facts.

In December, 1904, the plaintiff who was then engaged to be married to Mr. Riddle, the man who is now her husband (fol. 133-4) sat for her photograph at the studio of one White in this Borough (fol. 90). She ordered many pictures taken, one hundred in all, under the persuasion of one of White's employees, the inducement being that the large number could be obtained for practically the same price as the few she had intended to order, the posings being the expensive feature and not the reproduction of copies (fol. 139). Many of the pictures were taken in the stage costume which plaintiff had worn in a comic opera production called "Baroness Fiddlesticks" and in which she had appeared as a member of the chorus for a few weeks, practically her only stage appearance (fols. 134-5), but only eighteen of the entire hundred were distributed by her and those were practically all heads and street costumes and were given to her relatives and most intimate friends (fol. 139, 140).

At the suggestion of the photographer one picture of the plaintiff (Exh. 2) was taken with the idea of showing her luxuriant hair (fol. 137).

At the time the pictures were taken, plaintiff ordered one finished in time to enable her to send it to Detroit to Mr. Riddle as a Christmas remembrance and it was sent (fol. 131).

In the early part of the following year, McFadden, the appellant, sent his manager, one Frenz, to the studio of White, from whom he had been in the habit of obtaining photographs of "actresses and models" to get a photograph of a "girl with long hair" to use in advertising "New Hair Culture", one of his books that had not been selling very well (fol. 71). Although warned by Frenz that the

"girl's" consent had not been obtained, McFadden, on the assumption that "the girl *is* probably an artist's model or an actress" and "*will* be very glad of the advertising" (fol. 74), proceeded in March, April, May and June, 1905, to advertise "New Hair Culture" in two of his magazines, "Physical Culture" and "Beauty and Health," and in the upper left hand corner on a half-page advertisement reproduced the picture which the plaintiff had posed and paid for the December previous (fols. 185, 68-9; Exhs. 1, 2, 3, 4 & 6, the magazines for March, April, May and July).

The magazines themselves purported to be devoted to physical culture and a higher education, but they were in fact *scurrilous* publications, as the most casual inspection of the illustrations and reading matter will show (see particularly pages 3-5, July, "Physical Culture," 34-7 May, "Beauty & Health," and the advertising pages of all magazines, which are not numbered).

When the plaintiff learned of this use of her picture she protested at once, both in person and by correspondence and demanded that its use be discontinued (fols. 96-7, 137). This was promised (fols. 96-7), but to avoid a change in the proof of the magazines in press or in typesetting, McFadden persited in using the photograph in the next issue of his magazines (fol. 145).

In June, 1905, plaintiff went to Detroit, to be married (fol. 98). All arrangements had been made (fol. 100), but on learning of the publication of the plaintiff's picture in magazines of the "Physical Culture" and "Beauty and Health" type, Mr. Riddle's family so strenuously opposed the marriage that it was postponed (fol. 110). They could not be convinced of the facts and insisted on believing that plaintiff was a public character and no fit wife for one of their family, that she could

not be otherwise to have her picture appear in such magazines. There had been and was no objection whatever made to plaintiff on the ground that she had been a "chorus girl." Indeed, two cousins, very close to the family were at that time connected with the stage (fol. 112, 138).

The plaintiff and Mr. Riddle were eventually married in New York in August, 1905, and went to Detroit, where Mr. Riddle was engaged in business with his father, to live (fols. 113-120). The feeling against plaintiff which the publication had given rise to, continued for more than a year afterward. Plaintiff lived within six or seven blocks of her husband's family and frequently met his sisters and brothers in her husband's office, but they deliberately shunned and "cut" her and it was not until after the birth of her first child that amicable relations were established (fols. 113-120).

For the injury done, the mental suffering and humiliation inflicted, a jury has awarded her $3,000, but appellant seeks to set the verdict aside, and to obtain a new trial, because of

1. The admission of socalled "hearsay" evidence, the testimony objected to being remarks of the plaintiff's husband's family with reference to the exhibition of her photograph, which were reported to her.

2. The charge of the Trial Court as to the damages which the jury might award.

3. The amount of the verdict.

In answering these points in the order advanced, respondent contends:

I. The evidence objected to is not within the hearsay rule.

II. The charge was a correct exposition of the law in this class of cases.

III. The damages awarded are not excessive.

POINT I.

The evidence objected to is not within the hearsay rule.

Great stress is laid by appellant on the admission of evidence as to what different members of the plaintiff's husband's family said with regard to the publication of plaintiff's picture in "Physical Culture" and "Beauty and Health."

The first question asked by plaintiff's counsel in this regard appears at folio 106:

> "Q. After you came back to New York, did the man who is now your husband, say anything to you with regard to this photograph?"

Defendant's counsel objected and in response to to an apparent inquiry contained in a suggestion of the Court (fol. 107) plaintiff's counsel stated that no effort would be made to prove that the use of the picture "made any difference in Mr. Riddle's attitude toward Mrs Riddle."

Whereupon defendant's counsel promptly withdrew his objection.

Plaintiff's counsel then over-zealously and ingenuously but inconsiderately stated what plaintiff

further expected to prove as to the damage done her, making this remark (fol. 107):

> "I expect to show that she lived within a stone's throw of the house of her husband's parents and that they cut her openly."

The jury by request of defendant's counsel (fol. 108) were instructed to disregard this statement (fol. 109), but the evidence afterward adduced substantiated the fact which plaintiff's counsel had stated he expected to prove.

Plaintiff afterward testified, as heretofore stated, that she lived very near her husband's family, that she frequently met different members of the family on the street and in her husband's office, but they never spoke to her, that they passed her by as if she was "not anybody at all" and that they did not call on her for nearly a year (fols. 113-119).

The evidence of the remarks of Mr. Riddle's family were not introduced, as the Trial Court was well aware, to show the fact that they had snubbed the plaintiff, but to show the extent of plaintiff's mental suffering. The remarks were reported to her (fol. 112) and they not only explained to plaintiff the attitude of her in-law relations in refusing to recognize her, but as mere remarks connected with the publication of the photograph, annoyed her greatly.

Such reports are clearly admissible in an action of this sort where mental suffering is the essential injury inflicted.

In Points II and III, in justifying the assessments of exemplary damages and the amount of the award, particular attention will be called to those portions of the evidence which show that the wrong done was wilful and malicious, that the use was

made knowingly and that the publication continued after personal demand had been made upon McFadden to discontinue it, but it is sufficient for our present purpose to call the attention of the Court to the fact that McFadden sent for the plaintiff's picture to a photographer from whom he had been in the habit of obtaining photographs of living persons (fol. 151) and that the plaintiff protested to him against the use of the picture (fols. 96, 7 and 145).

It was incumbent on him to ascertain whether plaintiff had any objection to the publication of her picture and without any demand that its publication cease, he would be liable for *all* the consequences of his act, whether or not they were such as could be deemed natural and probable.

Crane v. Bennett, 77 App. Div., 102.
Palmer v. N. Y. News Co., 31 App. Div., 210.
Fry v. Bennett, 4 Duer, 247.
Rhodes v. Sperry & Hutchinson Co., 129 App. Div., 467.

In the *Rhodes* case which is an action similar to the present, but one where the circumstances of the use of the photograph were not such as to damage plaintiff's reputation or character, Mr. Justice Jenks, in writing for the reduction of the damages awarded, picks out (p. 470) a remark of a "woman relative (evidently a candid friend)" to the plaintiff, as showing the sort of damage to be expected in the case of the exhibition of a woman's picture, elsewhere than in a photographer's show case He quotes the plaintiff's testimony that this woman relative "came to her, kind of laughed satirically and said, 'I saw your picture in Sperry's trading stamp store; that is very funny.'"

The most natural consequence of such a use of a photograph as that complained of and certainly the most humiliating to a woman of refinement is the comment passed by friends and acquaintances.

The law is stated by Mr. Justice Bosworth in the *Fry* case, at p. 257:

> "If the injury was wilful or intentional the jury may consider the mental sufferings of the plaintiff, the circumstances of indignity and contumely under which the wrong was done and the consequent public disgrace to the plaintiff, *together with any other circumstances* belonging to the wrongful act and tending to the plaintiff's discomfort."

It is well recognized that in the case of all willful torts damages may be awarded for mental distress, humiliation and mortification alone.

> *Rhodes v. Sperry & Hutchinson Co.*, 120 App. Div., 467, 469.
> *Preiser v. Weilandt*, 48 App. Div., 569.
> *Smith v. Leo*, 92 Hun, 242.

In a case of this sort, therefore, where the evil aimed at by the statute is the infliction of mental suffering, every possible circumstance which tends to increase that mental suffering should be brought to the attention of the jury. It would be hard indeed to conceive of plaintiff's suffering more acutely from the wrong of the defendant, than when remarks of the kind attributed to her husband's folks were reported to her.

The issue was: How has plaintiff suffered; and it will hardly be contended that the report of such conversations did not affect her greatly. The fact that such a report was made to her is the important feature, not the question whether or not the re-

marks reported were actually made by the individuals to whom they were attributed, nor whether they felt toward her in the manner their remarks indicated.

The remarks are objected to as hearsay, but it must not be lost sight of that on cross-examination of the plaintiff (fol. 128) defendant's counsel saw fit to go into these remarks at length in an effort to prove that plaintiff's connection with the stage was the real cause of the estrangement, and that on the cross-examination, sufficient evidence of the fact that they were made was brought out to render the evidence conclusive and binding on the defendant, who elicited it, and that in the course of this cross-examination sufficient evidence was also brought out to establish the exhibition of the photograph was the real grievance (fols. 128 and 138).

POINT II.

There is no error in the charge.

Appellant contends that the learned Trial Justice erred in his charge as to the awarding of exemplary damages.

The only exceptions taken to the charge in this respect are those mentioned on pages 8 and 9 of appellant's brief.

The exception to that portion of the charge declaring that exemplary damages might be awarded although no actual damage had been suffered is clearly without merit.

Even though there had been no actual damage (and there is abundant evidence that there was) the jury would have been justified in punishing the defendant for the wrong done.

In *Fry v. Bennett*, 9 Abb. Pr., 45, the Court laid down the rule that proof of nominal damages will support an award of exemplary damages by a jury, in the following language (p. 53):

> "The amount of the damages was wholly within their control; it was their province to determine how far the libels were malevolent and calculated to wound the plaintiff's feelings and injure him in public estimation. The fact that his business is not shown to have been injured or that his houses" (plaintiff was an opera director) "were as well filled or even better filled in consequence of the libels, makes no difference; the damages are in their nature punitive as well as compensatory and involve the principle of punishment for the sake of example as well as satisfaction for the private wrong."

The other exception of appellant, that taken to the refusal of the learned Justice to charge that the jury must limit its award to actual damages, is equally without merit.

The statute itself (Sec. 2) provides the contrary. Where the use of the photograph has been "knowingly" made, "the jury may in its discretion award exemplary damages."

Even if it be admitted that the definition of Mr. Justice Jenks of the word "knowingly" as quoted by appellant on his brief (pages 7 & 8) is complete and binding, the learned Trial Justice would have fallen into grievious error if he had charged the jury as requested by appellant. The charge requested was to the effect that there was no evidence that defendant knew he was using the photograph of a living person, when as shown in the preliminary statement on this brief, he sent for the picture to a photographer's where he was in the habit of getting pictures of artisits' models and actresses

and used the picture in the July issue of his magazines, simply because they had gone to press and it might be a little extra trouble for him to change the advertisement of "New Hair Culture" by omitting the photograph, or inserting a new advertisement in the space intended to be occupied by it.

The mere purchase of the picture from the photographer, it is respectfully submitted, should have put defendant on inquiry as to whether or not the subject was a living person and charge him with knowledge of the fact, in the event that the subject turned out to be such. It can hardly be contended that it is the law that the defendant might well assume that the subject, who is plainly a young lady, was dead, until he was so informed. Until publication of the picture, there could be no reason for his receiving the information, and the statute would soon become of little use as a preventative measure if the true interpretation of the law and the true definition of the word "knowingly" are those contended for by the appellant.

The Court's charge was proper and in accordance with the law. The Court read to the jury the section of the statute under which the action is maintained. That section provides that where defendant "shall have knowingly used such" picture the jury, in its discretion, may award exemplary damages. That was charged as the law of the case.

The appellant made no request for a charge on the matter of "Appellant's knowingly using the picture."

The proof that appellant knowingly used plaintiff's picture for advertising purposes is overwhelming.

Counsel for appellant contends that "there is no testimony in behalf of plaintiff to the effect that the defendant knew the picture to be that of a living person and that defendant's testimony on this point" (that he did not know plaintiff to be living) "stands absolutely uncontradicted" (appellant's brief, page 8). We beg to submit that appellant contradicted his own statement when he said (fol. 145) that he received a letter from Mrs. Riddle or someone objecting and he never published the photograph again "outside of the one that was in the press Moreover he admitted on cross-examination that, when he first obtained the picture, he contemplated that plaintiff was a living person and that he contemplated she "wanted to be advertised" for he says (fol. 151): "We were in the habit of buying photographs from Mr. White; we bought from him actresses who *wanted* to be advertised and *wanted* their photographs used and that was one of them." So he thought of nothing else but that she was a living person with "wants" then existing "to be advertised."

So much is shown by his own testimony. But plaintiff shows (fol. 71) without contradiction that appellant sent his Mr. Frenz (who was an unwilling witness, subpoenaed, fol. 88) telling him to "obtain a photograph of a girl with long hair to be used in the advertisement of the Hair Culture book." (71). He returned with the picture and as he says: "I told him (appellant), that I had no permission from the photographer nor from the girl to use that picture, and he (appellant) said, 'Oh, that will be all right, the girl *is* probably an artist's model

or an actress and will be very glad of the advertising, and *we will use it, anyhow.'"* He expressed no doubt of her being then living. He did not say that she probably *had been*, but that she *is* an artist's model or an actress and he did not say that she "would have *been*" very glad, but he said that she *"will be* very glad" of the advertising. Then he wound up his statement with what was his position that whether this girl that *"is"* and *"will be," likes* the publication of her picture or not *"we will us it anyhow."* There is no statement which contradicts the statement that he used these very words.

POINT III.

The damages are not excessive.

The picture was published in two indecent magazines with large circulations, "Physical Culture," running into ten thousand (10,000) copies monthly, and "Beauty and Health," running into two thousand (2,000) copies monthly (fol. 149).

In the *Rhodes* case, (*supra*) the only reported case under the Statute which has gone to final judgment, an assessment of $1,000 damages was sustained where the plaintiff's picture was merely hung in a frame on a wall in a trading-stamp display room as a type or style of photograph obtainable for trading stamps, where there were no objectionable features other than the mere display, and where plaintiff did not suffer either in her reputation or social standing.

An effort was made in the present case by the introduction in evidence of some eighteen other poses of plaintiff to show that she was not the type

of woman who could be humiliated by the defendant's act, that she was an actress and that her husband's family objected to her on that score (139-140).

It must be remembered that at the time plaintiff had her pictures taken she was about to leave the stage (fol. 137) after an experience on it of only a few weeks, that the company was about to disband, that she was engaged to be married, and that she never expected to join another company. It was certainly pardonable vanity for her to wish to perpetuate for herself her appearance on the stage. The play was admittedly of a clean and wholesome variety and the costumes equally so (fols. 135, 136).
and it would not be fair to assume that this mere display of feminine vanity showed a loss of all the finer sensibilities. Indeed the disposition of these photographs (fols. 139-140), would indicate quite the contrary.

> "The damages must be flagrantly outrageous and extravagant or the Court cannot undertake to draw the line, for they have no standard by which to ascertain the excess."
> *Coleman* v. *Southwick*, 9 Johns., 45.

The case at bar was far different from the *Rhodes* case. The picture here was used as an advertisement of a cheap book on hair culture, of which appellant was the author, was displayed in two magazines both of which are sensational and, we submit to the Court, their illustrations and reading matter justify us in saying they are both scurrilous. These magazines were sent throughout the country. Ten thousand (10,000) of the one called "Physical Culture" were published in this state alone each month, and in four months, forty thousand (40,-

000), (fol. 149). To this add two thousand (2,000) of "Beauty and Health." These numbers do not include those sent to other states. Thus often has the plaintiff been offended by having her picture published in offensive surroundings and scattered everywhere through this state, as well as in other states where the magazines cannot be gathered up and where they may be a permanent and indelible stamp of her likeness to embarrass plaintiff. This is a permanent offense, will be a permanent injury to plaintiff and cause her permanent suffering.

Plaintiff did everything she could to avoid and stop its use. She told the photographer when the picture was taken not to "dare" use the picture (137). When it came out in "Physical Culture" in March she went immediately to see appellant and protested against its publication. A promise was made that it would cease in March (96-7), but it came out in the April, May and July numbers of "Physical Culture" (185-6) and in the May number of "Beauty and Health." Then she wrote defendant in June and still he suffered the July number to contain it. After she went to defendant's office in March she also saw the photographer and protested (97).

The jury was the best judge of the type of woman who was before them and who testified at length.

Appellate tribunals have had particular hesitation in interfering with verdicts in cases like the present, where so little can appear upon the record of what was before the jury. Plaintiff's character, disposition and temperament, education and evident refinement, all had an important bearing on the damage done, and the presence of the plaintiff in Court and the manner in which her testimony was given disclosed much to the jury that the printed page cannot reveal.

Stevens v. O'Neill, 51 App. Div., 565.
Mooney v. Press Pub. Co., 58 App. Div., 613.

In the Mooney case, the Court refused to interfere with the order of the trial judge reducing a $7,000 libel verdict to $3,000, saying at p. 613:

> "The question presented to the learned trial judge was one addressed to the sound discretion of the Court, based largely upon the conditions that existed at the trial. The Court was thus in a position to determine whether the verdict of the jury was based upon a proper consideration of the evidence presented or was influenced by other motives, of which an Appellate Court can have no knowledge except such as appear upon the printed record. * * * In considering that question the various incidents arising upon the trial of which a case on appeal can present but an imperfect record, are always an important element."

Point IV.

The judgment should be affirmed with costs.

RUFUS L. WEAVER,
Attorney for Respondent,
229 Broadway,
New York.

THOMAS E. O'BRIEN,
Of Counsel,
32 Nassau Street,
New York.