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Note and Comment

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NOTE AND COMMENT

A LESSON IN PATRIOTISM FROM PENNSYLVANIA.—In the recent report of *Russ* v. *Commonwealth* (Pa. Sup. Court), 60 Atl. Rep. 169, may be found the record of a "legislative junket" of no mean dimensions, which, coupled with judicial bombast on "patriotism," must make interesting reading for the good citizens of the Keystone State.

In 1897 the Senate of Pennsylvania passed a resolution, in which the House concurred, in the following terms:

"Whereas, the dedication of a monument erected in memory of the late General U. S. Grant, in New York, occurs on April 27th, and is a matter of national importance, which the commonwealth of Pennsylvania should suitably recognize as commemorating the life and deeds of a hero, whose memory we revere; therefore be it resolved (if the House concur), that the members of the Senate and House of Representatives attend such dedication in a body, and that all matters pertaining to such attendance be referred to the committee of military affairs of the Senate and House."

On the day of the dedication of the monument, and between the hours of 11:30 A. M. and 6 P. M., the plaintiff Russ entertained the 253 members of the legislature and their 172 guests at luncheon and dinner on the excursion boat which carried the patriots from Jersey City up the Hudson to the monument.

For this entertainment, plaintiff having been authorized by an act of 1903 to sue the commonwealth, presents the following statement of account—claiming $5,911.16 with interest from May 1, 1897:

"Legislature of Pennsylvania, Excursion to New York City, General Grant Monument Dedication.

To James Russ, Dr.

1897, April 27.	To table supplies	$1,678 36	
	Wines and liquors	3,026 60	
	Supper at Dooner's for Com	61 90	
	J. H. Riebel, cigars	450 00	
	Hire of china and breakage	187 53	
	Employes' services	240 00	
	Car fare	202 50	
	Purchase of stoves	70 00	
	Freight charges	8 75	
	James Russ, incidental expenses	175 00	
			$6,100 16
Cr.	By liquors returned	$157 00	
	Sale of stoves	32 00	
			189 00
			$5,911 16"

The plaintiff testified that what the committee "put out specially was 'white seal champagne'"; and further: "Oh, Lord! I furnished everything. They had a nice lunch and very fine dinner. I didn't calculate at all. There was no price whatever. If it cost $5,000,000, there was no price at all that was to it. Q. Do you know the price charged for the returned liquors? A. Just that much there. It was very lucky any was returned at all." And Senator Krause, chairman of the arrangement committee, testified that "White Seal —wasn't any too good for the members of the Legislature, we thought. * * Oh, it was so fine that I forget exactly all the elegancies that we had. * * * We had plenty of whisky, and we had plenty of beer, and plenty of apollinaris. I don't know how many drank apollinaris, but apollinaris was furnished."

It will be noticed that the crowd of 425 persons consumed $450 worth of cigars, which the plaintiff seems to have bought of "J. H. Riebel." The report shows that John Riebel, a cigar manufacturer of Philadelphia, was a member of the House military committee and of the committee of arrangements for the excursion; and he testified that the plaintiff "supplied one of the finest dinners a man wanted to sit down to, served on the boat; had all the elegancies of the season—anything you can mention in the eatable line, almost."

The plaintiff was non-suited in the trial court because authority from the state to the committees of military affairs to contract with him was deemed to be lacking. A majority of the Supreme Court, however,—MESTREZAT and POTTER, JJ., dissenting—are of opinion that there was such authority, because

"the authority of the law here was the reference of all matters pertaining to the attendance to the committees of military affairs of the Senate and House."

After discussing the powers of the Legislature under the Constitution, the Court says: "The payment of expenses by the state in having itself fittingly represented, when it ought to be represented on great public occasions, involves nothing but the maintenance of its own dignity; and who shall represent it, or how it shall be represented, is for the Legislature alone. If, in their judgment, its members, representing every portion of the state, ought to do so, who can better represent the commonwealth?"

Considering the items of plaintiff's bill, we ask, "who, indeed?" If, in view of these items, the dignity of the state was "maintained," who can say that the state was not "fittingly represented" on that memorable occasion? For note how small is the charge for "breakage"—a really creditable indication of the capacity of Pennsylvania statesmen for maintaining dignity under trying circumstances!

But the Court goes further, and, with this record before it, instead of simply passing on the legal questions involved in the case, seems to sanction a gross abuse of legislative power in this language: "From time out of mind, legislative bodies have, at the public expense, and with hearty popular approval, paid fitting tribute to the deserving dead, who, in peace or war, had served the state or nation; and public money so expended is well spent for the public, for it strengthens and elevates patriotism, and helps to make better men and women of the young who witness the homage so paid. But this digression need proceed no further."

Most emphatically, it need not! This turgid talk of patriotism is most inappropriate in view of the coarse testimony of members of the Assembly's committee, and can not even be justified as a feeble attempt to maintain the "dignity of the state" which the Assembly seems to have ignored. How much "better men and women" must indeed have been made of "the young" among the 172 hangers-on of this gormandizing crowd as they "witnessed the homage so paid"—as they witnessed the "strengthening" and "elevating" of the lawmakers' "patriotism"!

The Court says: "In disposing of the questions raised on this appeal, we have nothing to do with the appellant's claim as presented in the court below, and it would therefore be improper for us to say anything about it." Not being troubled with this delicate sense of propriety, the dissenting Justices say: "The character of the claim conclusively rebuts any implication that the Legislature, in passing the resolution, intended to authorize the committee to make a contract for it. Such interpretation of the resolution opens the door to raids upon the state treasury by committees of the Legislature by which the taxpayers of the state can be made to pay claims which, as in this instance, neither the General Assembly of the commonwealth, nor any other self-respecting legislative body, would for an instant think of approving. * * * About $1,700 worth of food and $3,000 worth of wines and liquors were consumed on the steamer by the 425 guests of the state in six and a half hours. This tells the brief but comprehensive story of the manner in which the money claimed here was applied (in the language of the preamble to the

joint resolution) 'in commemoration of the life and deeds of a hero whose memory we revere.' Further comment upon the subject is unnecessary. To hold that authority was conferred upon the legislative committee by the concurrent resolution to contract for such a claim is violative of all sound rules of interpretation, and is not supported by reason or authority."

One should not permit himself to be deluded with the idea that the members of the Assembly of 1897 *represented* the people of the state. As pointed out in 1898 by President Hensel of the Bar Association (*Vol. IV, Penn. Bar Association Rep., p. 112*), "the election of a United States Senator * * * largely controlled the original selection of the members, and its results deeply influenced the general movement of the session." One might perhaps pardon the members of the Assembly for themselves thinking and resolving that their attendance at the Grant monument dedication might be taken as a suitable recognition by the commonwealth of the importance of the event, but that the Court should bring itself to make such an admission is somewhat humiliating. The Assembly recognized its great obligations to the Pennsylvania Railroad Company for "providing transportation" (Penn. P. L. 1897, p. 543),—so, by the way, the nearly 50 cents a head for "car-fare" in plaintiff's claim must have gone into the coffers of some really soulless and heartless corporation,—but for the "strengthening" and "elevation" of the transported Assembly's "patriotism" who shall pay?

That great lawyer and patriot, James Wilson, of Pennsylvania, said, in speaking of the Pennsylvania Legislature: "Each house will be cautious, and careful, and circumspect, in those proceedings, which, they know, must undergo the strict and severe criticism of judges, whose inclination will lead them, and whose duty will enjoin them, not to leave a single blemish unnoticed or uncorrected." (*Wilson's Works,* II, 28.)

But that was a long time ago!

THE EFFECT OF A MOTION BY EACH PARTY FOR A DIRECTED VERDICT.—An interesting example of judicial legislation long ago arose in New York and has been perpetuated by the courts of that state. This was the holding that when each party to an action made a motion upon the trial that the court direct a verdict in his favor, such proceeding was in effect a consent to submit to the court all questions of law and fact, and was a waiver of the right to have the questions of fact go to the jury. And since, under this rule, the parties were deemed to clothe the court with the functions of a jury, a directed verdict stood as would the finding of a jury without any direction, and therefore the review of the case was governed by the same rules that applied in cases of ordinary verdicts, all controverted facts and all facts inferable in support of the judgment being deemed conclusively established in favor of the party for whom the verdict was directed. *Koehler* v. *Adler* (1879), 78 N. Y. 290; *Thompson* v. *Simpson* (1891), 128 N. Y. 283; *Trustees* v. *Vail* (1897), 151 N. Y. 468; *Porter* v. *Ins. Co.* (1900), 164 N. Y. 504; *Northam* v. *Ins. Co.* (1901), 165 N. Y. 666; *Sigua Iron Co.* v. *Brown* (1902), 171 N. Y. 488; *Leggat* v. *Leggat* (1903), 79 App. Div. 141.

Several similar cases arose in the United States courts sitting in New York, and the same rule was followed. *Chrystie* v. *Foster* (1894), 9 C. C. A. 606; *Merwin* v. *Magone* (1895), 17 C. C. A. 361. And one of them went to the Supreme Court of the United States, where the rule was affirmed without any question or serious discussion. *Beuttell* v. *Magone* (1894), 157 U. S. 157. But the rule seems to be established in the federal courts generally, and not limited to cases tried in New York, for it was recently adopted on the authority of the *Beuttell* case by the Circuit Court of Appeals for the fifth circuit, sitting in Alabama, in *Bradley Timber Co.* v. *White* (1903), 58 C. C. A. 55.

Two other jurisdictions have adopted it,—Ohio, in 1901, in the case of *Bank* v. *Hayes & Sons*, 64 Ohio St. 102, on the authority of the *Thompson* case in New York and the *Beuttell* case, and North Dakota, in 1897, in the case of *Mortgage Security Co.* v. *Elevator Co.*, 6 N. D. 408, on the authority of nothing in particular. The rule was reaffirmed in *First M. E. Church* v. *Fadden* (1898), 8 N. D. 162, and *Bank* v. *Town of Norton* (N. D. 1903), 97 N. W. 860.

But a recent case in Minnesota has refused to recognize the rule. This is *Strauff* v. *Bingenheimer* (1905), — Minn. —, 102 N. W. 694. The court, by CHIEF JUSTICE START, says: "A motion or a request for a directed verdict presents under our practice a question of law only. Such a motion or request is frequently made by counsel at the close of the evidence for the purpose of securing a ruling of the trial court upon some special question of law which is deemed to be decisive of the case, or for otherwise conserving the rights of his client. Now, to hold that when a party makes such a motion the opposite party, by making a counter motion for a directed verdict, may deprive him of the right to a jury trial in case the court should differ with him as to the law, would in practice result in great injustice. It would be a strained and unjust construction to hold in such a case that the party first making the motion thereby admitted that, if his own motion be denied, the motion of his adversary should be granted, or that he waived a jury trial, and consented that the trial judge might decide the case in accordance with the preponderance of the evidence. It cannot fairly be assumed, from the mere fact that a party makes a motion or request for a directed verdict in his favor, that he concedes anything except for the purposes of the motion * * * We therefore hold that a motion by each party to an action that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or an agreement to submit them to the trial judge in case the motion be denied."

This view seems more reasonable and more in accord with the general theory of motions for directed verdicts. The ordinary rule is that when the evidence so conclusively entitles a party to a verdict that a verdict for his opponent would have to be set aside, the court may properly direct a verdict in his favor. *Gentry* v. *Singleton* (1904), 63 C. C. A. 231; *Boston & Maine R. R. Co.* v. *Sargent* (1904), 72 N. H. 455. And the motion thus presents only the naked legal question whether or not there is *any* evidence tending to prove the cause of action or defense, but does not involve the question as to the weight of the evidence. *Illinois Cent. R. R. Co.* v. *Smith* (1903), 111 Ill.

App. 177. Such being the case where only one party makes the motion, it is hard to see how its scope and purpose can be wholly changed by the mere fact that the other party has made the same motion. If each party severally wishes merely to test the *legal sufficiency* of the evidence, why should the result of both efforts be to shift upon the court the wholly foreign question of the *weight* of the evidence? As was suggested by the Supreme Court of Wisconsin, "It is certainly a strained construction to hold that an assertion that there is no evidence against one is an admission that there is none in his favor; yet that is the result of the New York doctrine that a motion to direct a verdict is an admission that there is no quesion of fact for the jury." *Thompson* v. *Brennan* (1899), 104 Wis. 568.

It appears from the above quotation that the Wisconsin Supreme Court also dissents from the New York rule. It holds that in all cases of motions for directed verdicts the question is and always has been, "not whether there was any evidence to support the verdict, but whether there was any evidence to support a contrary verdict." And the same doctrine was reaffirmed in *Nat. Cash Register Co.* v. *Bonneville* (1903), 119 Wis. 222, where the court somewhat tartly requests counsel to cease quoting New York cases on this point. Iowa also holds against the New York rule, and in *German Savings Bank* v. *Bates Imp. Co.* (1900), 111 Iowa 435, the court condemned a contrary dictum in *Bank* v. *Milling Co.*, 103 Iowa 524, and squarely took the same position which is indorsed by the courts of Wisconsin and Minnesota.

THE RIGHT OF PRIVACY.—The right of privacy has at last been asserted by an American court of final resort. In a carefully prepared opinion in *Pavesich* v. *New England Life Ins. Co. et al.* (1905), — Georgia —, 50 S. E. Rep. 68, the Supreme Court of Georgia has brushed away the cobwebs of legal reasoning which have been alleged to stand in the way of an enforcement of this instinctively recognized right, and in a unanimous opinion written by Mr. JUSTICE COBB has forcefully and yet with judicial poise, maintained a principle, the general establishment of which would make mightily for the decencies of life. The defendant company, without the consent of the plaintiff, had obtained through its agent, who was also made a defendant, a photograph of plaintiff and published a reproduction of it in an advertisement in the *Atlanta Constitution*. Under the picture of plaintiff, appeared the following: "In my healthy and productive period of life, I bought insurance in the * * (plaintiff) company, and today my family is protected and I am drawing an annual dividend on my paid-up policies." By the side of plaintiff's picture was printed the likeness of a sickly and needy individual, who by appropriate language printed underneath, was made to bewail his own lack of similar forethought. The "moral" of this allegory was pointedly expressed. The plaintiff's name was not used. The action was for damages and the petition, after reciting the foregoing facts, alleged that plaintiff had never had insurance in the defendant company, had never made the statement attributed to him, and that the publication of the advertisement was malicious and tended to bring plaintiff into ridicule and contempt, especially with his friends who

knew that he had no policy in the defendant company, and was a breach of his right of privacy. The petition was demurred to generally and specially. The trial court sustained the demurrer on the ground that no cause of action was stated in the petition, and the case was taken on error to the Supreme Court.

The question involved, that of the existence of the right of privacy, has been widely discussed in legal and other periodicals and in the daily press during the last fifteen years, beginning with a scholarly article by Samuel D. Warren and Louis D. Brandeis, 4 *Harvard Law Review* 193. The other important articles are referred to in the opinion in the principal case. With two exceptions these articles strongly maintain the existence of the claimed right, and many of them sharply criticise the adverse doctrine laid down in the celebrated *Roberson* case, referred to later herein.

The cases in which the precise question has been squarely decided are few in number and have all arisen since 1890. In *Manola* v. *Stevens,* the Supreme Court of New York, upon an *ex parte* application, granted a preliminary injunction to complainant, an actress, photographs of whom in stage attire, were being circulated without her consent, and the defendant not appearing at the hearing, the injunction was made permanent. *New York Times,* June 15, 18 and 21, 1890; 4 *Harvard Law Review* 195, note 7. In *Mackenzie* v. *Soden Mineral Springs Co.* (1891), 18 N. Y. Supp. 240, the right of privacy was impliedly recognized in granting an injunction to restrain the unauthorized publication of a recommendation by plaintiff, a physician, of a proprietary medicine. The right was expressly recognized in *Schuyler* v. *Curtis* (1892), 15 N. Y. Supp. 787; but this case was afterward (1895) reversed on the ground that the person, whose alleged right of privacy was violated by the acts complained of (the making and placing in a public place of a statue of such person to represent a "typical philanthropist"), was dead, and that the right, if it existed at all, died with her. 147 N. Y. 434, 42 N. E. Rep. 22. And see a note to this case in 49 Am. St. Rep. 671, in which the decision of the court is approved. It will be noted that this reversal was not an adjudication as to the existence of such a right. Moreover the facts in that case were not such as to bring the question out in plain relief. In 1893 the existence of such a right was again affirmed by the Superior Court of New York City in *Marks* v. *Jaffa,* 26 N. Y. Supp. 908, where an injunction was granted restraining the publication of plaintiff's photograph in defendant's newspaper in a "popularity" voting contest. In the same year JUDGE COLT of the United States Circuit Court declined to grant an injunction to restrain the publication and sale of a biographical sketch of Corliss, the inventor, and the printing and sale of his picture, on the ground that Mr. Corliss was a public man, who could not have asserted this right in his life-time, and that certainly it could not be asserted by his family after his death. But JUDGE COLT in that case said: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or

of oral lectures delivered by a teacher to his class." *Corliss* v. *Walker*, 57 Fed. Rep. 434; Id. 64 Fed. Rep. 280, 31 L. R. A. 283, and note. In 1894, in *Murray* v. *Gast Lithographic Co.*, 28 N. Y. Supp. 271, the Court of Common Pleas of New York City and County, held that injunction should not be granted to a person to restrain the publication of a portrait of his infant child; but the existence of the right of privacy was not denied. And so, in 1899, in *Atkinson* v. *Doherty*, 121 Mich. 372, 80 N. W. Rep. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219, it was held that injunction will not lie to restrain the use of the name and likeness of a deceased person as a label for a brand of cigars. The court laid down the broad proposition that "so long as such use does not amount to a libel" the person whose name or likeness is thus published has no remedy or redress. But as the only question, a decision of which was necessary, was as to whether the right of privacy if it exists at all, is personal, and dies with the person, this case is not authority for denying the right of privacy.

The most important case on the subject, and the only one prior to the principal case, in which the question is squarely decided is *Roberson* v. *Rochester, etc. Co.* This was an application for an injunction to restrain defendant from publishing the likeness of plaintiff, a young woman, in an advertisement of a brand of flour, copies of which advertisement were placed in hotels, saloons and other public places. A demurrer to the complaint, on the ground that it did not state a cause of action, was overruled by the Supreme Court of Monroe County, at special term, 1890. 65 N. Y. Supp. 1109. On appeal, this interlocutory judgment was affirmed by the unanimous decision of the Supreme Court, Appellate Division. 71 N. Y. Supp. 876. This decision was reversed by the Court of Appeals in June, 1902, by a vote of four to three, the majority opinion being by PARKER, C. J., and the dissenting opinion by GRAY, J., 171 N. Y. 539, 64 N. E. Rep. 442, 89 Am. St. Rep. 828 and note, 59 L. R. A. 478. While the decision of the court is limited to a denial of the right to restrain the unauthorized publication of one's likeness for advertising purposes, yet JUDGE PARKER'S entire argument is, in effect, a denial of the "right of privacy, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers." (P. 544).

From this hasty review of the decided cases, it will be seen that prior to the Georgia case, the right of privacy had been impliedly recognized in *Mackenzie* v. *Mineral Springs Co.*, supra, and expressly recognized in one *ex parte* hearing, *Manola* v. *Stevens*, supra, and in five other hearings, *Schuyler* v. *Curtis*, supra (two trials), *Marks* v. *Jaffa*, supra, and *Roberson* v. *Rochester, etc. Co.* (two trials), supra, all in trial or intermediate appellate courts of New York; that of the latter five cases, one, *Schuyler* v. *Curtis*, was reversed on the ground that the right, if it existed at all, died with the person; and that in another case, *Roberson* v. *Rochester etc. Co.*, supra, the existence of the right at all, was squarely denied; also that an enforcement of the right was denied in *Corliss* v. *Walker*, supra, and in *Atkinson* v. *Doherty*, supra, on the same

ground relied upon in the *Schuyler* case, but with a dictum in the *Corliss* case recognizing the existence of the right in the person himself; and a dictum in the *Atkinson* case, squarely denying that the right exists at all. Therefore, despite the heavy blow dealt to the then growing recognition of this right by the decision expressed by JUDGE PARKER in *Roberson* v. *Rochester etc. Co.*, supra, in view of the strong dissenting opinion by JUDGE GRAY in that case, the decisions of lower New York courts and the preponderance of opinion of legal writers in favor of the existence of the right the Georgia court came to the question in the principal case, with "authority" pretty evenly divided. The objections urged against a legal recognition of the right were clearly and forcibly stated by JUDGE PARKER in the *Roberson* case, and may be summarized as falling under one or more of the following heads: 1. The lack of precedents precisely in point, and of recognition of the right by commentators on the law. 2. That the right is difficult to define, and that to judicially recognize it, would "open the flood-gates of litigation." 3. That recognition of such a right would restrict liberty of speech and freedom of the press. Taking these objections up in order, it may be said: (1) That while the courts which have denied the existence of the right, admit that the lack of exact precedent is not a fatal objection, yet one is impressed in reading their arguments with the fact that they are nevertheless powerfully influenced by their failure to find such precedents. But the previous non-assertion of this right by the courts is of course not fatal to its existence, novel though it be, as applied to the particular facts of any case, if it can be shown to be included in, or an aspect of, one of the great rights or principles of the common law. Failure to keep this truism in mind has resulted in these courts assuming a position, which to the writer seems somewhat timid, technical and unprogressive. But it is insisted by JUDGE GRAY and by the Georgia court that this right of privacy, or of the "inviolate personality" as the authors of the *Harvard Law Review* article (supra) phrase it, or the right "to be let alone" as JUDGE COOLEY tersely puts it (COOLEY ON TORTS, 2nd ed., p. 209), has been many times judicially asserted in analogous cases. Thus, the right is recognized in the remedies afforded for private nuisances resulting from noises interfering with one's enjoyment of his home, and in the remedies against eavesdroppers (4 Bl. Comm. 168), against common scolds (Id.), and in the common law rights of the people "to be secure in their persons, houses; papers and effects against unreasonable searches and seizures." The right to prevent the unauthorized publication of one's private letters, even though possessing no literary or financial value, or of lectures delivered to a class are other familiar examples. And so injunctions have been granted to restrain the unauthorized publication or use of recipes, writings and etchings. *Yovatt* v. *Wingard*, 1 J. & W. 394; *Abernethey* v. *Hutchinson*, 1 H. & L. 28, 3 L. J. (o. s.) Ch. 209; *Prince Albert* v. *Strange*, 2 De Gex & Sm. 652. In *Tuck* v. *Priester*, 19 Q. B. D. 629, the defendant was enjoined from publishing or selling copies of a picture owned by plaintiff, which he had been employed to copy; and in *Pollard* v. *Photo. Co.*, 40 Ch. Div. 345, defendant was restrained from selling photographs of the plaintiff, who had sat for his photograph in defendant's studio.

While it is true that these decisions were based in part upon property rights, or upon threatened breaches of contract, express or implied, or upon breaches of trust or confidence, there is great cogency in the following quotation from JUDGE COBB'S opinion in the principal case: "The true lawyer, when called to the discharge of judicial functions, has in all times, as a general rule, displayed remarkable conservatism; and, wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel. It was for this reason that the numerous cases both in England and in this country which really protected the right of privacy, were not placed upon the existence of this right, but were allowed to rest upon principles derived from the law of property, trust and contract." Moreover the conception of "property" is an ever widening one, and if it be broad enough to include the intangible, undivided interest which one has in a franchise or other incorporeal thing, or in one's valueless private letters, or the right which one has to enjoin the sale of photographs struck off from a negative for which plaintiff sat in the defendant's studio, may it not also include the right one has in his face, or portraiture, "until the use has been granted away?"

The second objection, that this right is difficult to define, and that its recognition would "open the flood-gates of litigation," may be briefly dismissed with the question, What of it? It is the business of the courts to define rights and principles, and if a mass of litigation ensues, this, of itself, tends to show that wrongs exist which need righting. If the litigation be legitimate—so much the better. If it be purely litigious the courts, and if need be, the legislature, can apply effective restrictions. And in answer to JUDGE PARKER'S suggestion, that if there be such a right, it should be formulated by the legislature and not by the courts, may it not be answered that the courts, with the trained ability of their judges, their latitude of action and their discretion in granting or refusing the redress sought, as the particular facts may seem to require, are far better adapted to the proper definition and enforcement of this right, than is the legislature which must act through hard and fast formulation?

As to the third objection, that the enforcement of this right would abridge liberty of speech and freedom of the press, it is sufficient to say that that liberty and freedom are and must always be abridged in submission to many demands of public policy. Instances of this are too obvious and too well known to require recital here. Enforcement of the right of privacy would not *unduly* abridge such freedom of speech, because all must admit that this right must itself be restricted and give way when public policy requires it, as in such obvious cases as those of the candidate for public office, or other public personages, whose lives, deeds and opinions the public welfare demands must always be open for public discussion. If these views are correct, the Supreme Court of Georgia has rendered a public service of greatest importance in thus vindicating a right instinctively recognized by all men, and in affording another proof of the boasted elasticity and adaptability of the Common Law.

MUTUAL MISTAKE AS TO THE QUANTITY OF LAND CONVEYED.—An interesting discussion of sales in gross and mutual mistake as to the quantity of land sold is found in the recent case of *Newman* v. *Kay* (1905), — W. Va., —, 49 S. E. Rep. 926. The effect of the conclusion is rather startling. The heirs of W. W. Newman conveyed to the defendant "all the following property," (giving its location and metes and bounds), "containing 200 acres and 37 square poles." It developed later that there was an excess of seventy-two acres over the amount mentioned in the deed, though at the time of the conveyance all the parties believed that the tract contained only the amount specified. None of the parties were acquainted with the premises and the mistake was entirely free from fraud or misrepresentation. The court treated the deed as ambiguous but held the evidence insufficient to establish a sale by the acre, refused compensation for the excess and denied rescission.

A material mistake in the quantity of land sold is just as detrimental in its effects as is a mistake in regard to the character, situation or title of the bargained property. It has been said in a case of deficiency that the result is the same as though a portion of the parcel had sunk into the sea. *Newton* v. *Tolles*, 66 N. H. 136, HUTCHINS' & BUNKER'S CAS. (2nd ed.) 225. The right to equitable relief in such cases is well recognized and it is difficult to see why the same principles should not apply in case of excess. Take the present case as an illustration. The minds of the parties never properly met, there was a misconception as to the very thing about which they were negotiating. There was a mutual mistake, an error on the part of all in respect to the amount of the subject matter, growing out of ignorance of a fact existing at the time the negotiations were carried on. It would seem that ordinarily such a mistake, if material, would fall within the general principles of equitable jurisdiction. POMEROY'S EQ. JUR., Secs. 852 et seq.

The court held that in view of the evidence the sale must be considered to be a sale in gross, the contract, a contract of hazard. Contracts of hazard are not favored, the presumption is against them, and where quantity is referred to, unless it plainly appears from the terms of the instrument itself that a sale in gross was intended, it is presumed that the sale was by the acre, and only clear and convincing proof will repel this presumption. *Hull* v. *Watts*, 95 Va. 10, 27 S. E. Rep. 829. In the present case no qualifying words were used. The purchase price is the exact multiple of the number of acres specified in the deed less six dollars the value of the thirty-seven square poles (which the court makes a very important factor in determining the intention of the parties). Nor does it seem that the evidence reviewed in the opinion is of a clear and convincing kind.

But granting the sale to be in gross—then, the court says, that to give relief would be to fly in the face of the deed; that by the very nature of such a sale as this the parties take upon themselves all risk as to the quantity of land and must be bound by the terms of the writing. Courts of equity have a broader jurisdiction than have the law courts in cases where a written instrument is involved. They will open the instrument and let in equities which strike at the very root of the apparent agreement expressed by its terms, and if it appears that the circumstances surrounding the parties were

such that a valid agreement could not be made, the writing will be declared void. Such evidence must necessarily be of matters extrinsic to the instrument. It does not contradict a written instrument, it shows there is no valid instrument. *Gillespie* v. *Moon,* 2 Johns. Ch. 585. This rule is substantially conceded by the court when it says, "Though there may be at some time a mutual and innocent mistake as to mere quantity in a sale in gross of such magnitude as to enable the court to say it goes to the substance of the contract, and justifies relief by way of rescission," yet it does not think the present case is such as to call for its application. Is not a mistake as to seventy-two acres of land in a tract believed to contain only two hundred of sufficient magnitude to call for equitable relief? Had it been a deficiency instead of an excess could there be any doubt? Answers to these questions may probably be found in *Hull* v. *Watts,* supra. (See also *Paine* v. *Upton,* 87 N. Y. 327, 41 Am. Rep. 371, where executed contracts are considered, and *Belknap* v. *Sealey,* 14 N. Y. 143.) What are the equities of the situation? The result is to take away from the plaintiffs, without compensation, seventy-two acres of land, and invest the defendant with title to it—a result clearly not contemplated by the parties. A court of equity ought to be able to relieve from such a hardship. *Riegel* v. *American Life Ins. Co.,* 153 Pa. St. 134, 25 Atl. Rep. 1070, HUTCHINS' & BUNKER'S CAS. (2nd ed.) 221; *Allen* v. *Hammond,* 11 Pet. 63, 71. And though a contract of sale in gross covers a reasonable excess or deficiency it hardly seems just to extend it to such a material variance as there was in the present case. (*White* v. *Miller,* 22 Vt. 380; *Hendricks* v. *Mosely,* 11 Tenn. 73; *Morrison* v. *Hardin,* 81 Miss. 583, 33 So. Rep. 80; *Marvin* v. *Bennett,* 8 Paige 312, 321; *Southern Finishing & Warehouse Co.* v. *Ozment,* 132 N. C. 839, 44 S. E. Rep. 681; *Miller* v. *Craig,* 83 Ky. 623, 4 Am. St. Rep. 179; *Jacobs* v. *Revell,* [1900] 2 Ch. 858.)

THE PRIVILEGE OF A WITNESS TO REFUSE TO DISCLOSE TRADE SECRETS.—In this age of marvelous commercial development, it is not surprising that the courts should be called upon to determine to what extent, if at all, there resides in a witness, the privilege to refuse to disclose the ingredients of a secret formula, the mechanical construction of an invention, or the names of customers, expenses of a business, and other private information, which for want of a better name have been designated "trade secrets."

The question was before the court in the recent case of *Crocker-Wheeler Co.* v. *Bullock* (Dec., 1904), 134 Fed. Rep. 241, wherein it was held, COCHRAN, J., delivering the opinion, that a witness has a legal privilege to refuse to give testimony sought, or to produce documents called for, where such testimony or documents will disclose trade secrets, and where the evidence is irrelevant or otherwise inadmissible in the case. The principal action was at law for damages for breach of contract, and was pending in the Circuit Court of the United States for the District of New Jersey. This proceeding was an application by the plaintiff corporation for an attachment against the person of Joseph S. Neave, vice-president of the Bullock Electric Co., for contempt in refusing to produce certain account books of said Bullock company before

the clerk of the court in obedience to a subpoena duces tecum commanding him to do so. It was contended on behalf of the witness against the application for an attachment that the witness had a legal privilege to withhold the books called for.

The disclosure of the truth required of every witness in a judicial proceeding has been very aptly defined as "a debt which every man owes his neighbor, which he is bound to pay when called upon, and which, in his turn he is entitled to receive," and for centuries it has been recognized as a fundamental maxim that the public has a right to every man's evidence. This duty will, of necessity, at some time, involve a sacrifice of time and convenience, or it may be a disclosure of private matters, which, if the sole interest of the witness were consulted, would remain securely locked in his own breast. But public policy forbids that the dispensation of justice depend upon the will of one man, or set of men, and at the sacrifice of time and convenience, or perhaps, with pecuniary loss to the witness, he must testify unless his privilege to refuse is expressly and positively secured to him by statute or judicial decisions. "When the course of justice requires the investigation of truth, no man has any knowledge which is rightly private."

But the duty of the witness is by no means a unilateral one. In return for the right to call him at any time, the public owes a duty to the witness not to exact testimony when necessity does not demand it, nor in those cases where the benefit gained by exacting it would in general be less valuable than the disadvantage caused. We follow the court in quoting Lord Chancellor HATHERLY, in the case of *Moore* v. *Craven*, L. R. 7 Ch. App. 94, as follows: "The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but when the nature of the discovery required is such that the giving of it may be prejudicial to the defendant the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery that can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the cause made by the plaintiff's pleadings and to what will be in issue at the hearing." In a recent work on Evidence, it is said, "In a day of prolific industrial invention and free economic competition it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitor and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This rule, and the necessity of guarding against it, may extend not merely to chemical and physical composition of substances employed and to the mechanical structure of tools and machines, but also to such other facts of possibly private nature, as the names of customers, the subjects and amounts of expenses and the like. Accordingly there ought to be, and there is, in some degree a recognition of the privilege not to disclose that class of facts, which, for lack of a better term have come to be known as 'trade secrets.'" WIGMORE, EVIDENCE, § 2212. As pointed out by the court in the principal case, the sole question is, Is the disclosure of trade secrets indispensable for the ascertainment of truth? and

the corollary, Is such disclosure relevant and admissible in evidence? If answered in the affirmative the question is proper and the privilege will not be recognized.

In *Lord Melville's Case,* and the statute subsequently enacted (46 Geo. III, chap. 37) the rule was settled in England against the right of a witness to refuse to give testimony where a pecuniary loss to the witness would result therefrom. And this rule is generally followed in the United States. *Bull* v. *Loveland,* 10 Pick. 9; *Baird* v. *Cochrane,* 4 S. & R. 397; *Lowney* v. *Perham,* 20 Me. 235; *Ward* v. *Sharp et ux.,* 15 Vt. 115. That the tests of relevancy and materiality govern the English courts in their decisions is evidenced by the following opinions: In *Mistouski* v. *Mandleberg and Co.,* 6 T. L. R. 207, the court said, "It is in the discretion of the court to compel answers to interrogatories and to order the inspection of documents which might disclose a trade secret." The evidence was held to be relevant and was admitted. In *Heugh* v. *Garrett,* 44 L. J. Ch. N. S. 305: "The court ought not to compel discovery of matters useless to the plaintiff for any purpose of the hearing which may be injurious to the defendant in case the plaintiff fails at the hearing." In *Ashworth* v. *Roberts,* L. R. 45 Ch. D. 623, "The plaintiff is entitled to deliver these interrogatories so long as they are not oppressive and so long as they do not compel the defendant to disclose his secret process." In *Badische Anilin und Soda Fabrik* v. *Levenstein,* L. R. 24 Ch. D. 156, the defendant objected to answering certain questions put to him on cross-examination for the reason that they would have the effect of causing him to disclose the secret process employed by him. The objection was sustained by the court, and the witness was given leave to refuse to answer the questions. In *Star Kidney Pad Co.* v. *Greenwood,* 3 Ont. R. 280, the action was upon a note given for the purchase price of some kidney pads. The defense was that the note was secured by fraud, and that the pads were in fact useless and of no curative value. To show these facts the defendant contended that he had the right to prove by the plaintiff the contents of the pads and that they were in that respect valueless. The court, however, held the evidence irrelevant and the defendant not entitled to discovery. See also: *The Don Francisco,* 31 L. J. Admr. N. S. 205; *Howe* v. *M'Kernan,* 30 Beav. 547; *Renard* v. *Levinstein,* 10 L. T. R. N. S. 94; *Carver* v. *Pinto Leite,* L. R. 7 Ch. App. 90, 96; *Great Western Colliery Co.* v. *Tucker,* L. R. 9 Ch. App. 376.

In America the decisions are not uniform. As early as 1860 the question came before the New York courts in the case of *Burnett* v. *Phalon,* 19 How. Pr. 530. The action was for the alleged invasion of the plaintiff's right to use a trademark. In estimating the damages, the witness refused to specify the materials of which the article "Cocaine" was composed, on the ground that the composition was secret, having a considerable pecuniary value to the plaintiff's firm and not known to the public. The referee declared the witness in contempt. The special term reversed the decree, which latter judgment was reversed by the higher court, which said: "But the Code adopts the principle of the bill of discovery, and allows the person to be examined against his interest, as well as to be examined on his own behalf." *Brooks* v. *McKinney,* 4 Scam. 309. In 1888, the question came before the federal court

in the case of *Moxie Nerve Food Co.* v. *Beach,* 35 Fed. Rep. 465, and the court, relying upon the argument in the case of *Tetlow* v. *Savournai,* 15 Phila. 170, 11 Weekly Notes Cases 191, where a rule for attachment against the plaintiff for his refusal to answer as to what ingredients entered into the composition of his powder was dismissed, said: "It must be admitted the question is not free from difficulty. I am strongly impressed that it would be inequitable to force the witness to make the disclosures called for, and therefore unless bound by authority, I must deny the motion. If these questions must be answered, every manufacturer will be at the mercy of anyone who desires to extort from him an account of his process, for an attempt to restrain an infringer would result in the disclosure of all that makes the invention valuable." In *In re Pac. Ry. Com'n.,* 32 Fed. Rep. 241, 254, the commission was held limited in its inquiries as to the interest of the directors in any other business, company, or corporation, to such matters as these persons may choose to disclose. To conclude this note, we quote from the case of *Dobson* v. *Graham,* 49 Fed. Rep. 17: "The plaintiff filed his bill charging infringement of his rights without having any positive knowledge upon the subject. He seems to have relied upon the chance of obtaining evidence to support the charge from the defendant and his workmen. Such a case is not entitled to the special favor of a court of equity. These secrets of his [defendant's] business, if they cover nothing unlawful are his property and as well entitled to protection as the rights secured by plaintiff's patent. If it were shown that these secrets are used as a cloak to cover an invasion of the plaintiff's rights, or if there was reliable evidence tending to show it, and justifying the belief that they are sound, the motions would be sustained. But there is no such evidence before us." *Stokes Bros. Mfg. Co.* v. *Heller,* 56 Fed. 297. The decision in the principal case is, we believe, clearly right and will have a tendency to settle the heretofore uncertain rules governing this justifiable privilege.

RIPARIAN OWNER'S TITLE TO CONTIGUOUS ISLANDS.—In *Webber* v. *Axtell* (1905), — Minn. —, 102 N. W. 915, an early patentee of land on the shore of a small lake and later patentees of an island opposite the first patentee's shore lots are in dispute over the title to the island. The lake in this case is about three and one-half miles long by one-half or three-fourths of a mile wide, and was meandered by the government surveyor in 1857, when the island was marked on the plat and indicated in the surveyor's notes as containing about two acres, though no actual survey of it was then made, nor was there any indication on the plat that it was reserved as a part of the public domain. It was about fifteen rods from the shore lots which plaintiff entered and patented under the homestead law, and it appears to have been claimed by him as part of his original grant for nearly twenty years, after which time the government caused it to be surveyed and conveyed to the present defendant's grantor. When the present action to recover the island was begun accretions had established a sand-bar between the island and the original patentee's shore lots, though there was no such connection between

the mainland and the island when the patents were issued. The court holds that the riparian rights of the first patentee vested in him a contingent interest in all relictions and accretions which included the island at the date of the patent from the government, and that he could not be deprived by the later patent of this vested interest. LEWIS, J., dissents from the majority's view that, as he states it, "the riparian owner acquired with his patent to the shore land a contingent interest in and to the island, based upon the possibility that at some future time, either by the action of or the recession of the waters, the island would become connected with the mainland, regardless of other rights subsequently acquired." Both the majority and the minority cite the case of *Lamprey* v. *State,* 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541, but no other Minnesota case, as sustaining their respective views.

The conclusion of the majority might have been sustained on what seems to have been the common law rule in such cases that on *non-tidal* waters generally the shore owner may own the bed of the lake or stream to its center line (*Bristow* v. *Cormican,* L. R. 3 App. Cas. 641; *Hardin* v. *Jordan,* 140 U. S. 371) and consequently owns islands between his shore line and this central line, unless they are specially excepted from the grant to him of the shore. (*Chandos* v. *Mack,* 77 Wis. 573, 20 Am. St. Rep. 139, 10 L. R. A. 207; *Butler* v. *G. R. & I. R. Co.,* 85 Mich. 246, 24 Am. St. Rep. 84, Aff'd 159 U. S. 87; *Goff* v. *Cougle,* 118 Mich. 307, 42 L. R. A. 161). It is true that in *Bristow* v. *Cormican* it was simply decided that the crown has of common right no prima facie title to the soil of a lake, and it was not decided that adjoining proprietors should be regarded as owning to the center of the lake; and it seems to be true also that precisely what the rights of shore owners would be in the bed of the lake has not been decided in England. But the common law test of public or private ownership to sub-aqueous land appears to have been the ebb and flow of the tide (*Murphy* v. *Ryan,* 2 Ir. C. L. Rep. 143, *Pearce* v. *Schotcher,* L. R. 9 Q. B. D. 162, Leake "Uses and Profits of Land," pp. 153, 156, 158, 159, 162, 180, 182), rather than the water's actual navigability, which is, at best, an uncertain guide. (*Cobb* v. *Davenport,* 32 N. J. L. 369).

The form of the long and comparatively narrow lake in the principal case would have made it possible to establish a center line from one end of it to the other, which should be considered its thread (as suggested in *Scheifert* v. *Briegel,* 90 Minn. 125, 96 N. W. Rep. 44, 101 Am. St. Rep. 399); and were the common law doctrine consistently recognized in Minnesota the solution of the questions presented in such cases would seem more simple. But in that state navigability is the test applied in determining whether the bed of the lake is public or may be private property, though the decisions leave one in some doubt as to what exactly "navigability" is (*Lamprey* v. *State,* supra; *Shell* v. *Matteson,* 81 Minn. 38; *Lamprey* v. *Danz,* 86 Minn. 317). The tidal test is at least certain, and where this is applied there is no inconsistency in excepting such inland seas as the Great Lakes from its operation and holding that private ownership extends only to the water's edge, and consequently does not embrace contiguous islands. (*People* v. *Warner,* 116 Mich. 228; *Sherwood* v. *Commissioner State Land Office,* 113 Mich. 227.)