The faculty of the Yale Law School has once more suffered a very heavy loss. Professor Willard T. Barbour died of pneumonia on March 2, 1920. Professor Barbour entered upon his duties at Yale last September, having been chosen to fill the Southmayd Professorship and to give courses in equity and legal history. In the short period since then he had already won the love and respect of his students and his fellow teachers. His exceptional educational training, his assured loyalty to this school, his strong common sense, his almost boyish enthusiasm, and his gifted and winning personality had already made certain a successful and productive career at Yale.

Professor Barbour graduated from the University of Michigan, receiving the degree of B.A. in 1905 and the degree of LL.B. in 1908. Later he spent three years at Oxford, doing original research in the field of legal history under Sir Paul Vinogradoff. This resulted in
his publishing his History of Contract in Early English Equity, in the Oxford Studies in Jurisprudence. In 1912, Oxford conferred upon him the degree of B.Litt. From 1912 to 1919 he was first assistant professor and then professor of law in the University of Michigan Law School. There, as at Yale, he received ungrudging recognition as a legal scholar and the deepest of affection as a man. Professor Barbour had published several scholarly and original articles in law reviews and had just begun a series of lectures on legal history on the Carpenter foundation at Columbia University. The Yale Law School takes pride in its recognition of his already high accomplishment, holds in high regard the memory of his modest and winning personality, and mourns the heavy and untimely loss to legal scholarship and to the profession of law teaching.

POWER OF EQUITY OVER PUBLIC ELECTIONS

In a recent Illinois case the secretary of state proposed to submit to the electors certain questions of public policy. It was alleged that to do so would be to exceed his power under the state constitution, and an injunction was asked to prevent it. It was held that “the court had no jurisdiction”; that “an injunction would not issue out of a court of equity for the purpose of restraining the holding of an election or in any manner directing the mode in which the same should be conducted” on the ground that it was a matter of a political nature, with which courts of equity had nothing to do. Emerson v. Payne (1919, Ill.) 125 N. E. 329. This limitation on the power of equity is asserted by the highest authorities, but some of those courts which adopt it are inclined to leave for themselves a loophole, and in the last thirty years in some very important cases it has been disregarded when a public wrong without other adequate remedy demanded it.¹

¹The court evidently meant no power to render any valid decree, even an erroneous one. For comment on the ambiguity of the word “jurisdiction” see (1915) 15 Col. L. Rev. 106-107 and Comment (1919) 28 Yale Law Journal, 483, note 4.


³“We should not care to commit ourselves to the doctrine that a court of equity will not under any circumstance interfere for the protection of political rights.” Winnett v. Adams (1904) 71 Neb. 817, 825, 99 N. W. 681, 684.

⁴State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 93 N. W. 35 (restraint of election under unconstitutional apportionment law); People v. Tool (1905) 35 Colo. 225, 86 Pac. 224 (injunction against conducting an election fraudulently); cf. Giddings v. Blacker (1899) 93 Mich. 1, 52 N. W. 944 (mandamus used to restrain, in the absence of original jurisdiction to grant injunction); cf. Attorney General v. Suffolk County Commissioners (1916) 224 Mass. 598,
An analysis of a long series of cases in Illinois that have had much to do with the firm establishment of this limitation will show that the grounds for it are two. In the first place elections seldom threaten to cause direct damage to property, and "property" relations are the usual basis for injunctive relief. This basis for judicial action of any kind is historical and not altogether logical, as Dean Pound has pointed out. That it has resulted in some unjust situations in our law cannot be doubted, but it is deep-rooted in our legal thought. The courts often strain a layman's understanding of the word property until its meaning is even more elusive than usual, in order to avoid the force of the rule and to vindicate something quite different from what we are accustomed to consider damage to property. The courts above mentioned which denied the universality of the rule as to political matters and elections are among the few in this class of cases that have placed their action squarely on the ground of irreparable injury to the public weal. This, it is believed, is sufficient reason for the intervention of equity whether damage is threatened to property or not.

In the second place, courts are cautious in interfering with an officer of the political branch of the government, and that is what restraint of an election usually means. This, it is said, attacks the foundation of our governmental system—the three-fold separation of powers. None of the cases analyze carefully, however, the possibilities of the situation. It is submitted that the acts which are sought to be restrained may be of three kinds: (1) acts of the executive within its discretion under power given by the constitution or some valid law; (2) acts beyond the power given by law or constitution; and (3) acts in pursuance of duties charged by invalid laws or invalid constitutional provisions. Cases involving any one of these classes are cited indiscriminately in cases involving any other one. As to the first class

113 N. E. 581 (mandamus used like injunction in state that originally had no courts of equity). The usual distinction between mandamus and injunction in similar cases is extremely well explained in State v. Lord (1896) 28 Ore. 498, 510, 43 Pac. 471, 474. But it is submitted that in the Michigan and Massachusetts cases cited the distinction does not apply, and that an equitable remedy in effect was employed.

14 See Comment (1917) 26 Yale Law Journal, 779; cf. (1920) 29 ibid., 344.

10 See in the instant case, which apparently falls under class 2, citations of Walton v. Develing (1871) 61 Ill. 201 (class 1); Harris v. Shryock (1876) 82 Ill. 119 (class 2); and Spies v. Byers (1919) 287 Ill. 627, 122 N. E. 841 (class 3). The language of the opinion in Walton v. Develing is imported bodily into that of the instant case at several points.
there can be no conflict. The judiciary cannot interfere with or review
the lawful discretion of the coordinate branches of government.\textsuperscript{11}
Naturally this principle should make the courts careful in doing any-
thing which seems so to interfere. Acts within this lawful discretion
are to be clearly distinguished from purely ministerial acts on the one
hand,\textsuperscript{12} and from acts \textit{ultra vires} (class 2) on the other. If any
court seeks to restrain or review acts within this first class, its order
or decree is not merely subject to reversal, but is probably void.\textsuperscript{13}
To allow interference here may well be said to attack the foundation of
our system.

Equity clearly has power to restrain acts \textit{ultra vires} and acts in
pursuance of an invalid law when property rights are immediately
threatened, whether an election is involved or not. In this way the
constitutionality of many laws is passed upon.\textsuperscript{14} So far as the Presi-
dent is concerned, it would be highly impolitic, of course, for any
court to issue orders of any kind to him, and obviously it would have
no power of enforcement beyond moral suasion.\textsuperscript{15} The policy does
not extend with quite the same force to the governor of a state, it
would seem.\textsuperscript{16} With reference to subordinate officers and boards
courts have no hesitation in acting.

Where the rights of the complainant personally are not threatened
by official acts \textit{ultra vires}, complaint to administrative superiors for
punishment for breach of duty is the usual and adequate procedure.
But why deny equity the power to prevent such acts? It is quite
possible for situations to arise in which the administrative superiors
refuse to see that the law is being broken, or in which the delay neces-
sary to take the ordinary steps means irreparable injury to the public.
Equity has the power and has used it in such cases.\textsuperscript{17} The fact that
it is an election that the officer illegally threatens to hold should only

\textsuperscript{11} Determinations of law, however, can be reviewed. See \textit{Comment} (1918)

\textsuperscript{12} Failure to perform these may be remedied specifically by \textit{mandamus}. See
(1915) \textit{24 Yale Law Journal}, 604. For errors of judgment in the exercise of
discretion, however gross, there is no remedy but appeal to a reviewing authority,
if there be one, assuming that the law authorizing the discretion is valid. For
\textit{mandamus} to force the holding of an election, see \textit{State v. Commissioners} (1914)
93 Kan. 405, 144 Pac. 241.

\textsuperscript{13} \textit{Walton v. Develing}, supra; \textit{Mississippi v. Johnson} (1866) 71 U. S. 475;
\textit{Morgan v. County Court} (1903) 53 W. Va. 372, 44 S. E. 182.

\textsuperscript{14} See cases cited \textit{Am. Dig., Dec. Injunction}, sec. 85; \textit{Cent. Dig. Injunction},
secs. 155, 156. On the subject of suits against the state in general, see 44
L. R. A. (N. S.) 189, note.

\textsuperscript{15} Cf. \textit{Mississippi v. Johnson}, supra.

\textsuperscript{16} Courts have occasionally controlled the actions of the governor, though
there is considerable conflict on this point. See \textit{State v. Cunningham}, supra
(restraint of board of election commissioners, of which governor was head);
(1913) \textit{23 Yale Law Journal}, 97.

\textsuperscript{17} \textit{People v. Tool}, supra.
make the court careful, and not deprive it of power. A privilege and power to vote at an election which is sure to be subsequently held void are not particularly sacred. The mere word "election," however, in the principal case and in two previous Illinois cases led the court to lose sight of the malfeasance in office, and to deny itself power to pass on the merits. Clearly restraint of an officer acting thus may be justifiable interference with the political branch of the government.

The exact status of acts performed under a statute subsequently held to be invalid forms a very interesting problem in itself. Those in which we are here interested, acts connected with elections, seem to be called in question frequently, when no property rights are involved, in cases of apportionment of representation, or gerrymandering. In *State ex rel. Lamb v. Cunningham*, the secretary of state was restrained from holding an election under an apportionment statute that was held unconstitutional. The court said, "The legislature that passed the act is not as assailed, nor is its constitutional province invaded. . . . The determination may have a political effect, but that would not necessarily make the question determined a political instead of a judicial question." The Illinois court on the other hand in *Fletcher v. Tuttle*, refused this same relief because the rights (sic) involved, namely to vote, to be a candidate, and to have the election called and held under a valid law were political and not the subject of equity jurisdiction. The question came up again under the Fourteenth and Fifteenth Amendments, when it was attempted to restrain an election under registration statutes that effectually deprived the negro of his power to vote. Chief Justice Fuller and Justice Holmes in the Circuit Court of Appeals dismissed the bill, the Chief Justice on the ground that no right of property was threatened, and Justice Holmes flatly on the basis of non-interference with the other departments. The circuit judge who filed an opinion in an identical case, after this last decision, but before seeing the opinion, seems to have furnished a fairly adequate

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18 *Harris v. Shryock*, supra; *Thompson v. Mahoney* (1907) 136 Ill. App. 403.
20 *Supra.*
22 *Green v. Mills*, supra.
23 The leading New York case went on this ground, in spite of the importance of the public interest involved. *Schieffelin v. Komfort* (1914) 212 N. Y. 520, 106 N. E. 675. This case was eminently one for a declaratory judgement; *cf.* Borchard, *The Declaratory Judgment* (1918) 28 *Yale Law Journal*, 1, 105; and *Comment* (1920) 29 ibid., 545.
answer to this entire argument. "I think that the rights as claimed by the plaintiffs as citizens of the United States and of South Carolina have a property value of the highest and most sacred character. These rights it is admitted the plaintiffs are deprived of; but it is insisted they have adequate remedies at law, and that equity therefore cannot entertain their complaints. I regret very much that the Court of Appeals did not indicate the character of the remedy at law. I regret also that I am unable after thorough investigation to find it."

It is submitted therefore that equity powers in matters of a political nature should be tested, not by the property interest involved or by the presence or absence of an election or of political rights, so-called, in the case, but by the character of the act to be enjoined. Once it is determined that the act is ultra vires, or that the law may perhaps be invalid, the case should be considered on the merits. The decision would then depend on the balance between the policy against interference with the political branch or with the freedom of elections, and the importance of the injury threatened to the public.

STOCKHOLDER'S LIABILITY FOR CORPORATE DEBTS

The theory that a corporation is a complete legal entity separate and distinct from its stockholders is receiving some severe blows. The recent case of *Louisville & N. R. R. v. Nield* (1919, Ky.) 216 S. W. 62 illustrates the point nicely. The plaintiff was the sole creditor of a corporation of which the defendant was the sole stockholder. In effect the bill alleged that the defendant, with notice of the plaintiff's claim, had wrongfully taken the corporate assets and so left the corporation insolvent, though not legally dissolved. The defendant demurred because no judgment had been secured against the corporation at law and because the corporation had not been joined as a party defendant. The court overruled the demurrer, saying that "the defendant had literally swallowed the corporation whole" and thereby placed himself under a duty to pay its debts.

It has been an established principle of corporation law that the corporation is under the primary duty to pay its own debts. So the rule, just as in the case of any debtor, would logically require a judgment at law to establish the debt as a condition precedent to the filing of a creditor's bill in equity.1 In many states both the law and the equity action may be prosecuted in one suit by bringing both parties in as defendants.2 But in no state, in the absence of statute, will the mere allegation of the insolvency of an individual debtor support a creditor's

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There must first be a judgment at law against the debtor, to establish the debt. The individual remains the principal debtor. But the court in the principal case very justly recognized that the defendant was the only person interested in the corporation. In legal theory the corporation and the defendant were distinct, but in fact the defendant was the corporation. It was really the defendant's debt which was being collected. The court therefore refused to put the plaintiff to the useless expense of first reducing his claim to a judgment against the corporation.

Though this distinction between corporate and individual debtors appears at first sight to show merely a difference of procedure, it is submitted that there is an important underlying difference of substance. When C contracts with the A corporation, what are, in fact, the resulting legal relations? Is it enough to indulge the fiction and say that the contract is between C and A, and that X, Y and Z, the stockholders of A, are only incidentally concerned? For ordinary purposes that explanation may suffice, but whenever the matter has come to a test the courts have shown themselves ready to ignore the legal entity completely—as in the principal case. Admittedly X, Y and Z own the entire beneficial interest in the corporate assets subject to C's right to payment. As a fact, is not a corporation a mere form to enable X, Y and Z to do business with certain combined assets as if (for many purposes) they were one person, and to limit their liability on such dealing to the amount of those assets? Then C's duty is to render certain services to the A corporation (which is X, Y, and Z) in return for the promise of X, Y and Z to pay for the same out of the combined assets held by them as the A corporation. For most purposes, such as holding “title” to property, contracting, committing torts in the course of business, or suing and being sued in ordinary cases, the corporation should and can conveniently be treated as if it were a legal entity. Such convenience of treatment (together with limitation of liability) is the whole purpose of incorporation. But a

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*Hardy v. Hardy* (1915) 143 Ga. 703, 86 S. E. 780; *Drahos v. Kopesky* (1906) 132 Iowa, 497, 109 N. W. 1021; *Union Credit Ass'n v. Corson* (1915) 77 Ore. 361, 149 Pac. 318.

*A corporation is not dissolved, even if it becomes insolvent and all the stock is held in one name. Elloitt v. Sullivan* (1911) 156 Mo. App. 496, 137 S. W. 287. *Contra, Swift v. Smith, Dixon & Co.* (1886) 65 Md. 428.


*For a careful exposition of this view, especially in its relation to the conflict of laws, see Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 Col. L. Rev. 285.

*Wormser, Piercing the Veil of Corporate Entity* (1912) 12 Col. L. Rev. 496.
conscious recognition of the real relations between the parties is necessary to clarify the principles underlying an important class of cases where the courts have on one pretext or another ignored the legal entity.

Take the principal case as an example. C is the sole creditor of the A corporation of which, let us assume, in order to reduce the case to its simplest form, X was the sole stockholder at the time C's claim arose. Then X promised to pay C from those of his assets which he held in the name of the A corporation. C agreed to accept that promise, so limited, as consideration for his services. Now clearly, if X through his control of the A corporation chooses to remove those assets from the corporation and to hold them in his individual name, he does not thereby alter or extinguish the scope of his duty to C. So long as X maintained the existence of A as a separate entity, C would indeed look to it first for payment. C might ("recognizing the entity") have treated the transfer as a fraudulent conveyance and, after reducing his claim to judgment against the corporation, have had the transfer set aside in equity to the extent of his claim. But the court in the principal case simply regarded the situation as one where the principal debtor had in his own hands the funds promised to the creditor. There were no other rights involved. So the court ignored the fictional entity and simply required the defendant, directly, to fulfill his duty. Any other decision would have been a blind worship of form.

If on the other hand the A corporation had transferred its assets to a second person W, or a second corporation B, in which X the stockholder of A had no interest whatever, the foregoing situation would be sharply contrasted. Of course if the sale was bona fide and for value, C has not been injured, because there has been a fair return made for the property withdrawn. C takes the chance that corporate assets may be depleted by accident or by poor judgment in the course of ordinary business transactions, and has no power to control the corporation's business policy. But if the transfer to B were fraudulent, then the principles applicable to fraudulent conveyances by individuals should apply. X as stockholder is still under a primary liability to be divested pro tanto of his interest in the assets remaining in the A corporation by C's exercise of his power to collect. But as X has not himself taken the assets transferred, C has no power to bring a creditor's bill against him. In such case there is no reason to question the sufficiency of A as a legal entity. Suit must first be brought according to the usual rule relating to fraudulent conveyances against

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Footnotes:


10 The same principle would seem to hold without relation to the number of stockholders. And on the sale of a share of stock the new stockholder assumes, in the main, his predecessor's liabilities.

11 Barrie v. United Rys. of St. Louis (1907) 125 Mo. App. 96, 102 S. W. 1078.
the A corporation, which represents X, in order to establish the debt, and then in equity to set aside the conveyance.\textsuperscript{18}

Another distinct type of case is that where the stockholders X, Y and Z of corporation A organize a new corporation B and "transfer" all their assets held in the A corporation to B in return for which they take stock in B. There have been several ways of treating the case with the common result of placing B under a duty to pay A's debts to the extent of the assets gratuitously transferred.\textsuperscript{18} One theory is that the transaction has merely been a change of name.\textsuperscript{14} The court thereby simply ignores the fact that in theory there are two separate legal entities and it permits A's creditors to recover of B either in law or in equity.\textsuperscript{15} By the majority view the assets are regarded as a "trust fund for the benefit of creditors" and B through the agency of the common officers has notice of A's debts. It then, in taking all A's assets and issuing its stock in return therefor among A's stockholders, is a party to a breach of trust.\textsuperscript{16} Yet it has often been decided that the assets of a corporation are not a technical trust fund.\textsuperscript{17} It is not a breach of trust for the corporation to transfer its assets to third parties in good faith and for value. And in the absence of statute such a sale is good even if the transferee has notice of the corporation's insolvency.\textsuperscript{18} There should be no more reason for calling funds from which a corporation's creditors are to be paid a "trust fund" than the funds of any other debtor. Courts resort to the doctrine to explain their judgment against B more plausibly. In fact they recognize that it is the stockholders who should and so are held to answer for the debt by a judgment against B. Were the stockholders not the same in each corporation the transaction would be treated as a sale.\textsuperscript{19}

It will not do merely to say that courts in the above case have made an exception where necessary to avoid fraud. Undoubtedly they do that but such an explanation offers no index as to when they would

\textsuperscript{18}Coleman v. Hagey (1913) 252 Mo. 102, 158 S. W. 829; Sharple Company v. Harding Creamery Co. (1907) 78 Neb. 795, 111 N. W. 783.

\textsuperscript{19}There seems no question but that the second corporation is only liable to the extent of the assets received. Johnson v. United Ry. of St. Louis (1912) 249 Mo. 326, 152 S. W. 362.

\textsuperscript{14}Auston v. Tecumseh Nat. Bank (1896) 49 Neb. 412, 68 N. W. 628; Blanc v. Paymaster Min. Co. (1892) 95 Calif. 524, 30 Pac. 765.

\textsuperscript{15}A judgment may be secured at law against either or both corporations. Wolff v. Shreveport Gas Elec. Light & Power Co. (1916) 138 La. 743, 70 So. 789.

\textsuperscript{16}Harbison-Walker Refractories Co. v. McFarland's Adm'r (1913) 156 Ky. 44, 160 S. W. 798; Jennings, Neff & Co. v. Crystal Ice Co. (1913) 128 Tenn. 231, 159 S. W. 1088.

\textsuperscript{17}Hollins v. Brierfield Coal & Iron Co. (1893) 150 U. S. 371, 14 Sup. Ct. 127.

\textsuperscript{18}Hagemann v. Southern Electric Ry. (1907) 202 Mo. 249, 100 S. W. 1081. The reason is that without such a rule there would be enormous difficulty in realizing on the assets of the corporation.

\textsuperscript{19}Sharple Company v. Harding Creamery Co., supra.
COMMENTS

consider another situation within the exception. The decisions mark two facts as operative: (1) that of corporate assets and (2) that of identity of stockholders. Where the same stockholders who may be said to have promised to pay C from their combined assets held in the name of the A corporation now hold those assets in the name of the B corporation leaving A insolvent C has uniformly been allowed to recover of B. The situation is the same as in the principal case, except that here the primary duty of the stockholders X, Y and Z to pay can be enforced by “recognizing” the B corporation and suing X, Y and Z under its name. It makes no difference to C’s rights in what manner X, Y and Z choose to keep the assets payable to C.

When the A and B corporations, however, are both maintained as going concerns, a more difficult situation is presented. It is of course clear that A and B may be entirely distinct businesses though managed by the same directors and owned by the same stockholders. And a sale made by A to B in good faith and for value cannot be set aside by A’s creditors. And if the control of A has not been exercised in the interest of B, no right of action is given A’s creditors against B. On the other hand, where the policy of A has been controlled in B’s interest with the result that A’s assets have been diminished, it has been held that a creditor of A might subject B’s assets to the payment of his claims in a bankruptcy proceeding. Here, although there had been no transfer of tangible assets, B had received an equivalent benefit from the control of A in B’s favor. The transactions have the same effect as if the stockholders had transferred their assets held in A to B. The case is thus analogous to the preceding instance.

So far the question has been in this type of case whether the A corporation was in fact the “agent,” “dummy,” or “subsidiary” of the B corporation. It has therefore been difficult to determine just when the A corporation might properly be considered “swallowed.” Depending on the answer to that question it has followed that either the B corporation was under a duty to pay the whole of A’s debts or under no duty at all. It would seem that this method of inquiry raises an incorrect and misleading question. Even though the stockholders and directors and officers in A are identical with those in B, the right of A’s creditor is only to be paid out of A’s assets. If that corporation has been managed in its own interest and fails from purely economic reasons, there is no justification for holding the B corporation. If A has been controlled in B’s interest, then B should be under a duty, but only to the extent to which A’s assets have been diminished as a result of that control. Of course if the control has been complete and wholly in the interest of B, it might be both difficult and, as a

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50 Atkinson v. Western Development Syndicate (1915) 170 Calif. 503, 150 P. 360.
51 In re Watertown Paper Co. (1909, C. C. A. 2d) 169 Fed. 252.
matter of policy, unnecessary to establish the extent of A's loss. It would seem, however, that such matters as separate account books, identity of directors, etc., are only evidential facts to establish the extent of the control in the interest of the dominant corporation.

Another type of case which offers from another angle a striking illustration of the courts' willingness to disregard the fictional entity is the recent case of Ballaine v. Alaska Northern Ry. (1919, C. C. A. 9th) 259 Fed. 183. The United States owned all the stock in the defendant corporation. It was held that because the government could not be sued without its permission, the plaintiff could not maintain his action of tort against the corporation. The case would seem to bear out the theory that a corporation is merely an association of stockholders doing business as if they were one person. And it lends indirect support to the statement that the real parties to a contract with a corporation (as to a tort committed by it) are the persons concerned and the stockholders, whose duty to pay is limited to the extent of the corporate assets.

Although all the courts in the foregoing cases profess to follow the legal entity theory in its entirety merely "making an exception in the particular case to secure evident justice," it is submitted that they have really recognized an entirely different principle. If it be conceded that a creditor has a right, not against the corporation, but against the stockholder, to be paid from the stockholder's interest in the assets held by him in the name of that corporation, practically all decisions may be explained without turnings and twistings of theory. Although, the case is more complicated where one corporation has been merged or consolidated with one owned by entirely different interests, the principle remains the same. The creditors' original

2 Where the B corporation holds all the stock in the A corporation and really conducts its own business through A, it is probably unnecessary to determine A's loss in most cases. Consequently if B loans A money, B should not be allowed to share as a creditor where the money loaned is less than the loss occasioned A's assets. S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania (Pa. 1919) 107 Atl. 721. The court in that case, however, simply confused the two corporations.

2 (1920) 4 MINN. L. REV. 219 discusses these relations as evidence but does not make this distinction.

3 This point is by no means settled but seems to be well decided. See contra, Panama R. R. v. Curran (1919, C. C. A. 5th) 256 Fed. 768.

4 For an instance of the many cases where the stockholders have been frustrated in their attempt to avoid a contract duty by organizing a second corporation see George v. Rollins (1913) 176 Mich. 144, 142 N. W. 337.


6 It has been intimated that as to those stockholders common to both corporations their liability remains unchanged, while as to the new stockholders it is the ordinary case of receiving a conveyance in fraud of creditors. Montgomery Web Co. v. Diehl (1890) 133 Pa. 585, 19 Atl. 448.
right is enforced, wherever the stockholder has placed the assets. The reason given may be that the one corporation has been left a mere "shell," or is a "dummy," or has been "literally swallowed whole." But the fact is that the legal entity fiction will be disregarded when necessary to enforce the stockholder's duty according to his true contract. However to go farther and disregard the corporate entity seemingly at will would be an unjustifiable blow at the basis of corporation law. It is submitted that it would tend toward accuracy of thought and justice to recognize more frankly the exact relations of the parties.

EVIDENCE OF INTENTION AS REBUTTING WAYS OF NECESSITY

Can the presumption of a grant, or of a reservation, of an easement of necessity be rebutted by proof of an oral agreement of the parties to the contrary? In giving effect to a written instrument, even where a writing is required by law, oral conversations are admissible to "rebut an equity." This old and very ambiguous doctrine, though sometimes construed to relate merely to constructive or resulting trusts, has nevertheless been extended to a rather miscellaneous group of legal presumptions. Clearly, however, not all legal presumptions may be overridden by this kind of evidence. Upon what principles are conclusions arising out of the application of legal presumptions to written instruments admitted to or excluded from the protection of the "parol evidence" rule?

In the case of Orpin v. Morrison, a deed was delivered embracing land so situated as to give rise, under ordinary circumstances, to a way of necessity across the land of the grantor. In litigation involving the existence of this "right of way," the alleged servient owner introduced without objection evidence of an oral understanding that no such easement should be granted. Subsequently the court was requested to rule that this evidence could not be considered. It was held that the evidence, once admitted, was relevant to prove the actual intentions of the parties as a means of rebutting the presumption.

It seems clear, notwithstanding a contrary intimation in the opinion, that we have here no middle ground between the absolute irrelevancy and the absolute admissibility of the evidence in question and that the latter, if objectionable at all, could not possibly be cured by the failure to object to its introduction. We need not enter into the by no means

3 Hall v. Hill (1841, Ix.) 1 Dr. & War. 94.
5 Ibid., 532.
settled controversy whether there exists a technical rule of evidence applicable to oral conversations when offered for strictly interpretative purposes. However this may be, the rule which prohibits the use of such evidence to contradict or supplement a writing is generally recognized as one of substantive law. In the present case, where the question was merely one of rebutting a legal presumption, the problem was manifestly one of contradiction and not of interpretation. The sole inquiry is, therefore, whether the legal conclusion thus contradicted was or was not within the protection of the parol evidence rule. If so, the conversation offered in contradiction was as irrelevant as if in direct conflict with the specific language of the instrument. If not, the conversation was not merely relevant, but perfectly good evidence within a well-established rule.

How should the issue of relevancy thus raised be decided? If it was correctly resolved in favor of the proof of the oral conversations, this must be, as recognized in the principal case, by virtue of the actual state of mind common to the parties as disclosed by the evidence, and not by reason of the oral agreement as an objectively operative fact. Under the statute of frauds the latter could not operate independently of the deed to create or prevent the creation of an easement. Could it be said that the deed was executed with reference to the oral agreement, just as it must be presumed to have been executed with reference to the physical situation and condition of the property? To assert this would be virtually to incorporate the oral agreement bodily into the deed in a manner which bears not the slightest resemblance to an interpretation of the document. To prevent such a proceeding is the very purpose of the parol evidence rule.

We are left then with the question as to the relevancy of the subjective state of mind of the parties as a fact overriding the legal presumption of a way of necessity. Is this a contradiction of the “instrument” which is protected against contradiction by the parol evidence rule?

Clearly the “instrument” within the meaning of this rule is much more than the mere succession of written words on the face of the document. No one would contend, for example, that the principles of syntax and the fixed canons of verbal usage are not within the protection of the rule to the same extent as the words themselves. Furthermore it is well settled that genuine, as distinguished from artificial, rules of construction applicable to particular parts of the

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3 See note 1, supra.
4 Orpin v. Morrison, supra, 532.
writing are essential elements of the instrument within the meaning of the rule.\footnote{Hall v. Hill, supra; 2 Taylor, Evidence (9th ed. 1897) sec. 1231.} This is undoubtedly equally true of many rules of presumption for ascertaining the interrelation of different provisions of the document, or the relative efficacy of different elements in the text in overriding apparent contradictions. Thus it is incredible that the presumption that monuments control distances in the specification of a boundary could be rebutted by proof of an oral understanding to the contrary, or that in the case of a bilateral contract embodied in a writing complete on its face, the condition implied in law of contemporaneous performance or readiness to perform could be excluded by proof of an oral agreement that the reciprocal promises should be strictly independent.

In fact the parol evidence rule would be devoid of meaning unless it were held to debar an interference, by direct proof of actual intention, with the legal consequences arising from the language of the instrument by a genuine process of interpretation. All these legal consequences, however, ensue only by the extrinsic operation of law, having for its purpose the giving effect to the instrument as a complete and exclusive expression of intention. These legal effects are not, and can not be, set forth with completeness in the text of the document. The law is as truly construing the instrument as such, when it finds an expression of intention in the general scheme of the document as when it finds such an expression incorporated in an express provision.

In the case of a way of necessity, however, the legal presumption is founded, not directly upon the express language or the structure of the document, but upon the immediate physical consequences of the grant which may or may not be ascertained without resort to extrinsic proof. It may be suggested that we have in such a case no longer a process of interpretation or construction, and that consequently a presumption thus founded is in no sense a part of the instrument within the protection of the parol evidence rule. But words in instruments of grant are always used with a view to producing physical effects through the changes in the legal relationship involved. How, then, can the value of these words be appraised as an expression of probable intention unless we look to the direct physical consequences thus produced, within the range of the probable contemplation of the parties? To examine the situation outside the deed to ascertain the change which the deed has effected is not to discard the instrument but to seek a more complete rational understanding of it as something dynamically operative rather than a mere series of formal expressions. If, therefore, such an examination discloses as a direct consequence of the grant a parcel deprived of direct access, and if the law finds in this situation a rational basis for an inference of intention sufficiently cogent to give rise to a presumption of a way of necessity, is not this
legal conclusion well within the range of a genuinely interpretative process of inference, which starts with the language of the document and which adheres throughout to the purpose of appraising this language as an expression of probable intention.\textsuperscript{14}

The presumption of a way of necessity is founded upon the elementary principle that the grant of a thing carries with it whatever is reasonably necessary to its enjoyment.\textsuperscript{15} It has therefore vastly greater genuinely probative force than those legal conclusions which are admittedly subject, under the authorities, to rebuttal by direct evidences of actual intention. Thus conclusions based upon technically equitable considerations are thus rebuttable,\textsuperscript{16} but these by their very nature exclude the element of probable intention. The implied warranty of title in the law of sales has been held to be within the same rule,\textsuperscript{17} but this is by the better opinion, deemed to proceed upon an essentially quasi-contractual disregard of probable intention. So too statutory presumptions, such as that of the inadvertence of the omission of a lineal descendant from a will, are within the rule,\textsuperscript{18} but these manifestly ride rough-shod over truly interpretative considerations.

There remains the "artificial" class of presumptions, such as courts of equity have sometimes adopted, often borrowing them from the civil law, as makeshifts for the solution of difficulties created by the absence of genuine probative data.\textsuperscript{19} Whether a repeated testamentary gift was intended to be cumulative or substitutional,\textsuperscript{20} whether an executor was the deed of the grantor as much creates the way of necessity as it does the way by grant; the only difference between the two is that one is granted in express words, and the other only by implication." \textit{Nichols v. Luce \textcopyright 1834, Mass.} 24 Pick. 102, 104.

\textit{Schmidt v. Quinn \textcopyright 1884} 136 Mass. 575 ("a right of way is presumed to be granted; otherwise the grant would be practically useless."); \textit{Doten v. Bartlett \textcopyright 1910} 107 Me. 351, 78 Atl. 456 ("it is not to be presumed that the parties intended the grantee to have no beneficial enjoyment of the estate."); \textit{Higbee Fishing Club v. Atlantic City Electric Co. \textcopyright 1911} 78 N. J. Eq. 434, 79 Atl. 326 ("In such a case the right of way is a necessary incident to the grant, for without it the grant would be useless; the grant is necessarily for the beneficial use of the grantee and the way is necessary to the use."); \textit{Collins v. Prentice \textcopyright 1842} 15 Conn. 39.

\textit{Mann v. Executors \textcopyright 1814, N. Y.} 1 Johns. Ch. 231; \textit{Faylor v. Faylor \textcopyright 1902} 136 Calif. 92, 68 Pac. 482 (resulting trust); \textit{Thurston v. Arnold \textcopyright 1876} 43 Iowa, 43 (equitable rule that time is not of the essence of the contract).

\textit{Miller v. Van Tassel \textcopyright 1864} 24 Calif. 458.

\textit{In re Atwood's Estate \textcopyright 1896} 14 Utah, 1, 45 Pac. 1036; \textit{Buckley v. Gerard \textcopyright 1877} 123 Mass. 8.

"The anomalous case of what are called 'presumptions' of law are, in reality, rules of construction derived from the civil law, which, having obtained a lodgment in English law, but being disapproved of, have been allowed to retain their own antidote in the shape of the capability of being rebutted by parol evidence, which (in common, however, with other rules of construction) they possessed in the system from which they were originally derived." Hawkins, \textit{Wills \textcopyright 1885} ed. ix.

given a specific legacy was thereby intended to be excluded from the residue, whether a bequest by a debtor to his creditor was intended as a payment of the debt—these are all questions upon which the intrinsic bases for inference of intention are meagre and nicely balanced. The presumptions applied to their solution being artificial and exotic, it is not surprising that, at a time when the parol evidence rule was still in a rudimentary stage, rebuttal by direct proof of subjective intention was admitted.

It must be conceded, under the authorities, that evidence of the prospective use of the granted premises is admissible to show whether, in view of such prospective use, an existing mode of access is sufficient to prevent the operation of the presumption. This, however, is suggestive of the usual case of bringing the subjective intention to the relief of an intrinsically ambiguous situation, rather than a use of the evidence in the rebuttal of the legal presumption.

In the law of conveyancing, in which the statute of frauds and the parol evidence rule coöperate to produce a system of transfers in permanent and accessible form, and in which the systems of recording render the results of an examination of the record both indispensable and decisive in important real estate transactions, it is of especial importance that legal principles should be applicable to matters of record with a minimum of resort to transient and untrustworthy evidences of subjective intention. The relaxation of the parol evidence rule in the principal case, though supported by some authority, is believed to be contrary both to immediate practical considerations and to sound principle.

**INJURY BY VOLUNTARY ACT OF COEMPLOYEE UNDER WORKMEN’S COMPENSATION ACTS**

The decision of the Connecticut Supreme Court of Errors in the case of Marchiatello v. Lynch Realty Company (1919, Conn.) 108 Atl. 799,

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23 "It (the testator's mere extrinsic intention) comes in as a mere incident to 'the equity,' as a ground of relief against the operation of a rule which refuses its proper construction to the document." Thayer, op. cit., 439.  
invites an examination of the cases arising under workmen’s compensation acts in which an employee has been injured by the voluntary act of a co-employee. In this recent Connecticut case the foreman of some construction work was also paymaster and had in his possession for his personal protection an automatic pistol. An office boy, fifteen years of age, found it on the desk where it was usually kept and picked it up to examine. While so doing it was discharged and the bullet penetrated a board partition separating the foreman’s office from the next room and struck the night watchman who was engaged in the performance of his duties. Death resulted from the wound and the court awarded compensation holding that the cause of death grew out of a risk to which the deceased was exposed by the condition of his employment.

The problem here raised is closely akin to that presented in the case of an assault upon an employee by a co-employee or by the “practical joke” or “horseplay.” In each case the injury results from a voluntary act of an employee who departs from his usual duties to gratify some personal desire. It is generally stated that an injury resulting directly from a wilfully tortious or sportive act of a fellow employee who has departed temporarily from his employment is not within that class of injuries provided for in the statutes. This rule, however, does not apply to injuries received by one in authority at the hands of an aggrieved subordinate, the risk of such an injury being considered as incidental to the exercise of authority. And so a foreman in charge of a section gang, a bookkeeper employed to check up and collect for shortages, a headwaiter with power to discharge, and even a school teacher, have been adjudged to be exposed to this risk.

1 The contest in these cases is over the construction of the limiting phrase, arising “out of and in the course of” the employment. This double limitation is common to almost all compensation acts.

2 An injury arises “out of the” employment when it occurs in the course of the employment and is a natural and necessary incident or consequence of it or the conditions and exposure surrounding it. Larke v. Hancock Mutual Life Ins. Co. (1915) 90 Conn. 303, 97 Atl. 320; McNicols’ Case (1913) 215 Mass. 497, 102 N. E. 697.

3 In the assault cases, he is seeking to gratify his feeling of anger or hatred; in the “horseplay” cases, it is his sportive instinct or his playfulness; in the instant case, it was his curiosity.


5 Western Indemnity Co. v. Pillsbury (1915) 270 Calif. 686, 151 Pac. 398; Stertz v. Industrial Ins. Commission (1916) 91 Wash. 988, 158 Pac. 256.


8 Trim School Board v. Kelly [1914] A. C. 667. But no recovery was allowed where a school teacher was assaulted by a stranger. State v. District Court (1920) 140 Minn. 470, 168 N. W. 555.
risk of assault as incidental to the exercise of their authority. But
when both the assaulted one and the assailant are of equal rank, com-
ensation has been denied even though the dispute giving rise to
the injury was in regard to the manner in which the work was being
done; unless, indeed, knowledge of the quarrelsome disposition of the
assailant can be "imputed" to the employer. There is much authority,
however, allowing compensation in this latter case irrespective of the
employer's knowledge, the assault being regarded as originating in
the employment since it is the gratification of some passion conceived
within the relationship between the two employees which exists only
because of the employment. An assault to satisfy merely an ugly
disposition is also taken out of the operation of the general rule by
knowledge of the employer of the character of the employee.

The "horseplay" and "curiosity" cases arising from frolicsome and
meddling dispositions of employees resemble this latter class of assault
cases, and the same subjective test of knowledge has been applied.
The causative danger is not peculiar to the employment. Hence it
has been held that only when the employer knows of the playfulness
of the employee can his victim, who has confined himself faithfully
to his duties, recover. In such a case only, the danger becomes an
incident to the conditions under which the employee performs his
duties. So in the principal case, the court allowed recovery on the
ground that the employer had such knowledge.

But knowledge of what facts must the employer have or be charged
with and why? When it is considered that the *raison d'être* of this

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4. There is no direct connection with the employment in either.
7. *State v. District Court* (1918) 140 Minn. 75, 167 N. W. 283.
8. "The watchman was required to perform his duties under the existing *conditions* of the employment, which were the presence of the boy and the pistol where the watchman was obliged to work, the knowledge of the boy that the pistol was in plain view and at hand, and the knowledge of the employer that the boy was liable to handle the pistol and cause it to go off. The placing of the pistol out of sight of the curious boy was within the power of the employer. By his failure to exercise such control, the pistol in the place where Cote found it became one of the conditions with which the watchman was obliged to work."
legislation was to ameliorate a social condition, it is difficult to understand why so much stress should be placed upon this subjective test. It would appear to be a clinging to the old common law—searching for a fault which can be fastened upon the employer.\textsuperscript{17} But the supposed purpose of this legislation was to impose "liability" regardless of fault—a "liability" materially different from that under the common law. In applying the subjective test, however, the liability is not based on fault but on the conditions of the employment.\textsuperscript{18} But why is the risk of assault, malicious or sportive, any less an incident of modern employment when the employer does not know? The employer's knowledge, of itself, does not diminish the risk of the employee who is one of a large number brought together and necessarily in constant intercourse with each other all of whom are possessed of one\textsuperscript{19} or more of the multitudinous frailties of man. The risk of injury by an employee who turns aside from his regular duties when moved by his infirmity or imperfection may properly be considered an inevitable, however undesirable, result—an industrial risk incident to the assembling of many men and a charge which industry was expected to bear under this beneficial legislation.\textsuperscript{20} The risk seems

\textsuperscript{17}"In the case at bar, the employer was not charged with the duty to see to it that none of his employees assaulted any other one of them, either wilfully or sportively. And when one made such an assault, he was guilty of the doing of a negligent act as an individual tort-feasor, for which his employer was not responsible." \textit{Hulley v. Moosbrugger} (1915, Ct. Err. & App.) 88 N. J. L. 161, 168, 95 Atl. 1007, 1010. Cited with approval in \textit{Pierce v. Boyer-Van Kuran Lumber & Coal Co.} (1916) 99 Neb. 321, 326, 156 N. W. 509. It requires no citation of authority that a master was not liable for the acts of a servant while on a frolic of his own.

\textsuperscript{18}"The test of this right of compensation under such acts is whether the injury resulted from some peril incident to the employment . . . regardless of whether such perils or surroundings involve negligence on the part of the employer." "But his knowledge plus failure to remove makes it an element of the conditions under which the employee was required to work." \textit{In re Loper} (1917, Ind. App.) 116 N. E. 324, 325, (1917) 27 \textit{Yale Law Journal}, 142.

\textsuperscript{19}"We do not include, of course, malicious assaults to gratify some personal grudge which one has conceived for the other outside of his relationship to the other as coemployee.

\textsuperscript{20}The argument of the Supreme Court of New Jersey in \textit{Hulley v. Moosbrugger} (1915) 87 N. J. L. 103, 93 Atl. 79, seems unanswerable. "It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For men of that age or even of maturer years, to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor." It was repudiated, however, to follow English authorities blindly. \textit{Hulley v. Moosbrugger} (1915, Ct. Err. & App.) 88 N. J. L. 161, 95 Atl. 1007. As the English authorities are now taking a more liberal stand in defining the phrase "arising out of the employment," a modification of the English doctrine on this point would not be entirely unexpected. See \textit{Thorn v. Sinclair} [1917] A. C. 127, (1917) 27 \textit{Yale Law Journal}, 143.
fairly comparable to that of a machine with a hidden defect. So long as the injured employee has not departed from his duties, it would seem that he should be granted compensation under the acts.21

The principal case is an illustration of the application of the subjective test of knowledge in order to reach a correct result, but without a clear analysis of the implications involved in the doctrine. Here the employer was fairly chargeable with knowledge of the youth of the co-employee and perhaps also of the presence of the pistol since that was known to a "number of employees." But there were no evidential facts to show knowledge of the "character or habits" of the employee.22 Hence knowledge of such facts is either imputed or unnecessary, i.e., it is not one of the operative facts creating the employer's duty to pay compensation. This means, in either event, that among the operative facts are the boy's age, disposition, etc., and the employer's knowledge of the same is not included. This being so, the requirement of knowledge is misleading and to give full effect in the future to the desirable result reached in the case under discussion, it will be necessary to discard entirely the pseudo-limitation attempted to be attached to the principles involved.

FAILURE TO TRANSMIT AN OFFER AS A TORT

It has been held the offeree's silence may be the equivalent of an affirmative act of acceptance of an offer so as to make a binding contract.23 Obviously such cases will be comparatively rare since the offeror cannot be permitted to compel the offeree to take action to avoid being bound by a contract unless the offeree's previous actions or the circumstances of the parties justify. But may there not be a breach of contract?

21 *Swift v. Industrial Commission* (1919) 287 Ill. 564, 122 N. E. 796. This position is strengthened by the fact that the same courts do allow recovery where the injury is the indirect result of a practical joke. "How can his rights be affected by the fact that the man who placed the can on the die says he did so "just to have some fun." *Knapp v. American Car Co.* (1914) 186 Ill. App. 605.

22 "There can be no serious contention that the injury did not arise out of his employment. Garls was required to present the slip given him at the window of the office of plaintiff-in-error to receive his pay. Complying with this regulation and standing in line waiting his turn he was jostled and thrown down and injured through no fault of his own. It does not appear that he was engaged in any jostling or "horseplay" or that he in any way was responsible for the injury he sustained." *Pekin Cooperage Co. v. Industrial Board* (1917) 277 Ill. 53, 115 N. E. 128.

of duty for which the offeror may recover damages where silence results from the failure of the offeree's agent to report to his principal the offer he has solicited.²

Now the question as to the existence of a duty to answer an offer promptly may arise when either the offer is made directly to the offeree or when it is made to the offeree's agent. In the former case the situation seems clearly one where each party knows that the offeree's volition is alone involved and hence mere delay in acting cannot be considered a negligent breach of duty. It may show an acceptance of the contract,² it may be a breach of a collateral contract either to accept or reject under certain conditions,⁴ or it may, where the offer has expired by lapse of time, demonstrate that the offer was not to be accepted.⁵ Other than this apparently it can have no operative effect.

Where the offer is made to the offeree's agent, however, there would seem to be occasions where the agent's negligence is a breach of duty which renders the principal liable in damages. The essential fact in the creation of such a duty is not mere delay in acceptance, but is the agent's failure to present the offer to his principal for acceptance within a time considered proper under the facts of a particular case. Thus in a well considered insurance case, application was made for life insurance, the agent neglected to forward the application, and the applicant died before action was taken upon the application although according to the company's usual course of business action should have been taken before the death occurred. Recovery was had against the company on the theory that the agent was negligent.⁶ The question arose in the recent case of Four States Grocer Co. v. Wickendon (1919, Tex.)

² The negative answer seems to be suggested in (1920) 33 Harv. L. Rev. 595, note 6.
³ See note 1, supra.
⁴ Note (1918) 27 Yale Law Journal, 361, criticising Evans Piano Co. v. Tully (1917) 116 Miss. 267, 76 So. 833.
⁵ Williston, op. cit., sec. 53.
217 S. W. 1103, where one Joplin, agent for the grocer company, took an order from Wickendon in October, 1916, for 3 bales of duck to be shipped August 1, 1917, “order taken subject to acceptance” of the company. Joplin did not send the order to the company which first heard of it when Wickendon wrote on July 5, 1917, asking that shipment be made during the following month. Upon the company’s refusal to ship the goods at the price stated in the order Wickendon sued for damages and recovered a verdict and judgment. The court now reverses this judgment and orders judgment entered for the company.

Wickendon had brought his action in two counts, one in ordinary form for breach of contract, while in the other he stated the facts in detail and alleged that he believed his order had been accepted as he had no notice to the contrary until July, 1917, that he failed to purchase duck as he otherwise would and has now been forced to purchase in the open market at a much higher price and that the defendant is now estopped from denying the making of a contract, because of the negligence of its salesman and the plaintiff’s belief that his order had been received. The court in its opinion seems to concede the vital element of the plaintiff’s case, as it says that “Joplin personally owed both his employer and his customer the duty to promptly transmit orders taken in the course of his business.” It then curiously bases its decision for the company on the ground that Joplin’s breach of duty was not that of his employer. This holding must surely be erroneous, for Joplin was certainly acting within the scope of his authority in transmitting orders to the company: that was very nearly the only thing he was to do under his contract of employment. Hence if the duty exists upon Joplin’s part—and there is more question about this than the court indicates—it must also exist upon his employer’s part. The court was doubtless misled by the fact that the plaintiff attempted to work out a contract by estoppel instead of stating directly a cause of action based upon the agent’s negligent failure to transmit the offer.7

Should such a duty of promptly transmitting the offer be held to

218, that in view of the nature of the business, insurance should be effective upon presentation of a proper application without reference to acceptance, it seems clear that the company should be privileged to reject risks without regard to its reasons, i.e., to choose those with whom it wishes to deal. Richards, Insurance (3d ed. 1910) secs. 69, 94. Hence the criticism of the Duffle case on this point in (1913) 27 Harv. L. Rev. 92, seems correct. If, however, the company may be held for its agent’s failure to transmit an application promptly, the applicant is reasonably well protected against the company’s delay.

7 The court says: “To hold that the appellant owed the duty of transmitting to itself for confirmation orders taken in that manner would be absurd. The very fact that the order must be accepted before the contract is made shows that the appellant was in no sense a party to the transaction of taking the order. Joplin had no authority to bind it in any manner.” The cases cited in note 6, supra, as being contra to the Duffle case seem to question the agent’s authority.
exist? There are these arguments to the contrary: (1) the lack of judicial precedents may indicate that such a duty is not contemplated or relied upon in ordinary business practice; (2) since a similar duty seems not to exist when the offer is made directly to the offeree it may be unreasonable for the offeror to rely on the existence of a duty in this case; and (3) the offeror may protect himself with comparative ease either by limiting the duration of the offer or by entering into a collateral contract with the agent for an early reply, (such contract apparently being within the scope of the agent's authority) or by making prompt inquiries. Nevertheless it is submitted that such a duty should be held to exist and that it is more in accord with business practice so to hold. The agent's main business is to transmit the offer and surely the offeror may expect that the agent will do what he is apparently hired to do. It is not to be expected that the offeror will wish to limit his offer, all the more if, as would seem from his making it, it is advantageous. Nor should he be required to protect himself in a way which would thus limit the possibility of making a contract and hence be disadvantageous to both parties. Then if it is his place to make inquiries, when must he start to inquire, that is, when is he to expect that his offer has gone astray? Is it not unfair to make him responsible for a failure to guess correctly? Moreover it is well known that the provision requiring acceptance is only a matter of protection to the seller, and non-acceptance will be the unusual course. Else why is the agent soliciting orders? In common judgment one buys from the agent. If the seller has made it an offer instead of a sale it but accords with business practice to put the affirmative duties connected with acceptance upon the seller. Therefore rather than force the buyer to make inquiries, it is fairer to hold that the duty of transmission rests upon the agent. It might be feasible to consider that under the circumstances there was an implied contract to reply promptly to the offer, but as there seems to be a negligent breach of duty it is unnecessary to resort to presumptions as to the intentions of the parties.

If such duty exists, it would seem breached whether the offer would have been accepted or not. The acceptability of the offer—a ques-

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6 Since a suit for the agent's negligence will lie against either the agent or the principal, where the agent is acting within the scope of his authority, the question here of duty owed by the principal to the offeror is identical with that of duty owed by the agent to the offeror and vice versa.
7 Star Clothing Mfg. Co. v. Jones (1900, Ark.) 218 S. W. 175, a suit by an agent to collect from his employer commissions on sales. It was held that the employer had as to the agent a duty to accept all orders from bona fide purchasers made in accordance with the provisions previously specified and could not refuse to accept because of an advance in market price beyond that at which the agent was authorized to sell.
8 Duffie v. Bankers' Life Ass'n, supra, p. 24 of 160 Iowa.
9 In Duffie v. Bankers' Life Ass'n, supra, it is expressly stated by the court that the jury might have found that in all reasonable probability the application would have been accepted. But note Dorman v. Conn. Fire Ins. Co., supra.
tion of fact for the jury—would affect simply the question of damages. If the offer was unacceptable, the damages would be only nominal. Here, too, an unreasonable delay upon the part of the offeror in making inquiries may be important as showing that he could not reasonably have relied so long on the expected acceptance of the contract and should have taken steps to mitigate the damages. Such questions would then all be matters of fact for the jury's decision in determining the amount of recovery.

Another question occurs where the offer is that of a proposed contract for the benefit of a third person. To whom is then the duty here in question owed? In the insurance case it was held that it was owed to the estate of the decedent and not to the proposed beneficiary. This seems unjust, for the substantial loss falls upon the beneficiary and not upon the creditors or heirs of the applicant. The loss is that of an expectancy and while the courts have been slow to believe that interference with an expectancy is a breach of a duty, yet the trend of decisions seems that way. Where the offeror goes so far as to make an offer of a contract for the benefit of a third party, the requirement of "immediacy" of the expectancy would seem to be satisfied. Hence there would be a breach of duty to the offeror, whose damages are nominal and a breach of duty to the beneficiary, whose damages are substantial. But in jurisdictions where such beneficiary is held not to have a right against the promisor of a contract, this rule of law would prevent the legal recognition of the expectancy in this class of cases.

C. E. C.

CONSTITUTIONAL UNLIMITATIONS

Again the question of free speech has come before the Supreme Court, this time in Schaefer v. United States (March 1, 1920) Oct. Term, 1919, Nos. 270-274. The opinions add little to the Abrams case. The majority (Justice McKenna) states the contention of the defendants indicted under the Espionage Law as that "the morale of the armies when formed could be weakened or debased by question
or calumny of the motives of authority, and this could not be made a crime." "Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it. . . ." The dissent (Justice Brandeis, Justice Holmes concurring) seeks once more to counter with explicit references to the explicit language and limitations of language in the unanimous opinions in the Schenck, Frohwerk, and Debs cases, insisting that the question of criminality of speech is one of degree. The special dissent of Justice Clark on the facts of the particular case is worth note: "I cannot see, as my associates seem to see, that the disposition of this case involves a great peril either to the maintenance of law and order and governmental authority on the one hand, or to the freedom of the press on the other. To me it seems simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men."

If one may judge the effect of the Eighteenth Amendment and the Volstead Act from *Street v. Lincoln Safe Deposit Co.* (Feb. 10, 1920, S. D. N. Y.) 62 N. Y. L. J. 1973 (Mar. 14, 1920), the hip pocket bids fair to become henceforward a useless ornament of male attire. For, under this decision, Congress has—and constitutionally—prohibited any transportation of liquors, even from safe deposit vault to dinner; and the bona fide dwelling has been fixed on as the only place where one may lawfully possess his liquor. In sober truth, a man’s house would seem to have become his only castle.

If courts may properly overrule their own previous decisions and lay down a new rule of law for the determination of the powers, privileges, rights, and immunities of citizens;¹ and if they may properly

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¹A careful reading of the three opinions leads one to the conclusion (1) that wilful obstruction of recruiting service was not shown, because no effects of the newspaper articles published appeared; but (2) that criminal attempts to cause insubordination were shown, if the majority’s test of criminality be sound, and attempts, by mere words, to commit crimes can constitutionally be made criminal, although there is no indication of any danger that the crime in question will be committed; (3) that the publication of false reports with intent to interfere with the success of the forces of the United States was shown only if, when a fourth-rate newspaper condenses for publication news items otherwise permissible, without purporting to reproduce any particular source, such condensation produces “false” reports within the act.

¹See *Fowler v. City of Cleveland* (1919, Ohio) 126 N. E. 72, to be commented on next month, holding that a municipal corporation must pay for injuries caused by the negligence of a driver of a fire hose wagon, and overruling *Frederick v. City of Columbus* (1898) 58 Ohio St. 538, 51 N. E. 35.
reverse their own decisions rendered on a previous appeal of the very same case and on the identical facts and pleadings; it would seem to be anything but revolutionary for the Supreme Court of the United States to adopt a new method of announcing its decisions. The antiquity of the custom of announcement by oral reading in open court is no doubt one reason for continuing to follow it, especially at a time when so many are ready to condemn any custom for no reason other than antiquity; but the Journal offers its support to the suggestion of a change in the present instance, in view of the business loss and inconvenience caused in the recent case of Eisner v. Macomber (March 8, 1920) U. S. Sup. Ct. Oct. Term, 1919, No. 318, when the newspaper reporter’s misreport of the decision caused a considerable and unfortunate stock market flurry.

The gradual liberalization of the long recalcitrant New York from its old-time narrow position respecting foreign ex parte divorce decrees is gratifying. Hubbard v. Hubbard (Feb. 24, 1920, N. Y.) 62 N. Y. L. J. 2001 presented the following problem: a man and woman married in Pennsylvania and separated there, the man later becoming a resident of New York, the woman of Massachusetts. She there procured an ex parte divorce decree for desertion. Somewhat later, the woman married the present plaintiff, who was also a resident of Massachusetts, in North Dakota. Still later each of the couple became residents of New York. The first husband died. Then the second husband sought a decree of annulment, alleging the invalidity of the divorce decree. The court’s decision was eminently sane. The marriage had been valid according to lex loci contractus and according to lex domicilii of both parties. To be sure: “We are at liberty to inquire into the validity of the divorce.” But New York’s public policy was held not to require in the circumstances the sanctioning of an attack on a marriage by one party to it, by reason solely of the ex parte character of a divorce whose procurement the plaintiff had himself instigated.

Scharrmann v. Union Pac. Ry. (1919, Minn.) 175 N. W. 554, discusses the effect of ex parte action even more interesting to the profession. A locomotive engineer was injured, and employed an attorney on a contingent fee of one-third to prosecute suit for him. Action was brought in Minnesota, issue joined, and the case placed on the calendar for trial, when an agreement of settlement was arrived at and the

*The case stands in pleasing contrast to the stiff policy behind In re Grosman’s Estate (1919, Pa.) 106 Atl. 86, 28 Yale Law Journal, 821. Discussion of the effect of ex parte divorce decrees more at length can be found in Comment (1917) 27 ibid., 117; (1913) 23 ibid., 88.
action dismissed. Later, the settlement never being consummated, a new action was brought. This time the plaintiff settled for less money, and dismissed the action without letting his attorney know anything about it. Later the defendant sought in Nebraska to interplead the attorney and the plaintiff's representatives, paying one-third of the second settlement into court. A default was entered against the attorney, and his claim adjudged void for champerty. But when the attorney applied to the Minnesota court to reinstate his cause and allow him to intervene and enforce his lien, his application was granted. The court held the Nebraska court's action to be a nullity, both as to the judgment, and as to the findings on which it was based. For if an attorney be employed in Minnesota, and a Minnesota court once acquires jurisdiction of the cause of action and of the parties, the attorney's lien on the cause of action is and remains subject to Minnesota law, as against ex parte action elsewhere.

All lovers of legal theory, however, will feel distressed that the attorney was not served personally in Nebraska. It would be very interesting to discover whether the Minnesota court would in such a pinch adhere to the strong hints dropped in its discussion: that the law-suit in this case was a Minnesota res, subject exclusively to the control of the courts of suit. How far the decree of a foreign court of equity regarding land will be recognized at the situs is still a matter of dispute.* Must one refer to the same rules, as to attorney's liens?

So that the times are not wholly dark for the lawyers, despite the rulings on the income tax. It is good, too, to see a serious attempt being made to check the more objectionable features of "claim-adjustment." Texas passed statutes on the subject, prohibiting personal solicitation of employment in law-suits. But the courts held that the statute applied only to lawyers, which left the bulk of the evil untouched. So the legislature amended the law to cover claim adjusters and collectors. The new provision, under attack as a deprivation of liberty and property, has been upheld in McCloskey v. Tobin (March 1, 1920) U. S. Sup. Ct. Oct. Term, 1919, No. 79. Admitting that tort claims, once made assignable, become an article of commerce, still says the court, "to prohibit solicitation is to regulate the business, not to prohibit it," and so within the power of the legislature.