THE MORAL DUTY TO AID OTHERS AS A BASIS OF TORT LIABILITY.

(CONCLUDED).

II.

In those case which appear to go farthest towards recognizing the existence of a legal duty to take positive steps to remove a peril innocently created or to mitigate an injury innocently caused, there will, in all but one case, be found to exist some ground for the plaintiff's recovery other than a breach of the ethical and humanitarian obligation to care for a fellow-man in helpless misfortune. Either, *first* the defendant has not merely failed to assist the plaintiff, but, by some act done with knowledge or means of knowledge of his peril, has turned it into actual injury or has increased the injury already sustained;[47] or, *second;* the

[47] As in *Weitzman* v. *R. R.*, 55 App. Div. N. Y. 585, Ante 219, and *R. R.* v. *Hill* (*Ark.*), 83 S. W. 303. In all of these cases the plaintiff's injury was caused or materially aggravated by some *act* of the defendants' agent in charge of the instrument which caused the injury, after he knew or ought to have perceived the plaintiff's peril. In *Pannell* v. *R. R.*, 97 Ala. 298, Ante, p. 218, it might appear at first glance that there is recognized a duty to take active steps to *rescue* a trespasser from peril, but in fact while the yard master, who by calling out might have prevented the plaintiff from being run over, had not the immediate physical control of the engine he was in charge of the entire operation of switching in the course of which the plaintiff's injury was received, and the Court speaks throughout of the defendant as the *actor,* who is bound to take care that its acts may not injure others. So in *Kesson* v. *R. R.*, 49 Ohio 230, where a passenger fell from a train, not through any fault of the company, but by reason of his own carelessness, and was seen by the crew lying helpless upon the track, it was held that it was their duty to remove him from the track or give notice to those in charge of the succeeding train, since "it was the duty of the company to use reasonable care to prevent the destruction of his life, which otherwise probably would, and in fact *did result from the movement of one of its trains.*" Whether the crew of the train which ran over the plaintiff knew of his peril or not, the company, through its agents in charge of the train from which he fell, knew

defendant stood in some antecedent relation to the plaintiff, which cast upon him the duty of affording to the latter protection;[48] or, third, the defendant by voluntarily taking upon himself the charge of the situation after knowledge of the plaintiff's peril, has, as it were, assumed a position of voluntary though gratuitous bailee of his safety. Often two or all of these elements co-exist.

The earliest and leading case upon this subject is that of the *B. and O. R. R.* v. *State to the use of Price.*[49] The plaintiff was struck by a train near a public crossing. On looking for his body it was found upon the pilot of the engine. The train crew removed it, and supposing him to

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of it and was bound to take care that he should not be injured by the subsequent operations of its road. The case differs very little from one, where a passenger is injured by reason of a failure of the railroad to send out brakemen to give warning to succeeding trains of the fact of some accidental and perfectably unavoidable stoppage of the train in which the plaintiff is a passenger, by reason of which a collision occurs. True, it is that in the one case only one passenger is helplessly exposed upon the company's tracks, and in the other a train full of passengers; but this only affects the amount of injury probable, not the existence of a duty to prevent it.

Decisions such as these, though often cited in support of the existence of a duty to aid those one has innocently imperilled, have in reality no such tendency. They do not recognize any duty on the railroad's part to remove to a place of safety a trespasser or even a passenger, who, without fault on its part, is in a position subjecting his person or property to the risk of injury from any cause other than the subsequent operation of the company's own business.

Once grant the existence of the duty and these decisions allow the plaintiff to recover, even where his own misconduct has contributed to cause his peril, since he being helpless cannot avoid the final injury, or mitigate his harm, while the defendant, by the performance of this duty (if, indeed, it exists), can do so. But evidently cases which are only of aid if the existence of the duty be assumed can be of no value as authority for its existence.

[48] These relations and the extent to which protective duties are attached thereto are dealt with in the first part of this article, 56 U. of P. Law Review and Am. L. Reg. p. 217, pp. 228, 242.

[49] 29 Md. 420 (1868). This, and the cases cited therein, which merely deal with the question of the railroad's liability for the acts of its employees in caring for the injured man, are the only cases cited by Beach in his work on Contributory Negligence, Sec. 215, and Thompson in his work on Negligence, Vol. ii, Sec. 1744, in support of their contention that the law imposes upon one innocently causing harm to another the duty to care for his victim. And every case which leans toward the recognition of this duty is in the last analysis founded upon its authority.

be dead, without any real examination, although the necessity of such examination was suggested to them, placed him upon a plank stretched across two barrels in their shed or warehouse adjoining their station. They had first proposed to place him in their telegraph office, but the telegraph operator objecting, they had instead placed him in the warehouse and there locked him in. The trial judge affirmed the plaintiff's two principal points, which presented his claim in the alternative; the first, dealing with the doctrine of last clear chance as affecting the plaintiff's right to recover for the original collision;[50] and the second, asserting the plaintiff's right to recover, even though the collision was not caused by the defendant's negligence, if "the decedent's death was subsequently caused by the gross negligence of the defendant, or of its agents acting in the course of their employment," and refused to charge as the defendant requested, that "unless the jury find that the collision, which resulted in the death of the deceased, was caused by the defendant's negligence, the plaintiff is not entitled to recover." The affirmance of the judgment by the Supreme Court necessarily, therefore, involved an approval of both these instructions, and it is plainly erroneous to treat the case as one deciding merely that since the plaintiff was struck at or near a public crossing, the defendant being

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[50] The decision of the Court upon this point appears open to grave criticism. It would appear that the plaintiff was struck at a point some distance from the public crossing, and the general tendency is to hold that one trespassing upon a railroad right-of-way by crossing it at a point other than a public crossing has no right to rely upon the absence of the customary signal as indicating that no train is approaching, and that in such case the company owes no duty to such a trespasser to keep a lookout in order to ascertain his presence, or to give any notice of approach of its trains, and, therefore, the defendant, being guilty of no negligence, the question of the plaintiff's contributory negligence, or the application of the last clear chance doctrine could not properly arise under the facts of the case. In addition the evidence was so meagre as to how the collision occurred that it would seem impossible for the jury to do more than guess whether either the plaintiff or defendant had the sole last chance to avert it. So far as the evidence went it appeared to be a case of continuing concurrent negligence on both sides.

liable for the original collision, was answerable for all the naturally ensuing consequences, and to dismiss what was said in regard to the defendant's dealings with the deceased after his body was discovered, as mere dictum.[51]

Under the facts of the case, it was unnecessary to decide that the railroad owed any duty to remove to a place of shelter, to care for, or to provide medical assistance for a trespasser injured without fault on their part. The road had, in fact, taken upon themselves the custody of the deceased, and had dealt with it in a way that was not only lacking in proper care and attention, but which showed a callous and complete indifference to what might become of him. Having taken charge of the deceased they had not merely failed to assist him, but had made bad worse by dealing with him in a grossly inhuman manner.[52]

In ascertaining the true meaning of an opinion, much light may be obtained from a consideration of the arguments addressed to the Court. The plaintiff's whole contention was that there was here something more than mere omission; that "*the act* of the company's servants in locking the man up in the warehouse," was an improper performance of the defendant's "voluntary undertaking to perform an act touching a matter as to which the party was under no duty to do anything." "In other words, the simple case of mandatory or depository."[53] As has been seen, the whole

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[51] As Lathrop, J., does in *Griswold* v. *R. R.*, 183 Mass. 434

[52] They assumed that he was dead, without taking any pains to ascertain his true condition, and treated his body like so much freight, and in the result, not merely failed to provide assistance for him, but put it out of his own power when he came to consciousness, and out of the power of others who might be disposed to help him, to procure for him the assistance necessary to save his life.

[53] On page 432, the plaintiff's counsel say, "whatever might have been the case if the injurious conduct had consisted in mere omission, the company is clearly responsible for the act of its servants in locking the man up in the warehouse. This distinction seems to have been indicated by Lord Chief Justice Best, in the famous Spring Gun case; "it has been argued," he said, "that the law does not compel every line of conduct which humanity or religion may require, but there is no act which christianity forbids that the law will not reach." *Bird* v. *Holbrook*, 4 Bing. 641; they then cite *Coggs* v. *Bernard*, 2 L. D. Raym. 909,

conduct of the defendant's servants, judged by any possible standard of humanity, was hideously bad, and more utter callous disregard of common decency can scarcely be imagined, and as the Court says, "from these facts it was clearly competent for the jury to conclude there was negligence" (active misconduct). Without going beyond what the facts required, and the plaintiff's counsel contended the decision may then well rest upon the statement of Alvey, J., that "if *in removing and locking up the unfortunate man,*[54] though apparently dead, negligence was committed, there is no principle of reason and justice upon which the defendant can be exonerated from responsibility."

The only thing in the decision which affords any ground for the contention that the case recognized a duty to care for those whom one innocently injures, is this one sentence in the opinion of Alvey, J. "From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of the defendant's engine in a helpless and insensible condition, and it thereupon became the duty of the agents in charge of the train to remove him, and to do it with a proper regard to his safety and the laws of humanity." It may well be that the Court in stating that it was the duty of the defendant's agents to remove the plaintiff's body from the fender, may have been addressing itself to the contention of the defendant's counsel that the acts of the train crew were outside of the scope of their employment. Not merely had the train crew removed the plaintiff's body from the pilot, but it would seem that the circumstances forced them in their employer's interest to do so. Even if the company owed no duty to the injured trespasser to take him to a place of safety, they were, at the least, clearly liable had they caused him further injury by their

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911, as follows: "An action will not lie for not doing the thing for want of a sufficient consideration, but yet, if the bailee will take the goods into his custody, he shall be answerable for them, for the taking of the goods into his custody is his own act."

[54] These words are italicised in *R. R.* v. *Woodward,* 41 Md. 268, where this sentence is quoted.

subsequent operations. They could no more have justified running their engine with his body upon the pilot had further injury resulted to him therefrom[55] than they could have justified running over a trespasser seen to be lying helpless upon their tracks. Until the decedent's body was removed, the engine could not go on, and the whole line would be blocked. The removal of this obstruction to the operation of the defendant's road was thus obviously for its benefit, and within the scope of the employment of its agents in charge of its train.[56]

On the whole it may be said that the case is based upon the principle that irrespective of whether or not a duty exists to aid those whom one has innocently injured, if one does gratuitously assume control of the situation, whether out of kindness or because it is necessary to remove the injured person in order that one may freely prosecute one's own affairs, there does arise a duty analogous to that imposed upon a gratuitous bailee of goods[57]—a duty to exercise common humanity that one shall not by his interference make bad worse. It does not, therefore, tend to support the existence of any legal duty to repair harm innocently caused.

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[55] *Weitzman* v. *Nassau Electric R. R.*, 33 App. Div. (N. Y.) 585, Ante. p. 219 and note 47, p.

[56] In fact, this case is in this respect practically similar to that of *Needham* v. *R. R.*, 37 Cal. 409, where it was held that the company's agents in removing a trespassing horse from a trestle bridge in which it had been caught, an act which, having for its object the clearing of the company's tracks, was plainly within the scope of their employment and for the company's benefit, must consider not their own convenience alone, but also the preservation of the plaintiff's property, and must adopt not the easiest and quickest way of clearing the track, but one which would not unnecessarily imperil the safety of the horse. See also *R. R.* v. *Weber*, 33 Kans. 543, Ante. p. 234, note 24 (a). In this *R. R.* v. *Price* differs from *Ollet* v. *R. R.*, 201 Pa. 361, where the trespasser, whom the train crew carried against his will to the company's hospital, does not to appear to have been in such a position that his removal was a necessary pre-requisite to the further use of the company's track or equipment.

[57] It is worthy of remark that it is dealt with by so astute and careful a writer as Judge Cooley in his work on Torts, in the chapter dealing with the Duties of Bailees.

The defendant's duty consequent upon his assuming charge of the safety of one whom he has injured, is based upon the helplessness of his victim, and requires nothing more than a humane effort to remove him to some point where he can be cared for, and to place him in charge of the public authorities, or of some competent person. It does not continue indefinitely; so, it was held in *B. & O. R. R.* v. *State, for the use of Woodward,*[58] that where a conductor had had his leg crushed in a collision, the company had fully discharged its duty to him by conveying him to the nearest station, and placing him at a hotel in charge of a surgeon and that it was not bound to furnish him with attendants during a subsequent journey to his home, which they, at his own request, had gratuitously furnished him on their line; nor was it liable for the neglect of one of its employees, a friend of the injured conductor, whom they had, at his instance and as a favor to him, allowed to accompany him.[59]

Nor does the case of *Dyche* v. *R. R.*[60] enforce any more extended liability. The plaintiff was throughout the whole transaction in the custody of the company. He had never been turned over to the care of others or placed in a safe place in charge of a competent servant, where, if he had wished, he could have been attended to; though a physician did attend him, this was a mere temporary measure, a precaution taken, as it were, en route. And though the journey came to a temporary stop, it was renewed, not at his instance, but by the company itself; and his injury was

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[58] 41 Md. 268.

[59] In the subsequent journey the plaintiff was in no better position than any other invalid passenger, to whom, as has been seen, the carrier owes no duty to provide attendants or medical assistance. *Statham* v. *R. R.*, 42 Miss. 608, Ante. p. 234, note 24 (a)—Nor would the favor extended him in allowing one of its employees to accompany him at his request make the defendant liable for such employee's conduct any more than supplying a physician to treat its servants renders a company liable for his malpractice. *R. R.* v. *Artist,* 60 Fed. 365; *Allen* v. *S. S. Co.,* 132 N. Y. 91.

[60] 79 Miss. 631.

aggravated and his death caused, not by the negligence of an attendant selected by himself, but by the complete indifference which agents of the company who had charge of removing him to the hospital at Vicksburg, the place selected by the company for his treatment, exhibited in permitting the car in which he was to be ferried two or more times across the Mississippi without removing him, thus losing much valuable time. The Court expressly held that the company was not liable for the conduct of the surgeon, having done its full duty in this particular when it procured the necessary and immediate medical assistance, but they held that, having taken charge of the removal of the plaintiff, it was bound to act in the performance of this self-assumed task, not, it is true, with care and skill, but with at least ordinary humanity.[61]

Dyche v. *R. R.,* is severely criticised by Lathrop, J., in *Griswold* v. *R. R.,*[62] who says that "it proceeds upon the singular ground that if a railroad company, though not in fault in injuring a trespasser, assumes charge of him, there is imposed on it the duty of common humanity, and whether it has performed this duty is a question for the jury. If it is law, no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly, or with more judgment. It is a doctrine which would allow an action against a good Samaritan and let a priest and a Levite

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[61] It may well be that the Court went too far in holding that the jury might find that the defendant had shown a lack of common humanity in sending the plaintiff eighteen miles to a small town where adequate facilities for his care were lacking, when all means of conveying to Vicksburg, which lay immediately across the river, had been suspended for the night; but there seems little doubt that to ferry a man in the condition in which the plaintiff was two or three times across the Mississippi instead of removing him at once to a hospital, was at the least some evidence of callous disregard for his safety, either on the part of those on the spot if they knew of his being in the car, or on the part of those whose sent him, if they took no pains to make known his presence.

[62] 183 Mass. 434.

go free." His statements are, of course, mere dicta. But it is submitted that it would be indeed singular if one who voluntarily and without compensation, or duty to do so, assumes the custody of another's property, should be universally held to the exercise of, at the very least, good faith while one who gratiutously takes charge of the life of another, helpless to save himself, might, without legal liability, display the greatest inhumanity, the most complete indifference to the safety of the life which is taken into his keeping. Nor does he fairly represent the decision in *Dyche* v. *R. R.*, when he intimates that it decides that the question whether the defendant has performed this duty of common humanity, or whether he could have acted more quickly or with greater skill, is always one for the jury. It, in fact, merely decided that there was enough in the facts of that particular case to warrant the jury in holding that the defendants had displayed not a lack of promptitude or competence, but gross inhumanity in dealing with the deceased after they assumed charge of him.

Nor can it be said that the criticism of Lathrop, J., as to the tendency of this decision to discourage the giving of voluntary aid to others, and of its injustice in holding the humane man who tries to relieve the sufferings of his fellow while letting free him who passes by on the other side, is, in view of the nature and extent of the duty imposed, well taken. Regarded from the viewpoint of abstract ethical justice it does not seem improper to require common humanity (and nothing more is required), from one whose humane motives prompts him to interfere in the affairs of others, nor viewed from the standpoint of expediency does it seem that it is the policy of the law to encourage the interference of those, who by their callous indifference, only aggravate the plight of him whom they are professing to assist. And it does seem quite certain that judged in the light of the fundamental principles of the common law, there is a vast difference between requiring a man to go out of his way to

aid others, and demanding that if he does choose to act, he shall not act improperly.[63]

While, as has been seen,[64] there are attached to relations voluntarily assumed varying duties to protect one's associates from injury from causes under the exclusive control of one of the parties, neither party is normally constituted the guardian of the other from all misfortune or perils that may befall him. A shopkeeper is not bound to provide a physician for a customer, nor is a host bound to care for a guest taken ill in his house; but neither may, by any act done with knowledge of his customer's or guest's helpless condition, aggravate his injury, or expose him to unnecessary danger or hardship. So, it has been held, that a saloonkeeper is liable for the death of a customer, who, having become drunk on the premises, was expelled in an unconscious condition late at night and died of the resulting exposure.[65] So, too, where a business guest, overcome by sudden illness, was refused permission to stay over night in his host's house, and was placed helpless and with the reins tied to his shoulders, he being incapable of holding them in his hands, in his sleigh, from which he soon fell and remained by the roadside all night, it was held, that he might recover from his hosts for the loss of his fingers, which were so frost-bitten as to require amputation, if they knew or ought to have known of his helpless condition, for, if they did "they must have known that to compel him to leave their house unattended would expose him to serious injury."[66]

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[63] Even in Rhode Island, a most conservative jurisdiction, where it was held that a railway owes no duty to transport an employee whose feet had become frozen while cleaning its track, to some place where he could procure assistance, *King* v. *R. R.*, 23 R. I. 583, Ante. p. 248, it was held that when a railroad which had assumed the duty of taking home an injured employee was liable to his representatives for his death caused by exposure due to a failure to cover and protect him during the journey—*Bresnahan* v. *Lonsdale Co.*, 51 Atl. 624.

[64] Ante. p. 233, *set seq.*

[65] *Wolff* v. *Weymire*, 52 Iowa, 533.

[66] *Depue* v. *Flatcau*, 100 Minn. 99, 111 N. W. 1. The real difficulty in both cases is as to what the defendants could have done except remove the plaintiff or else shelter him, and, in the latter case, his horse also,

Here, there is more than non-feasance, more than a mere failure to care for an ill guest; there is active misconduct in sending him helpless out into the cold and darkness.

Even a carrier, though said to owe to his passengers the duty to take the highest possible care to secure their safety, is not bound to take steps to relieve them from every peril into which they may fall. Its duty is limited to taking the utmost care in the preparation, operation and policing of its premises, roadbed and equipment, in order that a safe means of transportation may be provided. But, having done all it can to make its premises and equipment safe, having used the utmost care in its operations, and having exhausted all reasonable means to protect its passenger from the known or expectable violence of even those strangers to it, it has discharged its full duty, even though the passenger's safety, because of his physical disability, or of some peculiar situation in which he finds himself, may urgently require some further action on the part of those about him. Beyond the proper preparation and operation of the carrier's business. as to which the passenger may rely upon the carrier's care, he must look to himself or to the personal humanity of those around him, whether fellow-passengers or employees of the carrier, for his protection. That such employees, being of course on the spot, and of presumably more experience, will be probably better able to render aid to a passenger, who, from his physical disability or other peculiar situation, is unable to help himself, may make their humane duty the plainer, but since they are employed by the company to oper-

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for the night. This is perhaps not too stringent a duty to throw upon a saloonkeeper, who, for his own profit has allowed a customer to get helplessly drunk on his premises and has in fact, himself furnished the means of intoxication. And in *Dupue* v. *Flapeau,* the Court intimates that if the guest cannot be conveniently put up for the night, or notice of his condition sent to his friends, he may be set adrift without liability. It would seem that the plaintiff must have been voluntarily received into the plaintiff's house, and that if he has intruded, without invitation or consent expressed or implied, even though he is helplessly ill or drunk, he may be turned out with no more liability than if he had sought and been refused admittance.

ate its means of transportation and to keep it in good condition and not to render humane attention to its passengers, it will not be legally responsible for what they do or do not do in this particular.[67]

It would seem that those jurisdictions, which appear to recognize that a master owes to his servant where the circumstances surrounding the employment are equivalent to those under which a sailor serves during a voyage, a duty (similar to that recognized in such case by the maritime law), to provide such immediate assistance as may be necessary for the servant's safety, in view of the hazardous nature of the employment, his isolation from outside help, and his complete dependence upon the master, should equally recognize that a carrier owed to its passenger a duty to rescue him from dangerous situations likely to spring into being during the course of the journey analogous to the duty which the master of the vessel owes to a passenger to

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[67] An extreme but logically necessary exhibition of this is seen in *Prospert* v. *R. R.*, 67 Atl. 522, R. I. 1907, where through an unavoidable breakdown during a severe snow storm of the rural service of an electric railway one of its cars was stalled without heat in the open country. The plaintiff, who was prevented from seeking shelter for herself by the fact that she had to care for her infant child, was exposed for twelve hours to the cold, and severely injured. It was held that the company was not bound through its conductor to assist its helpless passengers exposed, through no fault of theirs, in the course of transportation to obtain shelter outside of its cars or premises. Had the plaintiff been injured, not by the cold, but by the violence of tramps, who had through the inattention or cowardice of the crew of the car, been allowed to invade it, the railway would undoubtedly have been liable, nor does there seem any doubt that had the conductor negligently failed to use means provided by the company to heat the car, or had the car been inadequately equipped with heating apparatus, the carrier would have been equally responsible, and it seems at first glance hard to distinguish these cases from the principal case. In all the passenger is injured, not by any act of the conductor, but by his passive inaction. While in the latter case, as in the principal case, the active cause of the plaintiff's harm is precisely the same, the cold. But, in the first two cases through the inaction of the carrier's servant, the means of transportation are rendered unnecessarily dangerous to those, who as passengers are entitled to be in it, in the latter, nothing which he could have done would have made the car more safe, nor could he have protected the passenger by any act normally incident to the operation of the company's business as carriers.

rescue him if he accidentally falls overboard.[68] And there is no doubt that while the carrier may not be bound to care for an invalid or drunken passenger,[69] it is bound in its dealings with him to do nothing, which, in view of his helpless condition, will expose him to unnecessary danger.[70]

The case of *Larkin* v. *Salt Air Beach Co.*[71] appears at first glance to hold that a defendant who stands to the plaintiff in the relation so closely allied in its legal incidents to that of carrier and passenger, that of one who for profit holds his premises open to the public as a place of resort, owes to his patrons a duty of general protection. The defendants maintained a public bathing resort, and it was held that it was their duty to make it as safe as possible, and that this duty was not satisfied by giving notice of dangerous holes and other dangers, whether caused by them arising from natural causes,[72] but required them, the bathing beach being dangerous and exposed to sudden storms, to maintain a sufficient force of bathing guards, and to answer for the care, skill and promptness with which they performed their work of rescue. Here, however, in view of the peculiarly dangerous character of the beach, it would seem that no lesser precaution would have rendered its use by the defendant's patrons safe. The duty, therefore, which is here imposed upon the defendant is merely to do all that can be reasonably done to make it probable that its premises can be safely used for the purposes for which it was held open to the public.

In *Raasch* v. *Elite Laundry Co.*[73] the plaintiff, on the facts of the case, might have recovered on the ground that

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[68] Per Field, J., *U. S.* v. *Knowles*, 4 Sawy. 517.

[69] See *Statham* v. *R. R.*, 42 Miss. 607, pp. 612, 613, and *R. R.* v. *Woodward*, 41 Md. 268, Ante. p. 234, note 24a.

[70] See *Weber* v. *R. R.*, 33 Kan. 543, Ante. p. , and *Wheeler* v. *R. R.*, 70 N. H. 607, Ante. p. 234, note 24a.

[71] 83 Pak. 686, Utah.

[72] As in *Dinnehan* v. *Lake Ont. Beach Co.*, 8 App. Div. N. Y. 509, 40 N. Y. Supp. 764.

[73] 98 Minn. 357, 7 L. R. A. N. S. 940, 108 N. W. 477.

the master, acting through his superintendent,[74] had, by improperly starting the machine when he knew that the plaintiff's hand was caught in it, caused the injury of which she complains, the loss of her hand. The defendant, therefore, whether bound to do so or not, had assumed the task of relieving the plaintiff, and her final injury was due to his active misconduct therein. However, the Court repudiates the existence of any distinction between cases where the master makes no attempt to relieve sufferings of an injured plaintiff, as in *Cappier* v. *R. R.*,[75] and cases where such an attempt is made, but negilengtly performed, as in *R. R.* v. *Price*,[76] nor do they attach any weight to the fact that the plaintiff's really serious injury was caused by the superintendent's act in starting the machine after knowledge of the plaintiff's peril. They rest their decision on the ground that those who employ in their business dangerous machinery in the use of which injury is likely to happen to those employed to operate it, whether by pure mischance or through their own ignorance or lack of caution "should be required to take reasonable means to alleviate the suffering occasioned by an accident," though caused by no fault of his; and that he or those to whom he entrusts the management of his business are bound to possess sufficient knowledge of the machinery to extricate the workman from the perilous or injurious situation into which he has accidently or by his own ignorance fallen. In this the case is directly in conflict with *Stager* v. *Troy Laundry Co.*,[77] where it is held, that while an employer may possibly be

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[74] Who in Minnesota, while exercising his power of superintendent and general direction of the business, represents the master as so-called "vice-principal."

[75] 66 Kans. 649.

[76] 29 Md. 420, Ante. p. .

[77] 38 Ore. 480, on the facts, the two cases differed in two particulars though in each the plaintiff's hand was caught in the rollers of a mangle. In *Raasch* v. *Co.*, the defendant's superintendent undertook to act, and his act, owing to his ignorance of the machinery, seriously aggrevated the plaintiff's injuries, while in *Stager* v. *Co.*, the superintendent merely failed to act so as to relieve the plaintiff as soon as he might, had he known more about the machine.

liable if his manager wilfully or wantonly prolongs the sufferings of an employee, he is not bound to possess himself of technical knowledge of the mechanism of machinery with a view to extricate persons from perils to which they may subject themselves by their own folly or negligence, nor to have on the spot some one possessed of such knowledge, for, says Wolverton, J., "it is unusual to anticipate accident and to provide for the most speedy relief when such exigency arises."

It is submitted that upon this point the decision in *Raasch* v. *Co.* is the better. While it may be unusual for those, who in their business use complicated machinery, to provide in advance for the speedy relief of those employed to operate them, if accidents arise, the statistics relating to the casualties yearly occurring to such operatives makes it impossible to imagine that any reasonably careful or experienced manufacturer could fail to realize the extreme likelihood of such accidents. Since, then, this is one of the normal hazards of the business, which, from the very nature of his employment the servant must encounter and from which the master and he alone is able, by appropriate precautions to protect the employees, while they are, of course, helpless and so unable to protect themselves, it would seem that all the elements, the existence of which require the imposition of a duty of protection upon the master are present, and that this obligation should be included in those which the master takes upon himself by assuming that relation to the servant.[78]

Where the accident occurs by pure unavoidable mischance, or through the negligence of a fellow-servant,[79] it

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[78] See pages 235, *et seq.*, and compare with the obligation asserted in *Raasch* v. *Co.*, the duty of a master of a vessel to attempt the rescue of a sailor, who from any cause falls overboard. Field, J., *U. S.* v. *Knowles*, 4 Sawy. 517.

[79] The mere act that the accident occurs through the negligence of a third party or even of one of the parties to the action, no longer makes its occurrence improbable as a matter of law. The view that no one need foresee the misconduct of another, announced in *Vicars* v. *Wilcocks*, 6 East. 1, has long since given place to the modern concep-

is submitted that to hold master to care to extricate the servant from his perilous position involves no novel extension of the master's duties, but results merely from the application to the particular facts of the general principles underlying the duties incident to all mutually beneficial relations voluntarily entered into, and so to the particular relation of master and servant, which is but one of them. Where, however, the plaintiff has by his own negligence[80] contributed to bring about the accident which imperils him, or has known and so assumed the risk of that defect in the machinery whereby he is injured, his right to recover may appear more doubtful; but once concede the general duty to provide for the relief of injured or imperiled employees and it seems plain that, though the plaintiff's negligence has contributed to cause the original accident, the defendant has had the last chance to prevent the injury by the proper per-

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tion that everything, which is, in fact, likely to occur, is legally foreseeable. *Lane* v. *Atlantic C.* 111 Mass. 316, and see 21 Har. L. R. 226, note 2.

[80] An interesting question is mooted in *Raasch* v. *Co.*, whether any different rule should exist where the defendant is free from all fault contributing to the cause of the original accident, and where though in fault, he is not legally liable for it because of the plaintiff's contributory negligence or voluntary assumption of risks. It would seem that while, as a matter of abstract justice, the propriety of holding the defendant liable in the latter case might appear more obvious, there is, nevertheless, no real distinction between them. Even where the defendant is legally liable for the original accident, he is not thereby subject to any new duty arising out of his wrongful authorship of the plaintiff's injury to relieve the sufferings of his victim, but as he is answerable for all the harm that follows as a natural result from his fault, it is to his interest to minimize his victim's injuries and so mitigate the damages he will have to pay.

So, where the plaintiff's own fault has contributed to bring about an injury to him, he is barred from recovering for all the harm which is the natural result thereof, unless the defendant had after knowledge of the plaintiff's peril the sole chance to avert, by the proper performance of his legal duties at that stage of the transaction, all or a distinct and separate part of the plaintiff's harm, but in such case the defendant's liability is based on his ability to avert the harm by doing what it is *legally* his duty to do. Unless, therefore, there is a legal duty either general or arising out of the particular relation in which the parties stand to one another, to relieve his peril or injury, the doctrine of last clear chance cannot apply. So, where a machine used by the plaintiff is known by him to be defective, this does not show the defendant to be

formance of his legal duties.[81] And that though a plaintiff know that a machine is defective, he merely assumes a risk of such injury as this defect necessarily involved, and does not assume the risk that this injury will be unduly aggravated by his master's incompetence or indifference, unless he knows of such incompetence and general indifference and should, therefore, realize that it constitutes an additional source of danger.

Where there is no antecedent relation, such as master and servant, imposing a duty to safeguard plaintiff from injury

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in fault; for he has done his whole duty by furnishing a machine, which is, in fact, no worse than it appears. See Voluntary Assumption of Risk, 20 Harvard L. R. 14. Even in those jurisdictions where the defendant is regarded as in default in supplying as defective machine, and the defendant's knowledge operates as an affirmative defense, while the plaintiff assumes only the risk arising from the violation of those duties which he knows that his master has broken, he, to recover, must point out some duty resting upon his master, by the breach of which he has been injured. Unless, therefore, the existence of a duty on the part of the master to aid an imperiled servant be assumed to exist, it avails him nothing to say that he has taken on himself only the risk of the original accident, and not the risk that by the master's failure to aid him, his injury would be unduly aggravated; for unless such a duty exists he cannot ascribe the aggravation of his harm to the breach of any duty legally owed to him. In the end, therefore, the question comes back to the point from whence it started.—Does the law recognize any general duty or one peculiar to the relation of master and servant to aid those innocently imperiled? If it does, a failure to render assistance is a ground of action whether the defendant was in any fault in causing the original accident or no. If no such duty be recognized the plaintiff's right to recover must depend upon the defendant's legal responsibility for the original accident.

[81] In *Bessimer Co.* v. *Campbell,* 121 Ala. 50, a miner imprisoned in a burning mine was suffocated by the failure of the superintendent who seemed to have completely lost his head in the crisis, to take any steps to render the situation as little dangerous as possible; instead of attempting to preserve the lives of those imprisoned in the mine by continuing to work the ventilating fan, the superintendent, though knowing that the miner was imprisoned, attempted to extinguish the fire by shutting off the air from the shafts. It being one of the universally admitted duties of a master to provide a safe place for the servants' labors, the case is one where master, after knowledge of the servant's peril might have secured his safety by the proper performance of this duty. See the very similar case of *Pierce* v. *Cunard S. S. Co.,* 153 Mass. 87, where the captain of a vessel, in order to extinguish a fire in the hold, battened down the hatches, though warned that one of the crew, who had, perhaps improvidently, gone back to fetch his coat, was still in the hold.

received in the course of employment, and where the defendant has not, after knowledge of the plaintiff's peril, voluntarily taken upon himself the charge of the situation, only one case asserts the existence of any duty to relieve the suffering of one innocently injured. In *Whitesides* v. *R. R.*,[82] it was held that if the servants of the road knew or ought to have known that they had knocked a trespasser from a trestle bridge, they were bound to stop and take care of him. The Court indulges in no reasoning in support of their decision, but accepts as authority without discussion or much apparent, if any, independent investigation the law as stated in Beach on Contributory Negligence,[83] and upon *R. R.* v. *Price* as interpreted therein.[84]

On the contrary, *Capier* v. *R. R.*,[85] and *Griswold* v. *R. R.*,[86] flatly deny the existence of any such duty. In the first case *R. R.* v. *State* is distinguished on the ground that the defendant had assumed charge of the plaintiff; in the latter the Court rejects the idea that even under such circumstances there can arise a legal duty to act with common humanity, apparently fearing that if such a duty were recognized the trial judge would be unable to restrain the jury from giving effect to their prejudice in favor of an injured plaintiff by holding that that which might appear to them to indicate the slightest lack of skill or promptness in fact amounted to inhuman treatment.

On the whole it may be said, that there is in none of the

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[82] 128 N. C. 229.

[83] The Court cites "Black" on Contributory Negligence, edition of 1885, as their authority. The writer has been unable to find any work answering this description. It would appear that the Court must have had in mind Mr. Beach's work upon this subject, which first appeared in 1885, and in which the duty to care for an innocently injured trespasser is announced as existing, for which statement *R. R.* v. *Price* is the only pertinent authority cited.

[84] Cook, J., in a strong dissenting opinion points out that this case fails to establish the view taken by the majority of the courts, in that it merely held the defendant liable for his gross negligence after taking the trespasser into its custody.

[85] 66 Kans. 649, 69 L. R. A. 513.

[86] 183 Mass. 434.

cases, save that of *Whitesides* v. *R. R.*, which, as has been seen, is based upon a misconception of the *R. R.* v. *State to the use of Price* embodied in a text-book of no very eminent authority, any pronounced tendency to the recognition of the existence of a legal duty resting upon an innocent author, of harm to repair the damage that he has wrought. There is, however, a distinct tendency in the cases where the relation of master and servant exists towards the adoption of the more humane view of the maritine law, and toward a fuller recognition that the various duties, universally recognized as incumbent upon a master, are not arbitrarily imposed, but are mere applications of the general principle that wherever the servant must, from the very nature of his employment, encounter perils from which the master alone can protect him, the master owes him a duty to take care to afford him adequate protection, and that this broad principle applies to all cases where the particular facts require it.[87] There is also a distinct tendency[88] to recognize that the gratuitous bailee of human life and limb owes a duty analogous to that due from a similar bailee of goods.

Nor does it follow that because the law has not as yet recognized the duty to repair harm innocently wrought, that it will continue indefinitely to refuse it recognition. While it is true that the common law does not attempt to enforce all moral, ethical, or humanitarian duties, it is, it is submitted, equally true that all ethical and moral conceptions, which are not the mere temporary manifestations of a passing wave of sentimentalism or puritanism,

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[87] In *Allen* v. *Hickson*, 111 Ga. 460, however, it was held that the duty to take active steps to aid a servant was one solely of humanity, from the breach of which no legal liability arose. It is true that the accident occurred by reason of the plaintiff officiously assuming a task outside of the scope of her employment. But while this relieved the master from liability for the original accident, the Court's opinion that the master was not bound save by humanity to aid his servant, was not based upon the fact that she was a volunteer.

[88] Unanimous save for the dicta of Lathrop, J., in *R. R.* v. *Griswold*, 183 Mass. 434, Ante.

but on the contrary, find a real and permanent place in the settled convictions of a race and become part of the normal habit of thought thereof, of necessity do in time color the judicial conception of legal obligation. And it may, perhaps, even be suggested that after all what are now regarded as legal duties as distinguished from moral and ethical duties, merely embody the crude conceptions on such points prevalent at that early stage of national civilization and social development when the King's Court took over into its keeping, and undertook the task of enforcing the common or customary law of England. The precedure was of the crown, but the substantive law it enforced was popular. It was the customs of the English people, or so many of them as were at that time of any political consequence. It represented what the people had come to regard as just and convenient, and was the embodiment of the fixed social and ethical ideas then prevalent.

The conservatism of common law courts has undoubtedly tended to retard the adoption into the body of the law of the more humane conceptions of modern thought, just as the early self-reliant individualism of the English race expressed in its common law survived therein long after it had given way in economic thought to the modern tendency toward collectivism. Nonetheless, as the tendency of modern judicial decision towards collectivism is exhibited in innumerable instances,[89] so, there appear in the cases

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[89] Perhaps the most conspicuous forces which have been at work in this direction have been, *first,* the transfer of political and economic power from the land-holding class, to, first, the commercial and manufacturing class, and now to the laboring class. The ownership of land has ceased to carry with it either economic or political power. So long as human nature remains human nature, it is inevitable that power, if possessed, will be exerted to procure material advantage to the possessor. It may be stated as an incontrovertible fact that a politically dominant class will eventually become legally privileged. *Second,* the complete volte face of philosophic thought from individualism to a collectivism verging on socialism. These influences have shown themselves in, *first,* a curtailment of the extraordinary privileges which the early law accorded to the landowner, among them, the almost unrestricted right to do what he pleased with his property; *second,* in enormously extend-

discussed in this article, a distinct tendency toward humaner conceptions. That this development should be slow, is not only natural, but desirable. To the writer it appears essential that courts of law should act as the final brake upon extremes of popular opinion, and should protect the public from their own temporary following after the false gods of extreme setimentalism and fashionable theorism. It appears essential that they should not yield to new ideas until time has proved their permanence, and their real place as a part of the fixed and settled national conviction, until they are seen to be a permanent habit of national thought. None the less, while they should not yield to mere popular hysteria, it would appear that they should not over-rigidly adhere to obsolete methods of thought.[90] The great merit of the common law lies in its flexibility, and this flexibility exhibits itself, not merely in its ability to adapt old conceptions to new facts, but to absorb and apply what is settled and permanent in economic and ethical ideas.

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ing the scope those duties which a citizen owes to his fellows, a recognition that the interests of the common good are of paramount importance in many matters which previously were considered as concerning only the individuals involved, and an adjustment of the proper exercise of mutually conflicting individual rights in accordance with what will best serve the interests of the State as a whole. *Third,* in a weakening of the extreme individualistic attitude which made every man the primary guardian of his own interests, and a growing recognition that there being many classes lacking this power of self-protection, the duty falls with the power of performance. The nicer ethical perceptions of modern times have as yet had less influence, though even here the more enlightened, modern ideal of business honesty has caused the early view that one who had failed to take the precaution to demand a warranty from his vendor, might be cheated with impunity to give place to the view that a vendee need not investigate the truth of facts stated by his vendor.

[90] A true conservatism does not consist in a blind worship of and adherence to what is and always has been, and a flat refusal to avail oneself of the wider experience and greater knowledge of the present time, but on the contrary, in a gradual acceptance of what is good in modern thought, a not too rapid yielding to the just demands of progress, in order that its forces being penned up may not finally in a great flood of ultra radicalism sweep away the existing social structure; and this appears especially true of the law, where it has been so often the case that a blind refusal to modify some archaic and, to modern thought and under present conditions, barbarous rule of law has led to legislative action of the most extreme character.

It may be said that changes so extreme should be left to the legislature. Such a contention would seem to concede almost the whole battleground to the advocates of a code, as distinguished from a common law. The common law is enabled to develop a new conception, and has done so time and time again, by slow steps to a final just and convenient solution of the problem. It is able to advance and recede, and finally to work out a principle capable of enforcement, without undue inconvenience. Legislative action, on the contrary, can make no such compromises and experiments, nor can it take into account every conceivable situation and provide for each. While not arguing for the immediate legal recognition of humanitarian duties it should not be forgotten that a system of law which lags too far behind the universally received conceptions of abstract justice, in the end must lose the sympathy, the confidence, perhaps even the respect of the community. Every day one sees instances of the evils of this divorce between the popular and judicial idea of justice. Juries habitually perjure themselves by verdicts in the very teeth of the facts, because the law as laid down to them by the Court offends the settled popular convicition of what is right.

While courts of law should not yield to every passing current of popular thought, nonetheless, it appears inevitable that unless they adopt as legal those popular standards which they themselves, as men, regard as just and socially practicable, but which, as judges, they refuse to recognize solely because they are not the standards of the past of Brian, of Rolle, of Fineux, and of Coke; they will more and more lose their distinctive common law character as part of the machinery whereby free men do justice among themselves.

To enforce their unpopular rules they must administer them themselves, and must more and more take over the functions of the jury, who cannot be depended upon to carry into effect ideas utterly out of accord with their own ideals of social convenience and justice. More and more

will they tend to become, if not actually, at least to the popular mind, the embodiment of the State as over-lord, not as the incarnation of the will of the people, arbitrarily administering an irksome discipline upon a people yielding thereto only until their dissent grows so strong as to impel them to demand from their legislative representatives recognition of their views.[91]

Francis H. Bohlen.

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[91] It must not be overlooked that the American people like, perhaps all other peoples, is very inert, very slow to move, not acting at all until some violent appeal to their imagination inflames them. This very inertia, once overcome, tends to create a momentum carrying their action to violent and often absurd extremes. Perhaps there is no better simile of the comparison between the ultra conservative attitude of the courts, and that contended for, than the contrasted attitudes of the old-fashioned schoolmaster arbitrarily—almost tyranically—imposing his will upon the students, who yield because nothing short of an appeal to their parents will make resistance effective, and that of Dr. Arnold, who yielding to school sentiment and tradition when just and workable and imperceptibly directing it into proper channels rather than appearing to impose his own will upon his scholars, for so many years made Rugby the ideal Public School.