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Article 2

Officiousness

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OFFICIOUSNESS†

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PART I. DEFINITIONS AND PRINCIPLES

1. *Contrast between the Roman and the English law:* "There are few persons for whom the common law has so little kindness as for the voluntary intermeddler in other persons' affairs. Not even equity will aid a volunteer, we are told. A person by unsolicited interference may incur liabilities, but scarcely obtain rights, as when an intermeddler with the property of an estate becomes executor *de son tort.* In the Roman law it was quite otherwise. A volunteer, who believed in good faith that the interests of an absent friend were in danger of suffering by neglect, might act for him."[1] This doctrine of the Roman law is found under the title "*Negotiorum Gestio*", and its significance is best seen from the following excerpt: "[I]f one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission to do so, and that other is thereby laid under legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing."[2] The commonest ex-

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[1]RADIN, HANDBOOK OF ROMAN LAW (1927) 301–2.

[2]JUSTINIAN, INST. lib. III, tit. xxvii, § 1. Further references: BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN (1921) 533–5; HOWE, STUDIES IN THE CIVIL LAW (2d ed. 1905) 176–8; MACKELDEY, HANDBOOK OF THE ROMAN LAW (Dropsie's ed. 1883) §§ 491–5; MELVILLE, A MANUAL OF THE PRINCIPLES OF ROMAN LAW (3d ed. 1921) §§ 147–9; RADIN, *op. cit. supra* note 1, at 301–3; SCOTT, CASES ON QUASI-CONTRACTS (1905) 1–4, 16, 18, 37–41, and 40–1, n.; 2 SHERMAN, ROMAN LAW IN THE MODERN WORLD (1917) §§ 810–11; WALTON, INTRODUCTION TO ROMAN LAW (2d ed. 1912) 260; WOODWARD, THE LAW OF QUASI CONTRACTS (1913) § 191. It is essential to note that the resultant

ample was where B is abroad, and his property is about to be seized by another claimant, or a mortgage foreclosed against him. A steps in and saves B's property.

In contrast to this free, encouraged, and rewarded helpfulness of the Roman law we have the rather dour individualism of the English law expressed by Bowen, L. J., in *Falcke v. Scottish Imperial Ins. Co.*: "The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."[3]

Taking this language at its face value, it does not contrast or differentiate the two legal systems, since the Roman law no less than the English forbade anything in the nature of concealment or force in the *gestor's* act, which indeed must have been open or overt, and not expressly forbidden by the other party. Lord Bowen's real intent was to deny the Roman rule any application in the English law, except in the case of salvage, and of general average contribution. His idea would have been more clearly expressed if he had affirmed in milder, but more far-reaching terms, that our law will never imply or raise a promise by the recipient to pay for a benefit retained, unless it was requested, or unless there was an agreement that it should be paid for. So painted, his picture would have been a black and white contrast, whatever might be thought of its truth to nature.[4]

obligation is purely quasi contractual, not contractual. The service rendered by the *gestor* (actor) might be of any kind, but it must have been a reasonable act, and in the circumstances, reasonable for the *gestor* to do it, rather than to leave it for the principal to do. It must have been useful and necessary at the time it was done, or accepted as such by the principal. It must have been done in the interest of the principal. If it was also in the interest of the *gestor*, he could recover only if he could not have protected his own interest without intervening in the other's affairs. It must not have been prohibited by the principal, that is, forced upon him. It must have been done with the intent at the time to charge the principal for it. It must not have been done as a pious duty, or at the mandate of the principal, or because of legal duty to him. Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law* (1927) 13 CORNELL LAW QUARTERLY 190; Heilman, *The Rights of the Voluntary Agent Against His Principal in Roman Law and in Anglo-American Law* (1926) 4 TENN. L. REV. 34, 76.

[3]34 Ch. D. 234, 248 (1886).

[4]Though unfortunately many cases may be marshaled in support of such a view, it would be too hasty an assumption to conclude that it is the undisputed law in England and the United States. Within one year after Bowen's decision an American author said: "Any benefit, of a sort commonly the subject of

The fact is, on the contrary, that the Anglo-American law, while it has not incorporated into itself the rule of *negotiorum gestio* in its entirety, is not hostile to it in principle. In agreement with the large equitable spirit animating that doctrine and expressed in the rule of natural justice that "*no one ought unjustly to enrich himself at the expense of another*," it will in not a few instances of what has been called "dutiful intervention"[5] create a promise to render back equivalent value for a benefit thus received. It is believed that this hospitable tendency, and a leaning toward the equities of each given case, is growing, though it still has to struggle through an age-long incrustation of hard and fast precedent, frequent misconception of the proper principles applicable, and general rule-of-thumb procedure.

2. *As to the meaning of the term "officiousness" and like words as used by the courts:* Has this term any definite legal content, such as for example highway robbery has, or is it a colloquial word employed by the courts with all the variety of meanings, unpredictability of application, and disparity of judgment to be expected of informal usage? It seems to be taken for granted that its meaning is clear and well known to all, since as far as observed, no judge has given an *ex cathedra* definition of its legal import. Of the standard English dictionaries, *Webster's New International* says it means: "Volunteering, or disposed to volunteer, one's services where they are neither asked nor needed; meddlesome; obtruding one's services or assistance where not needed. Offering unwelcome courtesies." *Century Dictionary:* "Forward in tendering services; interposing uninvited in the affairs of others; meddling; obtrusive." *Oxford Dictionary:* "Unduly forward in tendering services; doing or prone to do more than is asked or required." *Standard Dictionary:* "Excessively forward in kindness; importunately interposing service not desired or asked."

In these definitions there are four key-ideas of apparently equal importance: *unrequested, forced, unbeneficial, unnecessary.* In all there is the flavor of what is unwelcome, distasteful to the recipient. But on the other hand, if the *gestor's* services are welcome, they

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pecuniary compensation, which one, not intending it as a gift, confers on another who accepts it, is, in the absence of any agreement in fact, an adequate foundation for the law's created promise to render back its value." BISHOP, CONTRACTS (1887) § 217. In a note the author says of this statement: "In the nature of the law, this proposition, like multitudes of others which every competent law-writer introduces into his text-book, is not sustainable by a reference to any single authority. . . . It is held, in the several cases, fragment by fragment; and only by putting together the fragments, and permitting the law's reasons to give them adherence, can we discover it as a compact whole."

[5] WOODWARD, *op. cit. supra* note 2, § 191.

cannot in any true sense be said to be obtruded or forced; if necessary or beneficial, they cannot be superfluous or undesired; and this is true whether they have or have not been requested. One does not act unwarrantably or unreasonably or obtrusively by merely *voluntarily* (*i.e.* of his own motion—spontaneously—without request or compulsion of any sort) doing for another what that other finds useful or necessary to himself. Such a one cannot in any accurate sense be said to be forcing his service on another "behind his back" or "in spite of his teeth" or "against his will," although it may have been rendered without his knowledge, and without his express or tacit request or consent. No one who derives pleasure or profit or is saved from loss by another's action would call the actor officious, and if he would not, why should a court?

A search through eight law dictionaries and *Words and Phrases* (Series 1, 2, 3) has failed to disclose a single occurrence of the term "officious," and it is rarely found in the indexes of law books old or new. Of rare occurrence in law dictionaries are the equivalent nouns, "*meddler*" and "*intermeddler*," though they are given in *Words and Phrases*. The term "*interloper*" is occasionally used in the sense of officious person by the courts, but, it would seem, improperly.[6] "*Stranger*" is now being used frequently, but the word most often employed by the courts at present is "*volunteer*."[7] Not infrequently it seems to be employed as a synonym for officious person or intermeddler, but this does not seem to discriminate sufficiently. A volunteer would properly be one who acts for another without being requested and without being induced to do so by mistake or compulsion of any sort.[8] A volunteer would not necessarily be officious, and there is decided advantage in distinguishing between the two words.[9] It cannot be said that the use of this word "volunteer" is any more definite or precise than is the case with "officiousness."

Of "volunteer" Pomeroy says: "The term is used to designate one who, acting upon his own initiative, pays the debt of another without invitation, compulsion, or the necessity of self-protection. . . The term is applied somewhat indiscriminately in the reports to

[6]See BOUVIER, LAW DICTIONARY, where it is defined as one who interrupts the trade of a company of merchants by pursuing the same business with them in the same place without lawful authority.

[7]7 WDS. & PHR. (3d Ser.) 899 gives a considerably increased space to this word.

[8]WOODWARD, *op. cit. supra* note 2, § 210.

[9]See *supra* p. 27, and KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1893) 351, 388, where the author with this purpose in mind uses the expression "officious volunteer."

almost anyone who applies for subrogation and is refused, no matter what the reason be, so that many statements of the courts are misleading."[10] Black's *Law Dictionary* says of it: "A person who gives his services without any express or implied promise of remuneration in return is called a 'volunteer', and is entitled to no remuneration for his services, nor to any compensation for injuries sustained by him in performing what he has undertaken." If "implied" here means "tacit," the definition discards quasi-contract; if it means "implied by law," it, in conformity with Pomeroy's definition, means that a volunteer is one for whom neither the law nor equity will raise a promise or decree subrogation. It becomes, like "officiousness," a sort of tag or term of defeat.[11]

3. *As to the origin of the idea of officiousness:* There seem to be two main causes for the appearance of this idea in the English law, which may be discussed separately. Yet they are, probably, only different aspects of the same thing, one being the cause or the effect of the other, though which is cause and which is effect seems hard to say. These causes may be stated as follows:

(a) Self-direction or personal autonomy is a mark of the English race. The Englishman, as opposed to one of Latin lineage, does not so easily coalesce with the mass. He distinctly wishes to live his own life, make his own contacts, or as he frequently says, "muddle through" in his own way. He dislikes volunteered offerings—even of a conversational sort. Interference with his choice or freedom of movement is resented. This is familiar enough to travelers and students of English life and letters, and what is in English life will necessarily also exist in English law,[12] a notable example having already been given in Lord Bowen's decision above. It is an affair of national temperament.

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[10]5 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 2348, and note.

[11]The increase of late in the use of "volunteer" may indicate a more frequent resort to courts of equity, and a convenient disposition of such cases under the rule "equity will not assist a volunteer." This maxim is of common application to the other regular situation where "volunteer" means one who receives a voluntary (gratuitous) conveyance. Possibly there has been some confusion in the application of the maxim.

[12]If support were needed for this suggestion of temperamental "slant", it has lately been amusingly given by a French writer noted for the keen and accurate view he has in this matter: In the (June, 1929) ATL. MONTHLY, M. André Maurois writes *On Living in England—Informal Suggestions to a Young Frenchman.* He says: "Above all, don't be what the English call 'fussy'. Wait until you are *requested* [italics mine] to do things; don't rush into the breach." Here we have the Roman doctrine of *negotiorum gestio* and the English rule of *"mind your own business"* in perfect contrast.

Whether this national trait of the English continues to exist in full force in the polyglot nation which America has become, with its masses of people of Latin and Germanic birth and descent, whose instincts are, probably, more in accord with the spirit of the Roman law in this respect, is doubtful. If law tends in time to reflect the life of the people, it might be expected that decisions of our courts should veer away from the sharp individualism that marks the English cases. The conditions of modern life also tend strongly in the same direction.

(b) The other cause spoken of is the early and long enduring supremacy of the contract concept and the sacredness attached to "privity of contract."[13] A man was not obligated to another unless a formal or express contract could be spelled out. He need not remunerate another for a benefit unless he had requested the benefit beforehand, and it became the *consideration* of his express promise to pay for it. Later, his promise came to be inferred, *i.e.* implied in fact, but this is still true contract. As long as persons kept within the boundaries of their contract in rendering services or giving values of any kind there could, obviously, be no such thing as officiousness. Contract excludes officiousness, because every thing done is under the sanction of request or consent that it should be done.

Invited action alone commanded remuneration because contract was the only known instrument of obligation, at least, of positive obligation as opposed to negative. Quasi contracts, or contracts implied in law, were long in coming to England, were at the time of their coming little understood, and have continued to be little understood from that day down to the present both in England and in America.[14] Before Lord Mansfield's time (1705–1793), and es-

[13]See CARDOZO, THE GROWTH OF LAW (1924) 76–8; Ames, *The History of Assumpsit* (1888) 2 HARV. L. REV. 63.

[14]Late cases in this country are to be found still carefully explaining the difference between real (true) contracts and quasi contracts. See Miller v. Schloss, 218 N. Y. 400, 113 N. E. 337 (1916); City of New York v. Davis, 7 F. (2d) 566, 573 (C. C. A. 2d, 1925): "The action is based on quasi-contract, and it is no defense to such an action to allege that the parties did not contract." See 1 WILLISTON, CONTRACTS (1920) § 3; 40 CYC. 2807; 13 C. J. 244. The confusion as to the difference spoken of is perhaps contributed to by the fact that writers on contracts are still in the habit of incorporating in their books summary treatments of quasi contracts as a part of the subject of contracts. Much of the present ignorance about quasi contracts may be attributed directly to the fact that our digest system, otherwise admirable, has no separate heading under that name. This not only casts the subject into darkness for bench and bar, but for writers it enforces the Herculean task of searching for the *membra disjecta* over the whole surface of the law.

pecially before his decision of the case of *Moses v. Macferlan*,[15] all positive, as opposed to negative, or tortious legal obligations were customarily treated as contracts[16] and as requiring mutual assent to be valid. This assent could be expressed in words, but it could equally well be established from conduct. Assents of the latter kind are better termed "tacit" contracts and are, of course, real contracts. Unfortunately, they were called "implied" contracts as a short name for "implied in *fact*" contracts. It seems probable that Lord Mansfield was the first to introduce thoroughly the principle of quasi contract into the English law, bringing it over from the Roman law, but Adam Smith (1723–1790) lectured, and John Austin (1790–1859) wrote about them, as did Sir Henry Maine (1822–1888). The "contract" part of their name caused them to be confused with true formal contracts, and this confusion became worse confounded when they also were further referred to as "implied contracts" and were thus confused with "tacit" (true) contracts, although quasi contracts are in no sense whatever contracts, as they neither have nor need the mutual assent of the parties, the law alone creating the consent.

It will thus be seen that the idea of what the courts call "officiousness" took root and spread through our law from what were really four sources: (1) the temperamental dislike of the English people for voluntary intervention of others in their private affairs; (2) the fact that contract for centuries was the sole source of obligation, and the feeling that any approach without or beyond the terms of a contract was unwarrantable; and as subsidiary to this (a) the strangeness of quasi contract, with its equitable make-up, demanding that the law should supply the consent where unjust enrichment would result without it, and (b) the confusion resulting from the use of the term "implied" to cover both tacit and quasi contracts.

We are now in a better position to see why it is that, while the standard usage of the language as evidenced by the leading dictionaries[17] plainly requires that correctly to term an act officious it must be non-beneficial and unnecessary, as well as unrequested, many courts, instead of giving due weight and effect to the first two adjectives, have thrown them out of the count, and have adopted a lopsided scale by singling out and giving exclusive effect to the element of request. This is a lingering disease of which the symptoms are a fixed idea for contract and a "blind-spot" for quasi contract. On the other hand, the Roman law, placing the problem correctly in

[15] 2 Burr. 1005 (1760).

[16] Ames, *op. cit. supra* note 13.

[17] *Supra* p. 27.

quasi contract, and not touching contract at any point, proceeds on the ground that request or consent of the beneficiary, or even notice to him that the act is being done, is quite unnecessary,[18] provided that the act itself is useful and necessary, and reasonable under the circumstances. To insist on contract here as a foundation for recovery is to refuse recognition and enforcement of quasi contractual principles. Contract emphasizes the rights of the defendant (B, the beneficiary) and slights consideration of the rights of the plaintiff (A, the intervenor), while quasi contract works in the opposite direction.

4. *Is officiousness a tort?:* Suppose A by the application of all reasonable rules ought to be deemed officious. Is he therefore also a tort-feasor? In *Sloan v. Ry.*,[19] the regular brakeman on a train of defendant, B, when going on a vacation, asked plaintiff, A, to take his place. A did so with the knowledge of C, the conductor in charge, and while performing the work was injured. *Held*, that he can recover from the railroad, as the conductor had authority to employ necessary help in an emergency, and therefore A was neither a trespasser nor an intermeddler. The court said: "An intermeddler is a person who officiously intrudes into a business to which he has no right. The distinction between an intermeddler and a trespasser is not in any case very great."[20]

Where A enters upon the property of B, if the act is wrong at all, it is necessarily a trespass. It is superfluous to determine if he is also intermeddling. There is no such tort known to the law as intermeddling. In the *Sloan* case above it is not said that the two things are synonymous but that they are only more or less alike. This is obiter dictum. It is submitted that they are different. A trespasser is always a defendant, while an intervenor, unless he has injured where he was trying to benefit, is always a plaintiff. The motive and intent of the acts are different. A conscious trespasser intends injury, or at least is seeking some personal satisfaction or gain, while the trespasser who is unconscious of trespass and acts in good faith is at least negligent. Benefit to the other party is not his object—certainly no benefit results. On the other hand, the intervenor, though officious, means to benefit the other. A failure to confer benefit will by itself defeat any claim he might make to reward, both in the Roman and English law of quasi contract. Trespass is an inherently wrongful act,[21] and while it is true that our

[18]Police Jury v. Hampton, 5 Mart. N. S. 389 (La. 1827).
[19]62 Iowa 728, 16 N. W. 331 (1883).
[20]*Supra* note 19, at 736, 16 N. W. at 334.
[21]CHAPIN, TORTS (1917) 64–67.

law does not encourage intermeddling, its attitude towards it is negative merely: officiousness simply throws out of gear the working of the rule of unjust enrichment. Officiousness has never, so far as known to the writer, been declared an inherently wrongful act; and therefore the rule that good motive will not make lawful an inherently wrongful act has no application.[22]

In view of the above, it is here affirmed that our law is inconsistent in its dealing with trespass and officiousness. Trespass is an inherent wrong; yet if A in good faith (unconsciously) trespasses on B's land, takes B's timber, and very greatly increases its value by manufacture, A, when sued, may keep the value he has added, though it was done tortiously throughout.[23] There is even some judicial argument that a *conscious* trespasser who wholly changes B's article into a thing of different species may gain title to the new thing, and hence to its increased value.[24] If in a trespass case, A being inherently a wrongdoer, the law can because of the mere creation of value overlook as

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[22]Other cases similar to the Sloan case, and, like it, involving actual trespass on real property are: McCarroll v. Stafford, 24 Ark. 224 (1866); G. B. & L. Ry. v. Eagles, 9 Colo. 544, 13 Pac. 696 (1887); Aga v. Harbach, 127 Iowa 144, 102 N. W. 833 (1905), where it was said that if A in good faith and on merely apparent (as opposed to real or intended) authority of B's servant enters upon B's property and there works for B, he is neither a trespasser nor intermeddler, this conclusion being regarded by the court as the general consensus of opinion; Cubit v. O'Dett, 51 Mich. 347, 351, 16 N. W. 679, 680 (1883); Bruch v. Carter, 32 N. J. L. 554 (1867); Ketcham v. Cohn, 2 Misc. 427, 22 N. Y. Supp. 181 (1893), where it is held wrongful for A to go upon B's land *against B's wishes* to shore up B's building, the court saying (note that the decision is given "with reluctance"), that which is essentially a trespass cannot become lawful by being done with good intentions; Vassor v. Atlantic Coast Line Ry., 142 N. C. 68, 54 S. E. 849 (1906), where it was held that B's conductor had no authority to employ (two judges dissenting) so that A was neither a passenger nor employee, yet it was not held that A was a trespasser or intermeddler; Anon., Y. B. 21 Hen. VIII, 27 (*circ.* 1530), where it was held to be a trespass for A to go on B's land, take B's corn, and put it into B's barn, in order to save it from being eaten by cattle. It is submitted that the above decisions prove nothing as to the nature of officiousness when not united with trespass.

[23]Detroit Steel Co. v. Sisterville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753 (1914); Wetherbee v. Green, 22 Mich. 311 (1871); Isle Royal Mining Co. v. Hertin, 37 Mich. 332 (1877). There are some cases *contra*. See Arnold, *The Law of Accession of Personal Property* (1922) 22 COL. L. REV. 103.

[24]Dissenting opinion of Bronson, C. J., in Silsbury v. McCoon, 3 N. Y. 379 (1850). *Quaere:* If A knowingly and wrongfully took B's canvas of the value of ten cents and painted on it a $10,000 painting, would not A be held to have acquired title to the canvas? It is believed he would. An extreme case, such as this, has apparently not yet been decided. See BUCKLAND, *op. cit. supra* note 2, at 210–212.

mere form an infraction of the law, and consider, as the substantial and important thing, the increase of value, why should the law not follow the same principle where A is merely officious, and give first consideration to the benefit which A has conferred on B? Yet we are told that however great the benefit given, the officious intermeddler shall get nothing for his pains.

The same inconsistency is observable in the more lenient treatment accorded to A where he confuses his goods with B's. True, by the most savage rule, if A is a wilful confuser—the masses being of unequal value—A forfeits his contribution, though there is a possibility of apportionment; but other cases hold there is no forfeiture unless A's part is of inferior quality.[25] Even here, if A can point out his property, there is well founded argument that he should not lose it.[26] If the goods were of equal value, though the confusion were tortious, some cases hold there is no forfeiture.[27] If A is a good-faith trespasser and confuses his goods with B's, both lots being of equal value, A does not forfeit.[28]

If the law has established different grades of trespass to be determined by the trespasser's state of mind at the time of the trespass, that is, the motive and intent with which the act was done, why is it not possible and desirable to have different grades of officiousness, calling one kind "excusable" and the other "inexcusable," and allowing a recovery for one and denying it for the other? It seems hardly reasonable for the same court to hold that the motive and intent of A can be allowed to work to his advantage when A is a tort-feasor and has not benefited B, and yet to hold that A's motive and intent cannot be allowed to work to his advantage when he is merely officious and has actually benefited B. Therefore to the objection already made that the word "officiousness" has a lopsided meaning in our law because of the historical theory that contract is required for justifiable dealings between persons, and to the second objection that, in view of the origin of the idea and its individualistic philosophy and rather narrow legalism, it is probably out of harmony more or less with the views of a large body of present American society—are to be added a third and a fourth objection: the ambiguous place

[25]Jenkins v. Steanka, 19 Wis. 139 (1865).

[26]St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259 (1905).

[27]Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721 (1890); Page v. Jones, 26 N. M. 195, 190 Pac. 541 (1920). See 2 KENT, COMM. *365; (1917) 2 MINN. L. REV. 224.

[28]Hesseltine v. Stockwell, 30 Me. 237 (1849). But see the argument on confusion in its bearing on officiousness built up by the court in *In re* Leslie, 23 Ch. D. 552 (1883).

assigned to officiousness in our legal system, and the excessive rigor with which it is punished, as compared with the way a real tort such as trespass is treated.

5. *The doctrine of officiousness versus Christian ethics:* Any one who happens to remember Blackstone's statement to the general effect that the law of England is based in the main upon the Christian system of morals will be struck by this curious divergence from the latter presented by the doctrine under discussion. When A benefits B because from considerations of self-service or self-protection he is obliged to do so, A's act is justified, and A is not to be deemed officious. But when A voluntarily confers the same benefit, acting from the merely altruistic motive of helping B out of a difficulty, he is very apt to be held an intermeddler. That is, if A's main motive is to help himself, and the benefit to B is unavoidable and merely incidental, A can recover from B; but if his sole motive and intent is to help B, he can recover from no one. The Roman law squarely opposes the English at this point: it favors the altruistic action and looks askance at the self-regarding act,[29] while the English law frowns upon the altruistic action, and lauds the self-regarding act. The Roman mind is here closer to traditional ethics than is the English.

Some writers have of late been defining officious action in terms of "reasonableness" and would say that an act is not officious if it is "reasonable." This has possibilities of help, since it is a step toward the known and tangible. The Roman courts also demanded that A's act should be reasonable.[30] It affords some basis for thought and some invitation for improvement, which can in no sense be claimed for the blind test of "request." Naturally, there will still be difficulties. It still remains to define what is reasonable, but that is a familiar difficulty with which the courts have long dealt, and with, on the whole, satisfactory results, since the facts and the equities of each case can be given a hearing. However, under a view largely prevalent in our courts, the substitution of "reasonable" for non-officious would necessarily result in this form of creed: It is reasonable for A to benefit B, though unrequested to do so, whenever A is forced to do this for his own protection, but otherwise it is unreasonable, although it may be acting like a Christian for A so to act. But putting the law thus in bare-faced opposition to what is at least the professed moral code is not a pleasant thing to have to do, and the courts naturally do not like to be placed in the position of doing it. A way out of the difficulty, therefore, is quite often seized upon by which

[29] *Supra* note 2. See also HOWE, *op. cit. supra* note 2, at 273–4.
[30] *Supra* note 2. See BUCKLAND, *op. cit. supra* note 2, at 533.

neither Christianity, the law, nor the requirement of privity of contract is sacrificed or opposed one to the other. This way of handling the matter is by means of:

6. *The "irrebuttable presumption" that A intended to make a gift of his benefit to B:* With all due deference to those who think otherwise, it is the opinion of the writer that in cases of this sort there should never be an irrebuttable presumption of gift except, perhaps, in the case of services rendered each other by closely related members of a family living together. In all other cases the jury should determine A's intention from the facts. It is not apprehended that any harm could result from trying these cases on their merits. In salvage cases no such presumption is drawn, and salvage represents in our law the purest strain of quasi contract principles:[31] In principle and logic, it is impossible to make the common law distinction between property in danger of destruction on the sea and property so threatened on the land. Here again, the mere accident that England is a small island, and that consequently her maritime traffic was always great and of supreme importance, seems indeed a weak reason for further perpetuating an arbitrary distinction born of local needs and conditions that have no parallel in a country of continental proportions like the United States, where sea traffic certainly does not outweigh that on land in either bulk or importance.

The fact that property is located on water gives it no greater value or importance than if it were on land, nor is it any reason why its owner should prefer it to be saved, nor why public policy should be considered to be better served in such a case. On the contrary, in both cases equally, sound public policy should require that reasonable action by A in saving B's property should be encouraged and suitably rewarded. Since the burden of showing both the necessity of his action and its benefit to B is always on A, and, furthermore, since A can never hope to recover more than the reasonable value of his expenditure—never exceeding its value to B—and with the certainty of having to pay the costs if he fail to show real merit, it is not to be reasonably anticipated that a policy thus carefully limited would breed overnight a nation of busy-bodies anxious to perform useless and meddlesome services for others and to try their luck with the courts.

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[31] "Strictly, Quasi-Contracts are acts done by one man to his own inconvenience for the *advantage* of another, but without the authority of the other, and, consequently, without any promise on the part of the other to indemnify him or reward him for his trouble. Instances: *Negotiorum Gestio*, in the Roman Law; Salvage, in the English. . . . *The basis is, to incite to certain useful actions.* I f

The "irrebuttable presumption" of an intended free service is drawn most frequently where A saves B's property, and where A (not being a professional physician, surgeon, or nurse) saves B's life, health, or limb. It is affirmed, or suggested, by Professor Woodward[32] that the courts, in conformity with the common law view, base their use of this presumption either upon considerations of public policy or upon knowledge of normal human conduct. At another point, the same writer says:[33] "Although instances of benefits conferred by dutiful intervention in another's affairs are probably as frequent as those of benefits conferred by mistake, or compulsion, the topic is reduced to a comparatively narrow compass by the *fact*[34] that in most cases of such intervention, the benefit is conferred without expectation of compensation, and there is consequently no injustice in the retention of the benefit."[35]

There is, it is submitted, no good reason for dealing with these cases in this, as it may be termed, "steam-roller" fashion. It seems to be, really, a rather uncandid way of proceeding. The court, perhaps shutting its eyes to good evidence to the contrary, gratuitously attributes to A the high Christian virtue of a pure altruism that he never claimed and does not want attributed to him. On the contrary, A wants a reasonable return on his effort for B, and if he has not been inexcusably officious, he should have that, and not

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the principles were not admitted at all, such actions would not be performed so often as they are. If pushed to a certain extent, it would lead to inconvenient and impertinent intermeddling, with the view of catching reward." AUSTIN. LECTURES ON JURISPRUDENCE (3d ed. 1832) 944.

[32]WOODWARD, *op. cit. supra* note 2, §§ 201, 207.

[33]*Ibid.* § 199.

[34]Italics are the writer's.

[35]One must venture only with great diffidence to question anything Professor Woodward says on his chosen subject, but with deference it is suggested that the absence of any *evidence* of A's intention to charge B for service in any particular case is not equivalent to the *fact* of there being no such intention on his part. It would manifestly be impossible for any one to say in what proportion the cases where A intends a gift, stand to those cases where he had an actual intent to charge. It is the very fact of the "narrow compass" to which these cases of possibly dutiful intervention have been reduced by the employment of the "irrebuttable presumption," and the turning away from any evidence of A's intent that there may be, that the present writer thinks a cause of complaint and a reason for just criticism of the courts. If it be true, as suggested, that the courts proceed upon their knowledge of *normal* human nature, nevertheless the presumption, it is submitted, should not be irrebuttable, but should be at the most a rebuttable one, to take care of the *abnormal* cases among the public. Again, with all respect, it may be claimed on the basis of what seems to be rather general experience that it is quite as normal, human nature being what it is, to want something for nothing as it is to want nothing for something.

words of commendation for a virtue he does not profess. It really has the effect of *punishing* A, just as much as if upon satisfactory evidence the court had found him to have been officious and denied him a recovery on that ground. And yet A is, excluding officiousness, not blameworthy in intending merely an advance of his time, labor, or money in B's interest, rather than an outright gift of these. Surely one has a right to measure the extent of what he is willing to do for another without being made to forfeit what he has given on the pretext that he intended to give wholly without return. To make A forfeit to B the worth of his benefit in this way is to apply the same rule as is invoked for illegal contracts; it leaves the parties where the law finds them. It is hardly an answer to say, as some courts do that the common law deals with and defines legal duties, not moral. Moral duties are defined and enforced in a different forum.[36] Since Mansfield's time it is not only a rule of nature but of the common law, abundantly vouched for, that "*Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorem.*" As a matter of fact, the real effect of the presumption is to bring about just what the courts declare they cannot do: it enforces a *counsel of perfection* of the Christian religion in favor of B, a man who wants something for nothing, against A, who has benefited him. However convenient this technique may be for a prompt disposition of cases which oftentimes are, doubtless, full of difficulties, it can hardly be commended as an avenue of approach, if well considered justice is the thing to be striven for.

7. *Emergency as justifying intervention:* Closely connected with the presumption of gift, discussed in the preceding section, is the significance of an emergency in B's affairs as affecting A's liberty or duty of intervening. Webster defines emergency as "An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency" or "crisis." As was the case with the presumption of gift, so emergency is most often considered in cases where B's life, health, limb, or property are in critical danger of harm or destruction. While emergency undoubtedly tends to absolve A's intervention from the fault of officiousness, it offers the courts their greatest opportunity to use the presumption of a gratuity.[37] The result is that, precisely in those cases where B

[36]CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928) 14-25; HOCKING, LAW AND RIGHTS (1926) 55, 56.

[37]WOODWARD, *op. cit. supra* note 2, § 207: "This presumption that the service is gratuitously rendered may properly be invoked, it would seem, only in cases of sudden emergency, as where property is about to be destroyed by fire." He cites Bartholomew v. Jackson, 20 Johns. 28 (N. Y. 1822), as such a case, and

stands most in need of assistance, and where A's help will most certainly go unrebuked for officiousness, there A if he gives aid at all, must expect to give it for nothing. This is not the Roman law's idea of the best way to secure the general convenience. Some value in return for value received was thought to be a helpful stimulant to sluggish human nature, and nothing to be ashamed of.

Professor James Barr Ames, in his essay on *Law and Morals*,[38] makes some interesting suggestions. He hopes the time may come when the law will be moral enough to punish criminally a man who stands by and sees another drown without moving to save him, and would further make him pay money to the widow and children. To extend his suggestion, if A's failure to act benevolently toward B is to be a reason for A's paying money, is not A's active benevolence toward B a good reason for B's paying money? The Roman law does not complicate and obfuscate the problem by talk of emergency and non-emergency cases, any more than it talks of gratuities or officiousness. The only thing there considered is: Was the act done for B's benefit a reasonable act for A to do under the circumstances, and was it useful and necessary to B? If it was, that is the end of the story. In the work of simplifying the law, now progressing, it is to be hoped that the whole doctrine of officiousness will be thoroughly overhauled and cleared of the barnacles and seaweed attaching to it.[39]

But why should a crisis in B's affairs let A in with any more propriety than where B's property will be lost to him through the

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apparently approves the decision denying A recovery. But see KEENER, *op. cit. supra* note 2, at 354–6, where he says in effect that, if the case means that A's actual intention to be paid is to be disregarded in these cases, it goes too far. Keener therefore seems to be somewhat more hostile to the presumption than Woodward is, since he denies it a place even in emergency cases. If we substitute flood for fire, Glenn v. Savage, 14 Ore. 577, 13 Pac. 442 (1887) is the same sort of case in facts and holding as the Bartholomew case.

[38]AMES, LECTURES ON LEGAL HISTORY (1913) 450–451. See also CARDOZO, *supra* note 36, at 25; 26, n.58; 47; STAMMLER, THE THEORY OF JUSTICE (Mod. Leg. Phil. Ser. 1925) 253; POUND, LAW AND MORALS (1924) 71–75.

[39]What has just been said of the simplicity of the Roman law was said with the case of Police Jury v. Hampton, *supra* note 18, in mind. It must be noted, however, that after the Civil War this old law of Louisiana was changed. And even before that, in Watson v. Ledoux, 8 La. Ann. 68 (1853), it was held that in cases of fire and flood "services rendered voluntarily to preserve another man's property from destruction, are presumed to be gratuitous and give no cause of action." This was followed by New Orleans, etc., R. R. v. Turcan, 46 La. Ann. 155, 15 So. 187 (1894), at least so far as the building up a broken levee, rather than its repair before a threatening flood is concerned. This is doubtless one example of the inroads the common law has been making on the old law of that state.

action of more slowly moving circumstances? *A's* legal obligation to act is not one whit increased by a crisis to B. B's absence of legal or moral duty to save his own property is likewise not altered by it. B's benefit from the saving of his property will be no greater than if it would surely have been destroyed by slow rot, for instance, had A not come in to save it. The public, also, has no greater interest in its preservation from sudden destruction than from other modes of demolition. True, B is more helpless, and the certainty of loss is greater as well as its immediacy. But on the favorite argument of many courts that B's request must precede A's action, how is A any more justified in acting by that circumstance?

It seems that A's warrant for acting is readily found by the courts for several reasons: (1) There is no time for B himself to act in his own behalf, or for A to consult with him. (2) The great necessity for instant action, and the certainty of immediate loss to B, if it is not taken, subtracts from the usual importance of formal request. (3) A's intent will be presumed to be to make B a gift of his services in any case, and that being so, all possible objection to his acting ceases. Theoretically, and in a merely colloquial sense of the term, it may be possible for one to be officious by being too forward in acts of kindness that ask for no money return, but such a use of the word can, in the nature of things, find no application in the law. At least, it will never be necessary for a court to weigh the defense of officiousness, or to characterize an act as officious, where the actor at the time he acted, in fact intended a gift, or what is the same thing, where the court follows the consistent policy of conclusively presuming that he so intended. A reading of these cases will show that the word "officious" is conspicuous by its absence. Therefore, this third reason is alone quite sufficient to take care of these cases of emergency, where courts are satisfied to dispose of them in this manner.

But there is a series of rather late cases in the field of *tort*, where the courts do not follow this line of reasoning, but where they reach the opposite result of allowing A to recover. They do this under circumstances of emergency like the following: B (a railroad), through the negligent operation of its servants, is threatening instant disaster to the life or limb or property of C. A, seeing the danger, voluntarily and on impulse, intervenes to avert the harm to C, and thereby (unconsciously, perhaps, in most cases) confers a benefit upon B by saving it from the consequences of its own negligence. This benefit is specially pointed out by the courts in some cases and is made an important factor in justifying A's recovery from B. Was A requested by B to act as he did, or must A be considered a

pure volunteer? It is granted, of course, that he was under no legal obligation to act, and any motive of self-protection or self-interest would counsel him not to act. It might be said, and sometimes is argued, that B's request is inferred to have been actually made by simply considering that B must have known from the first that, if such a dangerous situation should ever be caused by its employees, any one in A's position would respond to it as A did. But in *Eckert v. Long Island R. R.*[40] no account is taken of such "request." A is said by the majority opinion to have had "a duty of important obligation" to rescue the child on the track. It accorded him damages against the railroad which had negligently imperilled the child in whose rescue he was injured. The dissenting opinion denies any such legal duty, and says the act was "voluntary" but lawful, praiseworthy, and *not a trespass* on B's property.[41] Like the *Eckert* case is *Wagner v. International Ry.*,[42] where Cardozo, J., not only sees no such request by B, but regards it as immaterial: "The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had." A much quoted remark in this case is: "Danger invites rescue." The *Wagner* case is followed by *Laufer v. Shapiro.*[43]

It is not merely the high regard the law has for human life that brings forth such decisions, for the same holding occurs in cases where A voluntarily saves C's property from the results of B's negligence: *Liming v. Illinois Central R. R.*[44]

The general drift of the thought in these cases clearly is that A is a mere volunteer, that no legal duty rests upon him, and that the only "request" that is thought of is one that the law will imply. There is no hint that A's act could be "officious," and this is because his act was done under a strong moral urge, and was reasonable, natural, and proper under the circumstances. It is not required that A's act should have been instinctive, or instantaneous, or reflex, but if, having had time to reflect, he then acted as a reasonable man would act, he may recover from B.[45]

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[40]43 N. Y. 502 (1871), cited with approval in POLLOCK, TORTS (12th ed. 1923) 481. See also (1911) 24 HARV. L. REV. 407; (1917) 27 YALE L. J. 415; *ibid.* 960.

[41]*Cf. supra* p. 32.

[42]232 N. Y. 176, 133 N. E. 437 (1921).

[43]210 App. Div. 436, 206 N. Y. Supp. 189 (1st. Dept. 1924). See also Brandon v. Osborn, Garrett & Co., [1924] 1 K. B. 548.

[44]81 Iowa 246, 47 N. W. 66 (1890). It was also held in Glanz v. C. M. & St. P. Ry., 119 Iowa 611, 93 N. W. 575 (1903). *Contra*: Taylor v. Home Tel. Co., 163 Mich. 458, 128 N. W. 728 (1910). See criticism in (1911) 24 HARV. L. REV. 406.

[45]These tort cases are not cited because they are thought to be analogous to the quasi contract cases (of course they are not), but merely to show how some

8. *Justifiable intervention limited to a "proper" or "appropriate" person:* There seems to be nothing in the Roman law corresponding to this requirement, attention there being centered rather upon the necessity and utility of the act than upon the person or qualifications of the actor. In the English law there is not a great deal said in the cases about "proper person," and most of that seems to be said in cases where B's wife has died while living apart from him and some one has undertaken her burial. There seems, in such a case, to be a divergence in point of view among the courts as to whether, in a matter so personal to B, and where the claims of sentiment are so great, it is not proper to limit intervention to one whom B would favor on account of nearness of kinship to him or deceased. Other courts, regarding first of all the interests of the public and the urgency of the matter, state that *any one* who will undertake the burial will be acceptable. This is rather apt to be said in the case of poor persons, however, where there is little or no estate, and consequently a dearth of volunteers might be expected. Such conjuncture, threatening both the public funds and the public's sense of decency and fitness, makes the requirement of "proper person" of little moment.[46]

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of the liberal courts are thinking upon the subject of "volunteer," "request," and "emergency."

[46]Hildebrand v. Kinney, 172 Ind. 447, 87 N. E. 832 (1909)—relatives or strangers may perform such services; Cunningham v. Reardon, 98 Mass. 538 (1868)—stranger acts—no question made of proper person; Gleason v. Warner, 78 Minn. 405, 81 N. W. 206 (1899)—"whoever reasonably performs the duty for him," *i. e.*, B, may recover; Duval v. Laclede County, 21 Mo. 396 (1855)—Scott, J., dissenting: "For the sake of humanity, it [the law] intended that *every man* [my italics] who would bury the decaying bodies of the poor, should be paid;" Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. App. 521, 140 S. W. 951 (1911); McCue v. Garvey, 14 Hun. 562 (N. Y. 1878)—". . . it is probably the law that a husband is liable to *any person* [my italics] who, by reason of his absence or neglect pays the burial expenses. . . . It is probably also the duty of any person under whose roof a dead body lies to see that it has a decent burial;" O'Reilly v. Kelly, 22 R. I. 151, 46 Atl. 681 (1900)—sister-in-law and housekeeper, only person left to take charge of the body; Jenkins v. Tucker, 1 H. Bl. 90 (1788)—"A father seems to be the proper person to interfere, in giving directions for his daughter's funeral, in the absence of her husband;" Reg. v. Stewart, 12 Ad. & El. 773 (1840). *Cf.* Fay v. Fay, 43 N. J. Eq. 438, 11 Atl. 122 (1887); Patterson v. Patterson, 59 N. Y. 574 (1875); McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861 (1886); Waters v. Register, 76 S. C. 132, 56 S. E. 849 (1907); Tugwell v. Heyman, 3 Campb. 298 (1812). See Vin. Abr. "Executor," B. a. 24, where it is said that in case of necessity, a stranger may direct the funeral, and defray the expense out of the deceased's effects, without rendering himself liable as executor *de son tort.*

That A should be a "proper person" is, according to the view of Woodward,[47] one of three essential conditions to his proper interposition, and that author states that the circumstances of a case will not infrequently designate who would be so considered.[48] Such circumstances appear to be numerous and varied, such as: nearness of kinship to B or deceased; preference for a certain person shown by deceased, as by residence or association;[48a] nearness of location of relatives more or less closely connected with B or deceased; their readiness and ability to take proper action; the absence or nonexistence of relatives; B's known or surmisable wishes, if time permits, and if he has not himself been recusant of his duties; the fortuitous circumstance of the place of death, possession of the body, local laws or ordinances; the impossibility or inconvenience or presumed uselessness of communicating with B or others—these and many other facts and considerations might enter to affect the question of the "proper person." As between relatives and close friends, or as between friends and neighbors, it might conceivably be a close question in certain cases. Time, space, affection, and regard, and above all the necessities and conveniences of the case might be determinative.

Would A properly be considered an intermeddler if circumstances seemed to point him out as the one to act, and then it turned out that a *more* appropriate person existed at the time but had failed to come forward, or was present and known but did not take the initiative? This could, it is believed, hardly be true, for the establishment of any such fixed hierarchy of entitled persons would often either make all action impossible, or so impede it as to defeat the very purpose of the law in allowing intervention in these cases. Probably all that is required is that A must not disregard or anticipate the rights of those persons who are closer in relationship or previous association with deceased or her husband than he is, and who, by common opinion, would therefore have better rights than he to come in, and who indicate that they are ready and able to act.

In view of the great number of conditions and limiting circumstances revealed by the cases, it seems quite difficult to assign any

[47] WOODWARD, *op. cit. supra* note 2, § 193.

[48] *Ibid.* § 196: "Thus, in a case requiring the payment of funeral expenses, a relative, friend, or neighbor may more appropriately intervene than a stranger. . . . One who, in disregard of the obvious proprieties, pushes in ahead of a more suitable person, is an officious intermeddler and is not entitled to compensation." *Ibid.* § 205: "One who pushes forward without justification to pay such expenses is an officious meddler. . . ."

[48a] *In re* Tangerman's Estate, 235 N. Y. Supp. 213 (3d Dept. 1929).

very great practical value to the concept "proper person" as an independent test or indication of the fact or degree of A's officiousness. No doubt there is such a thing as a "proper person" to act in every case, but the difficulty is to say when A would or would not be such person. The main trouble with its use as a measuring rod of officiousness is that it is itself as variable and incapable of fixed and clear definition as the thing proposed to be measured. It also seems open to doubt whether the idea really adds anything important to the already available tests of forced service and reasonable, useful, and necessary act.

Several prominent cases often cited as being instances of "improper" person have some interest at this point. In *Quinn v. Hill*,[49] a daughter died under A's (her mother's) roof, where the daughter and her husband, B, had been living. It does not appear that B was not able, ready, and willing to provide a funeral suitable to his means, but A, *in the presence of B*, assumed complete charge, ordering an expensive funeral, as the final mark of her affection and the last thing she could do for her daughter. The court deemed this officious, and an ignoring of B's rights. Consequently her attempt to secure reimbursement from the son-in-law failed. It seems to be a case of the proverbial, dominating mother-in-law, lording it in her own domain without too much consideration of or deference to B's possible preferences. How much B objected, if at all, does not appear. An important point to consider would be whether the words and conduct of A did or did not evince an existing intent on her part to make a gift of the funeral expenses. It would seem that they did, and if so, while possibly officious in a non-technical sense (this depending however entirely upon B's known attitude towards her act), she would not be legally officious unless it is ever legally officious to offer a gift, and the writer knows at present of no case where such a view has been held.[50] On the other hand, if her intent all along was to charge the funeral expenses to B, or her daughter's estate, the facts seem adequate to show forced service, or at least that the act was unreasonable, unbeneficial, and unnecessary as far as B was concerned, and therefore officious.[51]

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[49] 4 Dem. 69 (Surr. Ct. N. Y. 1886), cited by WOODWARD, *op. cit. supra* note 2, §§ 196, 205.

[50] *Supra* p. 40.

[51] *In re* Moran's Estate, 75 Misc. 90, 134 N. Y. Supp. 968 (Surr. Ct. 1911), is practically identical with the Quinn case in its facts and holding. Here the court found that A did not intend to seek repayment for the burial expenses, and it calls him "a mere volunteer," which was probably equivalent to "officious" in the court's intent. In both cases the simple finding that a gift was intended would have fully disposed of them.

Another case cited as an illustration of the "proper person" test in action is *Manhattan Fire Alarm Co. v. Weber*,[52] where A had installed in a theatre, while X was tenant thereof, some fire-alarm boxes, approved by the public authorities for other theatres. Boxes of some sort were required by statute to be kept in theatres. B succeeded X as tenant, and A allowed the boxes to remain in place for more than a year. B knew of this and permitted them to remain. During all this time A was trying to get a contract from B to take them permanently. It is not stated that B had, during this time, installed other boxes of approved type, but probably he had not, as he was dickering with A concerning his. B, on this supposition, was consciously making use of A's boxes though he could have avoided doing so. B also knew, or should have known, that A expected to be paid for this use. A contended that "where one voluntarily accepts and avails himself of valuable services, rendered for his benefit, when he has the option to accept or reject them, with knowledge that the party rendering the same expects payment therefor, a promise to pay may be inferred even without distinct proof that they were rendered at his request." That is *admitted* by the court, but recovery was denied A on the sole ground that he had not sus-

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In Fay v. Fay, *supra* note 46, A, a distant relative of deceased, voluntarily (without request, and without being obliged to do so) paid the undertaker and later sought to be subrogated to his rights against the estate. The court, on the mere ground that he was a volunteer and had not taken a formal assignment from the undertaker, denied him relief on the basis of the maxim that "a volunteer can never claim the benefit of the law of subrogation." [As to this, see the case of Neely v. Jones, 16 W. Va. 625 (1880); also the Cape Girardeau ease, *supra* note 46.] But the court presumes, on the above facts, that A intended a gift. It then expresses regret that it has to decide against A. Why does the court regret, if it *really believes* that a gift was intended? Professor Woodward thinks that here A pushed forward without justification to pay the costs, and he classes it with the Quinn ease.

Frances' Estate, 75 Pa. St. 220 (1874), and Ray v. Honeycutt, 119 N. C. 510, 26 S. E. 127 (1896), which relies on the former, are identical in facts and result and are interesting in that where A declared to a stranger before paying the costs of her (A's) husband's funeral that she did not intend anyone else to pay the expenses, and that she did it voluntarily out of respect to her husband, the court, on the ground that A was a *proper person*, broke the recognized rule that one intending a gift when he gives cannot afterwards make the donee pay, and implied a promise by her husband's representatives to repay her. The court adds: "It is not intended, however, to say that any person who intermeddles officiously and incurs such expense can recover." See *In re* Agnew's Will, 132 Misc. 466, 230 N. Y. Supp. 519 (Surr. Ct. 1928), and (1929) 14 CORNELL LAW QUARTERLY 239.

[52]22 Misc. 729, 50 N. Y. Supp. 42 (Sup. Ct. 1898). See WOODWARD, *op. cit. supra* note 2, § 196.

tained his burden of proving that his act was necessary, in that he had not shown that B had no other approved boxes in the theatre during the year. If B *had* other such boxes on hand, then A has not shown that his (A's) boxes were necessary or beneficial to B. *The decision might well have been rested on this point.*

But the court then adds the following: "But aside from this there was no necessity for the plaintiff to maintain its service upon the defendant's premises, as the public authorities had ample power to compel the defendants to discharge the duty which the law imposed." Professor Woodward sees in this point which the court now makes an example of "appropriate intervenor." It is not clear from the facts, however, why A was not a proper person, or that he had been officious. His boxes were properly on the premises while X was tenant. The facts of the case do not show that B had on hand other proper boxes, and the inference is that he had not. A's boxes were evidently satisfactory to the public authorities, and this being so, the latter had no duty to perform, and therefore cannot be said to have been ousted by A from their right to perform their duty. Even supposing that B had had other proper boxes put in, in that case, equally, there was no duty for the officials to perform and no chance for A to push in ahead of them in performing it. The fact that A's business was the installing of these boxes would not in itself make his act officious any more than an undertaker's or a surgeon's business would have that effect on appropriate acts done by them. At all events, the basis of the court's decision throughout is the absence of necessity for A's act. There is no mention in terms of "proper" or "appropriate" person.[53]

The facts in *Macclesfield Corp. v. Great Central Ry.*[54] were that A, the district highway authorities, being under no legal duty either by common law or statute, nevertheless made some necessary road repairs, which B, whose statutory duty it was to have done this, had, after notice, failed to make. Recovery was denied A on the bare ground that he was a "volunteer." It is remarkable that the

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[53]*Cf.* the case of McSorley v. Faulkner, 18 N. Y. Supp. 460 (1892), where A, the licensee of a telephone, left it on the premises which he sold to B. B used it, and it was decided that B was chargeable with notice that such use involved the obligation of the licensee (A) and implied a promise to pay A.

[54][1911] 2 K. B. 528. WOODWARD, *op. cit. supra* note 2, § 210, very justly criticizes the case as erroneously decided. He says, "the plaintiffs were eminently the proper persons to intervene." He does not give specific reasons for this opinion, but the facts suggest them, as the facts make it evident that A was the local body which, before the act of Parliament was passed, had had the duty of making repairs. See also the note in (1911) 25 HARV. L. REV. 77–79.

court stresses the absence of a legal obligation resting on *A*, whereas the important consideration was that there was a statutory obligation upon *B*, which he had failed to perform after due notice.

9. *The public's interest in the performance of B's obligation as affecting the question of officiousness in A's vicarious performance of it:* Cases in which there may be said to be a sufficient public interest have sometimes been limited to those where the general law or a statute or the moral sense of the community, relating to a matter of grave moment, demands the actual and prompt performance of an act which touches in some important way the material or moral welfare or convenience of society.[55] This, in substance, is the strength of the public interest which Professor Woodward thinks it essential society should have in B's obligation, in order that A's unrequested performance of it may be considered dutiful, and thus entitle A to recover from B. The best example of it, he thinks, is B's legal obligation to support his wife. Professor Keener, less exacting, does not require that the public should be particularly interested in the actual and prompt performance of the specific thing which B is obligated to do, but is content if the public simply has an interest in its performance, though that interest might be satisfied by B's paying a penalty for failing to do the specific thing. It is a difference of view that finds a parallel in the decree of *equity* that certain contracts shall be specifically carried out in terms, while the *common law* admits the power to pay damages in lieu of specific performance, though not the right to do so.

It is evident that Keener's conception of "public interest" will permit A a wider field for legitimate interference. But, on the other hand, Keener goes further than Woodward by requiring in all cases, as a condition of A's recovery in quasi contract (though not in equity), that B's "legal" obligation shall be one imposed upon him by law (general or statute), as distinguished from an obligation which B has himself voluntarily assumed by contract. In this direction, it is Keener who narrows the scope of dutiful intervention for A, at least as far as law courts as opposed to equity courts are concerned. But, since a limitation on the mere form of the remedy is not in itself a limitation of the field of public interest, the result seems to be that of the two most prominent writers on quasi contract Keener will be found more often viewing A's action in a favorable light.

As to the distinction Keener inclines to make between an obligation imposed on B by the law and one which B imposes on himself by

[55]See WOODWARD, *op. cit. supra* note 2, § 194; and *cf.* KEENER, *op. cit. supra* note 9, at 341.

contract, both being "legal" obligations, nothing of importance, as it seems to the present writer, hinges thereon. The only consideration of weight in such cases is the sufficiency of the public's interest in the thing which B is obligated to do. Whether the source of the obligation is in the general law or statutory enactment, or in self-imposed contract, would seem to be quite immaterial, given the requisite public interest in the subject matter of the obligation.[56]

Public interest is very like the ocean "without a mark without a bound;" at one time and place it is fiercely aroused, at other times and places it is quiescent, lethargic; it includes all things and is capable of swallowing everything that touches it; it is never still, but is always encroaching or receding. Can one say what kinds of business are "affected with a public interest"? There is a list of those that have been held to be such. Tomorrow the list will be added to, or subtracted from.[57] So the attempt to measure the quantum or the spread that an interest must have before it can be called a "public" interest seems futile. The most one can do is to say that up to the present the courts generally have been apt to hold that this is or is not a matter of public interest, or that has or has not enough of public importance about it to be so classed. If the public is vitally interested in preserving life in a human being, in safeguarding his health, and in promptly and decently disposing of his dead body, it is also true that it has an important interest, in civilized countries, in the honesty of business transactions; the scru-

[56]See KEENER, *op. cit. supra* note 9, at 344–347, for his views on the case of Force v. Haines, and his criticism of Forsyth v. Ganson, at 351–2, and compare comment on the latter case in WOODWARD, *op. cit. supra* note 2, § 209, where the author treats a contract to furnish necessaries of life on the same plane with cases where a legal obligation rests on B to support his wife. Keener's argument (p. 351) that B's contract gives no rights to A is true, if by "rights" is meant "contract rights," but that is wholly indecisive of the possibility of A's acquiring quasi contractual rights against B by unofficious performance of B's contract with resulting benefit to B. That sort of argument seems to involve Keener in the same mistake some courts have been laboring under through confusing the requirements of contract with those of quasi contract law. As to his further argument that in the absence of a contract B would have been under no obligation at all, it is clear, even in cases of providing necessaries to B's wife, that if B had not by a *contract* taken upon himself the duties of a husband he would not have occupied "a position in consequence of which the law" has "imposed the obligation upon him, and therefore, in the absence of a contract obligation on his part, it would have been necessary for the public, and not the defendant, to render the service in question."

[57]See Robinson, *The Public Utility: A Problem in Social Engineering* (1928) 14 CORNELL LAW QUARTERLY 8, 9; Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277, 282.

pulous and prompt performance of contracts; transportation; food supply; education; the protection and well being of domestic animals[58] and game; proper housing; amusements; and a host of other things. One thing seems indubitable, and that is that the list of things in which the public is considered to have an important interest is growing larger, not smaller. This will have its effect upon the decisions of courts as to what A may justifiably do in B's affairs without request, and yet without officiousness. Given, then, a sufficient public interest, it results, with hardly any dissent, that B's request or consent for A to act is never required, contract is hardly mentioned, and *A is allowed to force himself upon B as his creditor*, provided only that B was in blameworthy default, or unable to perform his obligation promptly. Even a prior express dissent by B will not make A's performance officious.

10. *The interrelation between public interest and benefit to B, and the place of each in determining A's officiousness in performing B's obligation:* We have here three factors to correlate, and we must attempt to assign to each its proper weight as affecting the question of A's officiousness in performing B's obligation. They are: (1) public interest in B's obligation of a sufficient strength to bring A in; (2) B's inability or blameworthy default in not performing such obligation; (3) the benefit conferred by A's performance of B's obligation.

The extraordinary interest the public has in certain acts required of B has the appearance of setting such acts apart in a separate class, which is not amenable to the strict rules often applied in other cases. B is the person obligated to act, but in any event some one must take care of the situation in the public's interest or the public will suffer. When it becomes reasonably certain that B will default, A may act for him and acquire rights against B, because society through its established agencies, the courts, says that A's act is reasonable, and beneficial and necessary, and therefore not officious. The public's benefit from A's act is what is first and most considered and is what justifies A. But how is a benefit to C (the public), on any principle of quasi contract, to avail A at all when he is not to recover from C, the beneficiary of his act, but from B? Is it not essential to show that B also has had benefit from A's act? It is, if we are to stay within the realm of quasi contract, and not to be forced to explain these cases upon some other principle of the law. Here the courts, with almost no dissent, will imply B's request or consent to A's act and

[58]In the case of animals there is a definite public interest. See editorial, *Animal Week and Bergh*, New York Times, Apr. 13, 1929; WOODWARD, *op. cit. supra* note 2, § 197, n. 3.

his promise to repay A's advances. This can only be so because justice requires the implication, which is equivalent to saying that B is morally obligated to repay A. This moral obligation can arise here only because B has received a benefit from A.

But it is not always clear just how benefit to B is to be shown. Suppose, in addition to the merely negative conduct of defaulting in his obligation, B should in advance of A's act convey to A his express refusal to A's acting for him and to repay A if he did act in, we will say, supplying the food to B's wife which B ought to supply. Suppose, further, that B loathes his wife and can easily evade any present or future legal obligations to her by going abroad to live, and that he prefers to live abroad, anyway, and intends to go immediately with all his property. There is still B's legal obligation to feed his wife, but he cares nothing at all about that. The fulfillment of such legal obligation by himself or another would afford him no pleasure or satisfaction, but would be regarded by him as merely a loss of money. If A, upon these facts, supplies B's wife with necessaries, how can benefit to B be shown?

It is taken to be a fundamental and self-evident proposition that the performance of B's legal obligation is necessarily a benefit to him. Why so? In the case supposed, is it on some merely moral ground, as that, even though B actually would think it a loss of money if he were made to repay A, yet he *ought* to feel differently and feel himself to be a better man morally if he repays A, and that the court, on the basis of this supposititious moral feeling in B, will therefore conclusively presume him to have been benefited?[59]

[59]WOODWARD, *op. cit. supra* note 2, § 198, does not see the benefit as being of this moral sort, but describes it as material: "[I]t saves him the necessity either of performing the duty himself or of paying the penalty of non-performance." But in the case supposed, it is not A's act of performance of B's duty that saves B from the necessity either of performing it himself or of paying the penalty of not performing it, but rather his escape to a foreign country or a sister state. It is *self-help, not A's help*, that gives B his benefit.

Possibly a court would deny B any satisfaction he might feel in having helped himself by holding that one cannot have advantage of his own wrong, and that thus it must be considered that it is, after all, A's performance that benefited B. This would merely be substituting a desired legal result (no doubt a good one) for the actual facts or the conclusion that the science of physics would draw from them. It would thus appear that there might be considered to be exceptions to the rule that A's performance of B's legal obligation is *necessarily* a benefit to B.

But even supposing that B remained within the jurisdiction where A is performing his obligation for him in installment fashion, what is the nature of the benefit A renders B? By the exact wording of the rule it is only of the "necessity . . . of performing the duty himself" or of paying the penalty, etc., of which B is relieved. The legal liability for the support of his own wife remains throughout,

In spite of the suggestions made in the preceding note, it is quite probable that most courts would say that A has conferred a benefit on B by performing his legal obligation for him. They no doubt see the clear necessity for so holding, if the case is to be decided on the principles of quasi contract. It follows inevitably, even in the strongest type of public interest case, where no doubt the public's interest is paramount in the mind of the court, that it is nevertheless considered indispensable that B, as well as the public, should have a benefit before the court will imply B's promise to reimburse A for his outlay. That is to say, even the strongest public interest or advantage will not, if standing alone, be enough to persuade the court to force a promise into B's mouth, and, to borrow a phrase, "*in spite of his teeth.*" So important is this benefit element that, as we have just seen, the courts find it necessary to keep on hand a *manufactured* benefit that will answer the purpose—one which the plain facts will often show B not to want nor to consider a benefit at all, or which the facts will show does not come to B from A, but is a benefit to which B has helped himself by an exit from the jurisdiction *cum bonis catallisque.* In other words, this benefit, if taken in a material sense, is distinctly a second-rate affair, considering B's own distaste for it, his power of avoiding his obligation, and the doubt as to the real source of the benefit. But, nevertheless, for theory's sake the benefit must be provided. With these considerations in mind, the point which the writer desires to make is simply this: If, even in a case where the public's interest is superlative, the element of benefit to B is none the less indispensable, and the *sine qua non* of recovery, and if it *stands by itself apart and quite independent of the factor of public interest* as the basis upon which alone A can establish a quasi contractual claim against B, it seems an idle thing for a court[60] to say in a case where B has received from A and retained a clear material benefit, undoubtedly useful to B and admitted by him to

doubtless, on B, unless it is true that another can satisfy a legal obligation which the law says B himself must satisfy. What would happen if B's wife, immediately after receiving from A a month's installment of provisions, should sue B for divorce on the ground that he was failing to provide for her? By furnishing one installment, A does not protect B from the penalty of failing to provide further installments. It seems, then, that whatever benefit there is to B comes largely, if not wholly, from the fact that his wife does not choose for the moment to complain against him.

[60]See Renss Glass Factory v. Reid, 5 Cow. 587 (N. Y. 1825); Falcke v. Scottish Imperial Ins. Co., discussed *supra* at p. 26. Cases *contra* and making benefit received the real test, or the one to be most considered, are: Todd v. Martin, 104 Calif. xviii, 37 Pac. 872 (1894); Baggerly v. Bainbridge State Bank, 160 Ga. 556, 128 S.. E. 766 (1925); Edler v. Hood, 38 Ill. 533 (1865); Morrison v.

be advantageous—a benefit which was not officiously, but reasonably given, and intended by A at the time to be paid for—that such a benefit does not in the English law, "if standing alone, create any obligation to repay the expenditure."

What, then, is the effect to be given to public interest and B's legal obligation, as an answer to the question of A's officiousness? It is believed that public interest has its legitimate effect in this only, that it permits A, if in other respects his action is proper, to perform B's obligation even against B's known or express dissent. Where B's dissent is not expressed, or A does not know of it, or is not chargeable with knowledge of it, it is believed that public interest existing in B's obligation does not require that these cases should be treated as a separate class to be judged by other and different criteria, but that benefit to B, properly rendered, and retained where its return was possible, is the proper test *here*, as elsewhere, of A's officiousness.

It is tentatively suggested, from the point of view of *equity*, that public interest, when sufficiently intense, might be employed to work out a sort of subrogation, thus: B owes a duty to the public to support his wife and decently and promptly to inter her dead body. In principle, and apart from technical details, it is a debt to the public. On B's threatened default, A voluntarily satisfies B's debt at the creditor's instance. This is also a benefit to B, as shown. In return, it is just that the public should now subrogate A to its right to B's duty of care. It is the same situation as is presented in the railroad tort cases referred to above.[61]

As to B's legal obligation, that goes along *pari passu* with public interest in the sense that wherever there is a very strong public interest in B's performance there will always be a legal duty in him to perform, or at least there will be an urge upon him coming from the "moral sense of the community" that will be considered the equivalent of a

Jones, 6 Bradw. 89 (Ill. 1880); Lomax v. Bailey, 7 Blackf. 599 (Ind. 1845); Patterson v. Prior, 18 Ind. 440 (1862); Adams v. Cosby, 48 Ind. 153 (1874); Hathaway v. Winnishiek, 30 Iowa 596 (1870); Police Jury v. Hampton, *supra* note 18; Watchman v. Crook, 5 Gill. & J. 239 (Md. 1833); Davis v. Thompson, 1 Nev. 17 (1865); Monaghan v. Woolsey, 53 Hun 633, 6 N. Y. Supp. 157 (Sup. Ct. 1889); McSorley v. Faulkner, *supra* note 53; Hoover v. Epler, 52 Pa. St. 522 (1866); Jones v. Woods, 26 P. F. Smith, 408 (Pa. 1874); Beckwith v. Frisbee, 32 Vt. 559 (1860); Morris v. Morris, 4 Gratt. 293 (Va. 1848); Stanhop v. Ecquester, Latch 87 (1625); *Ex parte* Bishop and *in re* Fox, Walker & Co., 15 Ch. D. 400 (1880). See also Medlin v. Brooks, 9 Mo. 106 (1845), which holds that the law will not imply B's promise to pay for A's service where there was no benefit to B, and where also B had no legal obligation to have the work done.

[61]See *supra* pp. 40, 41.

statute. But B's legal duty goes only to the question whether there has been *a benefit* to B from A's performance of the duty. In other words, you may use B's duty as a stepping-stone to reach benefit to B, and it will always lead to that goal by virtue of the conclusive presumption referred to, that legal duty performed must necessarily be a benefit. It will always be serviceable as a peg on which to hang benefit, and it will also be useful to stop B's mouth, if he is disposed to deny that what he has received from A *is* a benefit to him. But B's obligation should always be regarded as merely a means to prove benefit, not as an independent, self-sufficient factor by which to judge the character of A's act. To use it for the latter purpose will necessarily entail three bad results from three separate points of view: that of logic, simplicity, and unity of treatment.

From the standpoint of *logic*, if one stresses B's duty and merely *derives* benefit therefrom, it must immediately appear unexplainable why this legally presumed benefit should bind B, though he has not requested the benefit, while many cases still say that an actual benefit will not bind him unless he requested it. As to *simplicity*, if duty is emphasized and benefit ignored, or given second place in "public interest" cases, that horse goes dead when the journey through the cases is half finished, for in all those cases where A saves B's property, or his life, health, or limb, *there is no duty* in B, in a legal sense, to save either, and consequently you have to shift to another horse to carry on through these cases. Here you have to saddle up *benefit* to continue the ride. Is it not also flying in the face of the ordinary facts of everyday life to say that the only way you can benefit a man is to fulfill a legal duty that he owes? That may well be one way, but it is certainly not the only way, and probably not the most usual one. From the angle of *unity of treatment*, any failure to treat benefit as the one and sole-sufficient cause for implying B's promise of making proper return is a direct turning away from the principles of quasi contract law, the central nerve of which is unjust enrichment, benefit unjustly retained. Such failure tends directly to take these "public interest" cases out of the field of quasi contract and place them elsewhere in the body of our law.

(To be concluded in the February issue)