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OFFICIOUSNESS†
Edward W. Hope*

PART II. TYPICAL OCCASIONS WHERE "OFFICIOUSNESS" COMES IN QUESTION

There are a number of ways in which A by rendering unrequested service may intervene in B's affairs, thus making the propriety of his intervention the point at issue in a suit to obtain remuneration from B. It is proposed in the second part of this article to arrange and discuss these different occasions of A's interposition, beginning with those in which his officiousness is most often and successfully offered as a defense. We will therefore consider the cases in the following order: (I) where A pays B's money debt to C; (II) where A performs B's contract with C; (III) where A saves B's property; (IV) where A saves B's life, health, or limb; (V) where A's service in any of the above instances is supported by public interest; (VI) where A's service in the named situations is justified by the principle of self-protection or self-interest.

In connection with the first two occasions of intervention especially, the part that equity plays through its doctrine of subrogation must be studied.

I. A pays B's money debt to C: We are to consider this as done under the following limitations: (a) A means to benefit B. (b) A means that B shall repay him. (c) There is no actual prior request for the service, or actual subsequent ratification of it by B. (d) A pays the debt voluntarily, and not by (i) mere unconscious inadvertence, or (2) mistake of fact, thinking it to be his own debt, or (3) mistake of law, thinking he is legally liable to pay it, or (4) constraint of legal obligation (surety, guarantor, and the like), or (5) necessity of self-protection through B's default, or (6) the invitation of public interest.

These conditions strip away all possibility of contract or agency between A and B as to the payment, all innocent error and justifying constraint on A's part, and nothing is left but the voluntary payment of the debt with the intention of benefiting B.1 Naturally, A is

†This is the second and final installment of the article, the first having appeared in (1929) 15 Cornell Law Quarterly 25.
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1We are not as yet considering A's possible rights against B through equitable subrogation, but only his rights in quasi contract. Numerous expressions in the cases and in the works of writers seem to indicate that he would have no rights in either tribunal. The voice of the law usually is that one man cannot pay another's
a volunteer here, but on principles already discussed that should not be fatal, unless he is an officious volunteer.2

How can A expect to benefit B by paying his debt when A from the first intends to make B pay him instead of paying C? Is it not merely substituting one creditor for another? That is true, but there might be benefit to B even in that case. A might be a more lenient creditor, and intend to be such. If A's motive is beneficent, he may not be officious in a legal sense, but in any event he must show actual benefit to B, or he cannot recover even though he was not officious.3 However, there is another way for benefit to arise, and

debt without his request and thereby substitute himself as his creditor, while equity, it is said, declines to assist a volunteer. LEAKE, CONTRACTS (7th ed. 1921) 45: "A voluntary payment of the debt of another, without request, and under no legal liability or compulsion, gives no claim for the money paid against the person whose debt is discharged." But immediately after this, the author says that, if A pays an insurance premium for B, he may recover if he has an "interest to do so", though there was no duty, contract, or request. See infra p. 239 for a discussion of the kind of interest which this may be.

2 GREENLEAF, EVIDENCE (15th ed. 1892) § 114: "Where no express order or request has been given, it will ordinarily be sufficient for the plaintiff to show that he has paid money for the defendant for a reasonable cause, and not officiously." KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1893) 388: "No one officiously paying the debt of another can maintain an action either at law or in equity to recover from the debtor the money so paid. To hold otherwise would be to hold that a person has a right to thrust himself officiously upon another as his creditor. If, however, the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed by the debtor..." These two passages are quoted with approval by the court in Irvine v. Angus, 93 Fed. 629, 633 (C. C. A. 9th, 1889). The two writers cited have been discussing the case of an officious volunteer. The court prefers to call such person a "mere volunteer", but all three are talking about officiousness. Interpreting the above passages, the court says: "A mere volunteer is not entitled to be repaid money which he has expended for the benefit of another. Who is a 'volunteer', within the meaning of this rule? A volunteer is one who has paid the debts of another without request, when he was not legally or morally bound to do so, and when he had no interest to protect in making such payment..." It follows that a volunteer, if acting under a moral urge, is not officious and is entitled to repayment if he has conferred a benefit, though he was not obliged to confer it by law or the necessity of self-protection. This puts a different face upon the matter and does not at all agree with Leake's statement, supra note 1. See also Bates v. Townley, 154 Eng. Repr. 444 (1848); Sleigh v. Sleigh, 5 Ex. 514 (1850); CLARK, CONTRACTS (3d ed. 1914) 627.

3In Butler v. Rice, [1910] 2 Ch. 277, the point is stressed that, where A (by mistake) pays B's debt, and this does not increase B's burden, but is merely making him pay A instead of C, B should not object to this, as A is not seeking to create a new charge in his own favor. A was allowed recovery, though B did not request or know of A's payment. Note that no benefit to B is required, but
that is where by paying the debt A saves B's property. This kind of a case logically comes within the third way or occasion for intervention before mentioned, since it would not seem that the mere means or manner in which property is saved is important, whether it be by payment of a debt or by the expenditure of labor.\(^4\)

Given the fact that there is a real benefit to B in any case where A pays his debt, there might seem to be little reason for employing a stricter rule against A in these cases than where the benefit is to B's life, health, or property. And yet such reading of the cases as time has permitted shows a clear tendency, approaching a settled habit, to deny recovery to A when he has paid B's debt under the limitations set by the first paragraph of this section. With hardly a break the decisions require that B shall have requested the payment, or shall have subsequently ratified it, or consented to it by promising repayment, or have relied on it in some way, or that A should have been obligated or constrained to pay. In other words, contract law or self-protective principles govern almost without exception.\(^5\)

Wherever either of these two principles can work, A is allowed to prevail. A late case worthy of note is *Morin v. Bond*,\(^6\) where A and B, each owning one-half of a tobacco crop, sold it to C as being sound in quality, C paying to each one-half of the purchase price.\(^7\)

only that his burden shall not be increased. See a note in (1910) 24 Harv. L. Rev. 161. This is a proper case for equity, and the result seems to be good; but in quasi contract, a benefit rendered B is necessary for A's success. It should be noted that the mere absence of harm to B does not at all meet the classic objection to one's substituting himself as creditor of another.

\(^4\) Such debt-paying and property-saving cases will be considered, therefore, with property-saving cases, infra p. 227.

\(^5\) McGlew v. McDade, 146 Calif. 553, 80 Pac. 695 (1905); Durant v. Rogers, 71 Ill. 121 (1873); Shirts v. Irons, 28 Ind. 459 (1867); Benson v. Thompson, 27 Me. 471 (1847); Inhabitants of So. Scituate v. Inhabitants of Hanover, 9 Gray 426 (Mass. 1857) (facts not clear as to why A paid debt here); Helm v. Smith-Fee Co., 76 Minn. 328, 79 N. W. 313 (1899); Beach v. Vandenburgh, 10 Johns. 361 (N. Y. 1813); Matter of Rider, 68 Misc. 270, 124 N. Y. Supp. 1001 (Surr. Ct. 1910) (questionable decision, as children had an interest). It is to be observed, however, that many of the cases where A is defeated on the basis of the usual rule that one cannot make himself another's creditor without his request could have been decided on other principles involved in their facts: Kenan v. Holloway, 16 Ala. 53 (1849) (no benefit to B); Edwards v. Hardwood Mfg. Co., 59 Minn. 178, 60 N. W. 1097 (1894) (same); Albany v. McNamara, 117 N. Y. 168, 21 N. E. 931 (1889) (intended gift); *in re* Babcock, 169 N. Y. Supp. 900 (Surr. Ct. 1917) (same); Evarts v. Adams, 12 Johns. 352 (N. Y. 1815) (A's loan in violation of statute); Nat. Bk. of Ballston Spa v. Board of Supervisors, 106 N. Y. 488, 13 N. E. 439 (1887) (same—see Keener, *op. cit. supra* note 2, at 347).

\(^6\) 96 Conn. 642, 115 Atl. 218 (1921).
It turned out to be in part unsound, and on C's demand A paid back a part of the price covering what both he and B were liable for. This was without B's express request. In the lower court it was held that A was a mere volunteer in paying for B's half, and recovery was denied. The upper court reversed this on the ground that the facts warranted the jury in finding that B had given A authority to control the entire sale and its terms, such not being complete until C was reimbursed. A, therefore, acted throughout within his authority. The court declines to say what, if this were not so, A's rights would be on the theory of equitable subrogation. It adds with significance, "One thing is to be remembered in such situations. The law is solicitous to prevent one man enriching himself at the cost of another who has in good faith paid that other's obligation." As it is very often difficult or impossible to distinguish certainly between a tacit (real) request and an implied (unreal) one, that is, between a contract and a quasi contract, courts desirous of doing full justice and yet hesitant about raising the law's implied promise can often find, as was the case here, a tacit request. It is at least a good result.

The question we are considering sometimes arises in the case of connecting carriers. In *Wabash R. R. v. Pearce* it was held that an initial carrier may pay the legal duties on imported goods demanded by the United States at the port of entry, in order to secure possession of the goods so as to start their transportation inland; and that upon so paying it will be subrogated to the lien which the United States had upon the goods. Also, that the ultimate carrier who has advanced the legal charges to the preceding carrier "is not a mere volunteer" and may recover such charges from the owner and hold the goods under its lien until payment is made.

It would be possible, it seems, to find a real request from owner to carrier to pay the necessary and customary charges where the owner himself has ordered goods sent to him. No officiousness could enter here. But suppose goods are sent to B by mistake or on a chance, he not having ordered them, and that the proper charges are in good faith paid by A (initial or ultimate carrier). If B rejects the goods, A cannot recover, but this is not because of A's officiousness, but because of no benefit accruing to B. No doubt A could recover from the sender, he being in no position to charge A with officiousness.

5b Ibid. at 644, 115 Atl. at 219.
6a 192 U. S. 179, 24 Sup. Ct. 231 (1904).
In *American Ry. Express Co. v. Heilbrunn*, the plaintiff carrier, after delivery of the goods from Canada to defendant in New York, paid the duty thereon upon demand of the United States. Defendant had accepted the goods before this payment was made, his being the legal obligation to pay the duty assessed. It was held that plaintiff was "a mere volunteer", as it was under no legal obligation to pay. Recovery was denied. By dictum, the court added that, if the plaintiff while still in possession of the goods had paid the duty, or promised to pay it to prevent the goods from being stopped, it might have collected from the defendant the amount paid.

In this case it could be supposed that the tacit request of the owner that the carrier pay the duties ended upon delivery, B assuming the duty of paying from that time. B owed a debt to the United States (C), and C not only accepted payment from A, but demanded it. It seems that justice would require A's subrogation to C's rights. A can hardly be thought officious if it paid under a sense of duty, or thought that the United States had the power of exacting payment. As to the dictum that A's possession would have made a difference, it is believed that on principle this is not important, except as B's tacit request may be thought to continue during such possession.

The writer must admit that to the present he has found no instance where, subject to the strict limitations outlined above, A has been allowed to recover for paying B's money debt to C. There seems to be no reason why recovery should not be allowed here in a proper case.

The fact seems to be that the "contract complex" which

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8That B does make a tacit request of the carrier to pay the duties in such cases the following seems to indicate: "A connecting carrier is under no obligation to make advancement for charges paid by a preceding carrier or to give credit therefor, even though it is customary so to do... [N]evertheless a connecting carrier may advance the charges of the preceding carrier, including charges which the preceding carrier may have already advanced in the same way, and demand the full amount of its own charges and the advancements at the end of the transportation... This, it is said, is a right long sanctioned by law and custom, and is founded on public convenience and common sense" 10 C. J. 444.

It will have been noticed that contract, subrogation, and the item of self-interest enter into these carrier cases, and for this reason they do not wholly belong here. So many and mixed are the factors of decision, however, that it is well-nigh impossible to make a clear-cut, logical arrangement.


10Keener, *op. cit. supra* note 2, at 325, says: "In point of principle it is submitted that it is impossible to distinguish between the receipt of money or other
shapes the attitude of the courts elsewhere is found in concentrated form in the debt cases, as it is also where A performs B's contract. This is no more than should have been expected from the nature of the relation interfered with. In equity the story is somewhat different, as will be seen presently.

I. A. Subrogation in equity, where A pays B's money debt to C: Where A, having paid B's money debt to C, sues B at law in indebitatus assumpsit for money paid to B's use, there must have been, as we have seen,11 some benefit therefrom to B, in order that A may merit recovery in quasi contract, and this entirely irrespective of any lack of officiousness on A's part. If, however, A should proceed in equity, the rather surprising fact becomes apparent that benefit to B is of no importance in determining A's rights against B, but that A's rights are worked out through C, the creditor. In subrogation cases there are always three persons to consider: actor (A), beneficiary (B), and creditor (C). The peculiarity of equity's method of disposing of such cases arises from this triangular character of the problem. It is not only B's rights which are to be determined, but also those of C, which he has or may realize through assignment. The almost sacred idea of privity of contract, and the consequent resistance to all alienation of choses in action at the common law, is elementary learning, but highly pertinent to recall at this point.

The common law view gave way before the necessities of modern business: "Under our modern law, business necessity has largely done away with the idea of the sacredness and inviolability of the personal relationship of the parties to choses in action... It never has been considered that the personality of the creditor mattered to the debtor once the obligation was created; it could matter only in the formation of the contract."12 C may transfer to A, though A is B's worst enemy, and this is no injury to B. The law considers that as long as C has legal title (as he does in transfers of negotiable instruments, for example) it is a greater hardship on C not to let him transfer this to A (though B's enemy) than it is to B to have a new creditor thrust upon him. The same is true of simple contract debts (only here the assignee does not get legal title); but B cannot object to C's transfer to A, nor is B's consent necessary. What difference

property by the defendant and the receipt of services." In the Roman law, the negotiorum gestor could as freely pay a debt of his principal as perform any other kind of service.

11Supra p. 206.

12Costigan, The Doctrine of Boston Ice Company v. Potter (1907) 7 Col. L. Rev. 32, 34-40; see also Ames, The Disseisin of Chattels (1890) 3 Harv. L. Rev. 337-8.
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does it make to B whether he has to pay a sum of money to C or to A? C has fulfilled his contract by services, etc., so nothing is left of the personal equation argument. There is no objection, therefore, to assignment. A contract right is in a broad sense "property", and public policy favors the alienability of property. It is obvious therefore that in these cases we shall not be considering either benefit to B or "dutiful intervention" by A in B's affairs, but only a permitted matter of business between A and C. Since this is so, it would seem as though A could never be called officious in taking an assignment from C, either to supply values to B, or to demand values of B.13

The preliminary question whether A can legally and effectively "pay" B's debt to C: There has been a long standing dispute whether a tender by A and acceptance by C can operate per se as a discharge or payment of B's debt to C, so as to prevent C from later suing B on it. One series of decisions holds that it can, while another says there can be no payment unless and until B ratifies. We are not required for the advancement of our theme to take more than a summary view of this dispute,14 but two important cases,14 representing the view that there is no payment until B ratifies, will bear discussion. In the first of these, Neely v. Jones, all the details of the argument are ably and clearly stated. The results put concisely are:

(1) When A pays he may demand and receive from C a formal assignment. B need not know or consent. It is a purchase of the debt.

(2) When A pays, C may expressly agree to assign the debt to him. If so, and he yet fails to make formal assignment, equity nevertheless deems it an equitable assignment. B need not know or consent. It, too, is a purchase of the debt.

13Woodward, op. cit. supra note 7, § 56, thinks this might be officious in some circumstances, but could rarely be inexcusably officious in regard to the purchase and performance of a contract.

14See 3 Williston, Contracts (1920) §§ 1857-1860. Williston's view, in brief, is that the weight of American authority now says that C after accepting A's tender cannot sue B. It is, strictly, only an accord and satisfaction—not a legal discharge; but is a valid defence to B against C. Any additional evidence, though slight, that the payment was made on B's behalf and was ratified by him is gladly seized on by the courts. Thus there is little practical difference between the two lines of decisions. New York, however, long followed the early and strict English view. C's acceptance of A's payment may afford an equitable defence, as C impliedly promises thereby perpetually to forbear to sue B. See Snyder v. Pharo, 25 Fed. 398 (C. C. D. Del. 1885); Jackson v. Pennsylvania R. R., 66 N. J. L. 319, 49 Atl. 730 (1901); Gray v. Herman, 75 Wis. 453, 44 N. W. 248 (1890); (1894) 7 Harv. L. Rev. 437.

(3) When A pays, neither of the above may happen, there being a mere tender and acceptance between A and C. Here the presumption is that A means that B shall repay him. There is no express or implied agreement between A and C for an assignment. The real agreement is of a conditional and "dilatory" character, so to speak. It is this:

(a) If B ratifies A's act as a payment, C will also so consider it. Until B ratifies, the debt is paid as to C, but not as to B. As between A and B the debt is still alive, and A may sue on it in assumpsit as for money paid to C for B's use.

(b) If B repudiates, as he may, C cannot deem the tender and acceptance to be payment even as to himself. Legal title to the debt remains in C, and he can still sue B for it. C's recovery would give him double payment, however, and A would be without recourse against any one. The court, to avoid this unjust result, will therefore deem C's agreement with A to have been that, in the event B repudiates, C will transfer the debt to A; and, enforcing this agreement, the court will decree A to be the equitable owner of the debt.

The procedural results upon B's repudiation: (1) A sues B at law in C's name for A's use. But if B now pleads A's payment as a discharge of the debt, A can sue B, still in law, for money paid to C at B's request. Or instead of suing B in law, A can in the first place sue B in equity, A being the equitable owner of the debt. And if B now pleads A's payment as a discharge of the debt, equity will consider such plea as itself an admission of liability to refund to A and will so decree to save multiplicity of actions.18

18While the reasoning of the case seems to run along well, there are logical difficulties in the third paragraph of the outline of results in regard to its solution of the question: Did the tender and acceptance pay the debt? The answer to this question made in the case of Crumlish's Adm'r v. Central Improvement Co., supra note 14a, at 395, 18 S. E. at 457, was: "The answer depends on whether you mean [paid] as to the creditor [C], or debtor [B]." But it is somewhat difficult to see how a debt can thus exist "paid" as to C and unpaid as to B. Can there be a debt without two parties, debtor and creditor? If paid as to one of them, why is not the debt destroyed? B owed C only, and if C ceases to have any right to enforce the debt, it being fully paid as to him, "it would seem, according to plain common sense, that the obligation was extinguished and is no longer in force as a contract", as was said in Gray v. Herman, supra note 14, at 457, 44 N. W. at 249. Whether B ratifies or repudiates, in either case C cannot enforce the debt against him. In Harrison v. Hicks, 1 Port. 423 (Ala. 1834), the court says that payment of a debt, though made by one not a party to the contract, and though the consent of the debtor to the payment does not appear, is still the extinguishment of the demand. BISHOP, CONTRACTS (1887) § 211 states if payment "be accepted by the creditor in discharge of the debt, it has that effect."
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Under the doctrine of Neely v. Jones, it is not perceived how A could ever be thought inexcusably officious. He could not be under the facts of paragraph one of the above outline. In this case A and C together have the power to change B's legal relations by substituting A for C as B's creditor without B's knowledge or consent, and even against his protest. As the law allows A to recover, it goes without saying that the law cannot regard A as officious. The same is true under the conditions stated in paragraph two. Since equity relieves A by making him an equitable assignee, equity cannot consider him officious. If equity regards him complacently, does it not follow that the law should, or are we to be afflicted with two sorts of officiousness, one in law and another in equity? But how does A fare under paragraph three? Here, upon A's paying, the character of his act and its potential effect upon the relations of all three parties is yet undetermined, being dependent upon B's future action. It is a sort of conditional payment to C for the time being. It is not a payment at all as far as B is concerned, for he may repudiate it. It becomes a payment as to all three parties if B ratifies. What B does determines what C's action must be, and also what A's will be. But whatever B does cannot make A officious. Suppose B repudiates. That is the very contingency which will require C by his agreement to transfer the debt to A in return for A's payment to him, and this payment will now be regarded by equity, at least, as a satisfaction of the debt, and equity will allow A, as equitable owner of the debt, to have reimbursement of B. Of course, if B ratifies, officiousness could not be thought of.

An important point concerns the lack of an agreement, either express or tacit, for an absolute assignment under the facts of the third paragraph of the outline. The court holds that this makes no difference, in spite of the frequent assertions by courts that a stranger paying the debt of another will not be subrogated to the creditor's rights without an agreement to that effect. An analogous case is mentioned, where A, a stranger, is requested by C, the creditor, to guarantee B's debt to C. Here, A is not strictly a surety, since not requested to act by B, the principal debtor. B may not even know of A's act; yet A will be substituted to C's rights in spite of the fact that he is a volunteer as far as B is concerned and was under no legal obligation to make the contract with C. This shows that the right of subrogation is based on natural justice, and not on contract.

15a Supra note 14a. 16 Woodward, op. cit. supra note 7, § 56. 17 Story, Equity Jurisprudence (14th ed. 1918) § 724, says an "express" agreement is essential.
Crumlish’s Adm’r v. Central Improvement Co.\textsuperscript{17a} follows the Neely case. Both of these cases are specially approved by Pomeroy.\textsuperscript{18} In the Crumlish case, the defendant (B) was a judgment debtor of C. C later attached some bonds of A, a railroad company, in which B had an interest. A for its own business advantage wished to get hold of the bonds and cancel them, to clear the way for a new bond issue. A, therefore, offered to pay C the debt of B in return for the surrender and transfer of the bonds to A. C accepted the offer and received the agreed payment from A, whose action had been neither requested nor ratified by B. It was held that A can recover from B. The court said:\textsuperscript{18a} “It remains a correct legal proposition to the present, that one man, who is under no obligation to pay the debt of another, can not without his request officiously\textsuperscript{18b} pay that other’s debt and

\textsuperscript{17a}Supra note 14a.

\textsuperscript{18} POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 2335. How, then, can Pomeroy, having approved these cases, say almost in the same breath: “A mere stranger or volunteer paying the debt of another without request or subsequent ratification is not entitled to indemnity from the latter [my italics]? The statement is further elaborated and his meaning made clear at § 1212, where, in substance, he says that equity does not give every one subrogation who pays another’s debt. To get it, one must be so related to the subject or to the other parties that his payment is not a purely voluntary act, but is equitably necessary or proper as a means of securing his interests from injury. Therefore a mere stranger who pays off a mortgage as a purely voluntary act can never be an equitable assignee. He then explains this statement by the extremely obvious, but quite inconclusive, truth that the volunteer cannot compel the mortgagee to accept the payment, or having accepted it, compel him to assign the mortgage to him. Continuing, he says that if the mortgagee consents both to accept and assign, then it becomes an ordinary purchase of the mortgage, which can always be effected with the mortgagee’s consent, but never without this. So, in no case can one voluntarily paying occupy the position of equitable assignee. The author’s meaning is that the volunteer can never claim as a right to be subrogated to the rights of the mortgagee. Again, at § 2348 he says: “A mere volunteer, it is generally agreed, is never entitled to subrogation. 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 fault of this argument and the answer to it is equally plain. It all depends upon what point of time you choose to set for the real show to begin. It is idle to consider A’s tender before C accepts it. Of course A can’t make C take it, and if C does not take it, there could be no talk of “volunteer” or “payment”. We, naturally, only care about the case where C has accepted A’s tender, and we wish to learn what A’s rights will then and thereafter be against B. Any dispute about them will come under the third paragraph supra p. 212 (discussing the Neely case), where the court very decidedly disagrees with Pomeroy and states that, if B repudiates A’s payment, then A will be decreed to be the equitable owner of the debt.

\textsuperscript{18a}Supra note 14a, at 395, 18 S. E. at 457.

\textsuperscript{18b}Italics are the writer’s.
charge him with it." Later on, the court added\(^\text{18c}\) "and this Court, while recognizing the rule that one can not officiously pay the debt of another and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment makes the payment in the eyes of a court of equity operate to satisfy the creditor, and render the stranger a creditor of the debtor." This is just what was held in Neely v. Jones, on which the main case relies. In the Neely case, A was a sheriff who had had an execution issued to him and had paid the judgment debt to the creditor out of his own pocket without request or ratification by the judgment debtor. The court there regarded him just as any other stranger. It seems a fair conclusion to draw from these cases that if a volunteer pays the debt unofficiously he may recover in equity. Pomeroy, however, would have the rule to be that a volunteer, in the sense of one who is not requested, or not legally obligated or compelled by self-interest, can never be an equitable assignee.

Taking these two cases together, it seems to the writer that they mark an advance in the liberality of relief offered by equity. Under these decisions, at least, can it any longer be taken as gospel truth that one man may not substitute himself as a creditor of another without his consent, even though he has no formal assignment from the creditor or agreement with him for such? And how do these two cases harmonize with the saying, "Equity will not aid a volunteer"?\(^\text{19}\)

\(^{18c}\text{Supra note 14a, at 397, 18 S. E. at 458.}\)

\(^{19}\text{Story, op. cit. supra note 17, }\S\text{ 723: }\text{"Volunteers or Intermeddlers Are Not Entitled to Subrogation... The question as to who is a volunteer is not very hard to determine. The right to invoke the equitable principle depends largely upon the facts in a given case and whenever it appears that the third party has paid the debt, which he was not responsible for and in which he had no interest, as a general rule he will lose what he has paid."}\)

This rule, while because of its generality it seems to approach a somewhat more liberal view, belongs on the whole to an older, and more strict and conservative type of thought, limiting A's right of access to this equitable relief rather rigidly and narrowly by tests that may be termed mechanical. The following cases are believed to represent this view: Crippen v. Chappel, 35 Kan. 495, 11 Pac. 453 (1886), which holds that, to absolve A from being classed as a volunteer, stranger, or intermeddler in paying B's debt to C, there must have been: (1) a request from B or, that failing, some one of the following four substitutes: (2) a legal or equitable assignment from C (not required by Neely v. Jones, supra note 14a); (3) A must be a surety, or otherwise secondarily legally liable (this is rejected by later cases of liberal tendency); (4) A's payment must have been made to save his own actual or supposed right or interest; (5) some agreement or understanding by B that A was to become the creditor. (Cf. supra p. 213). See the following: Iowa Homestead Co. v. Des Moines Nav. & R. R., 81 U. S. 622 (1872) (no request; recovery denied); Aetna Life Ins. Co. v. Middleport,
I.B. A voluntarily pays B's money debt to C, or renders B some other service, and B subsequently promises A to reimburse him therefor: One would suppose that this would be as clear a case of ratification or adoption as could be found, and that no question could be made of A's right to recover from B on plain quasi contractual principles. However officious A might have been in conferring the benefit, B's ratification, being equivalent to a previous request, ought to wipe away all stain of that nature. As was said in Ingraham v. Gilbert, "The reasons why a debtor is not liable to repay to another a debt which that other has voluntarily paid, entirely fail, when such debtor afterward agrees to the payment and promises to remunerate him for what he has done."

All courts would probably agree that, where A has unofficiously benefited B, that fact alone imposes upon B a moral duty to repay. But there is a difference of opinion as to whether such moral duty is a sufficient support for B's subsequent express promise to reimburse. The more liberal courts say it is; the stricter ones that it is not, but that there must have been in the first place an antecedent legal liability in B, which has later been suspended or barred by some positive rule of law operating to extinguish the remedy but not the debt, such as the statutes of limitation or of bankruptcy, or the bar of infancy.

124 U. S. 534, 8 Sup. Ct. 625 (1888) (lacks all the above; recovery denied); Suppiger v. Garrels, 20 Ill. App. 625 (1886) (says subrogation confined to where [3] and [4] exist; recovery denied); Harrison v. Bisland, 5 Rob. 204 (La. 1843) (request by B; no obligation in A; recovery denied); Shinn v. Budd, 14 N. J. Eq. 234 (1862) (no request; no assignment; but obligation in A; recovery denied); Gadsden v. Brown, 1 Speer, Eq. 41 (S. C. 1843). See also Winder v. Diffenderffer, 2 Bland 166, 199 (Md. 1840) where there is no request, and recovery is denied. The court says: "It is a well settled general rule, that no one can be allowed to intrude himself upon another as his surety... [T]he only exception... is, where, on a bill of exchange being dishonored, a third person, not a party to it, may pay it for the honor of the drawer, or any of the endorsers. The reason of allowing this exception is, that it induces the friends of the drawer or endorsers to render them this service; and by that means preserves the honor of commerce, and the credit of the trader." Opposed to the above cases, there are many, and it is believed that it is a growing class which do not require that there shall be a request by B, or that any of the mentioned substitutes shall be present. These cases will be discussed under later headings.

20 Barb. 152, 153 (N. Y. 1855).

20 For a full note on this subject, see (1922) 17 A.L.R. 1299, 1359–1377. The case of McMorris v. Herndon, 2 Bail. L. 56, 57 (S. C. 1830), 21 Am. Dec. 515, 516, well expresses the liberal view: "If a person pay money which another was under a legal or moral obligation to pay, though without his knowledge or request, the law raises an assumpsit; as in the case of goods distrained by the commissioners of the land tax, if a neighbor should redeem the goods and pay the tax he may maintain an action against the owner for the money so paid.
OFFICIOUSNESS

I. c. A by mistake of law or fact pays B's debt, believing it to be his own obligation: Under these circumstances there is no good reason for considering A officious. The essence of officiousness is the conscious purpose of interposing in another's affairs for his advantage. Here, there is nothing of this sort. A has no thought of paying another's debt, but intends to pay his own. Moreover, in the pursuit of such intention he is acting in conformity with what he conceives to be both his right and his duty. That is not an officious state of mind. If officiousness were a crime, A could not be con-

Bacon. Abr. Assumpsit, D. [See Jenkins v. Tucker, 1 H. Bl. 90 (1788).] ... I think the cases point to a distinction of this sort, which is probably the correct one—where a person is under a legal obligation to pay money, and another pays it for him without request, the law raises an implied assumpsit to refund without any express promise on his part; but where he was not under any legal obligation, but receives the benefit of any payment made, or labor done by another; as if a person sees the fence of my field decayed, and out of kindness pay another to repair it, and I promise to reimburse him; or if he repair it himself, and I promise to pay him for his trouble, here the express promise is good." The court cites Watson v. Turner, Bull. N. P. 129 (circ. 1767); Atkins v. Banwell, 2 East 505 (1802); Wennall v. Adney, 2 Bos. & P. 247 (1802).

Many of the following cases stress the benefit B has received as being alone sufficient to support B's later promise to refund: Oakes v. Cushing, 24 Me. 313 (1844); Stuht v. Sweesy, 48 Neb. 767, 67 N. W. 748 (1896); Drake v. Bell, 26 Misc. 237, 55 N. Y. Supp. 945 (Sup. Ct. 1899) (good case to read); State of Oregon ex rel. Bayer v. Funk, 105 Ore. 134, 269 Pac. 113 (1922), 25 A. L. R. 625, 635 (1923) (good case to read); Wright v. Farmers Nat. Bk., 31 Tex. Civ. App. 406, 72 S. W. 103 (1903).

In Bevan v. Tomlinson, 25 Ind. 253 (1865), the court cites 2 GREENLEAF, op. cit. supra note 2, § 107: "where the act done is beneficial to the other party, whether he was himself legally bound to have done it or not, his subsequent express promise will be binding; and even his subsequent assent will be sufficient evidence, from which the jury may find a previous request, and he will be bound accordingly." The court says that this passage is not supported by the authorities cited, and that it does not believe it to be the law. It then at 255 quotes what it says is the correct rule from 1 PARSONS, CONTRACTS (5th ed. 1864) 471, and note "d": "... Where one does voluntarily, and without request, that which he is not compellable to do for another, who is compellable to do it, as if one who is not a surety, or bound in any way, pays a debt due from another, he has not the same claim and right as if he had been compelled to pay this debt."

Upon a little study it is seen that Greenleaf and Parsons are here talking about two entirely different things, and that there is no contradiction in their statements which makes one necessarily right and the other necessarily wrong. All that Greenleaf says is that it does not make any difference whether B was or was not obligated to do the thing which A voluntarily did for him. All that is important is that B was benefited and then later promised to repay A. It is not stated whether A was obligated to act. Nothing at all is made to turn upon that. The benefit is the important point.

Greenleaf's rule that B's assent, shown by his voluntary retention of the benefit, is all that is needed for A to recover in these cases is, it is believed, the
victed thereof for the lack of the necessary mens rea. There may be reasons of public policy for deeming one a trespasser who enters on another's land, though he be unaware that he has passed his own boundaries, for there is in such a case some harm or loss entailed. But public policy does not audibly call on the courts to punish A when he by honest mistake pays B's debt.21 A payment made by such mistake, whether of law or of fact, is not in a true sense a voluntary payment, nor is the one making it rightly to be considered a volunteer, much less an officious volunteer.

correct one. See Price v. Towsey, 3 Litt. 423 (Ky. 1823). If A was not officious, and the act was useful and necessary to B, that is quite sufficient on quasi contractual principles for A's recovery. To go further and require that B must be shown to have expressly or tacitly promised repayment, in other words, to require B's ratification, is just as unnecessary as it is to require B's previous request for A's act. Greenleaf's discarding of the necessity of B's being obligated to act is also, it seems, quite correct; performance of another's duty is one way to benefit him, but by no means the only way. See Part I, (1929) 15 Cornell Law Quarterly 25, 49 et seq.

Other cases on this subject, but leaning the other way, are: Greene v. The First Parish in Malden, 10 Pick. 499 (Mass. 1830); Chamberlain v. Whitford, 102 Mass. 448 (1869); Critcher v. Watson, 146 N. C. 150, 59 S. E. 544 (1907).

21 In (1908) 8 Col. L. Rev. 654, 655, the notewriter says: "It might seem that the considerations of policy and of natural justice affecting a conscious intermeddler should not defeat a person who has acted under mistake. But from the recipient's point of view, an unsolicited benefit is not changed in character because dictated by mistake." But that is only to say that the benefit remains unsolicited in spite of the mistake. There is a benefit, and if it was unofficiously given, the rule against unjust enrichment has a clear field. The mistake should rid A of officiousness in the eyes of the law, and it is the law's point of view—not B's—that is to decide. The scales should tip toward A, for he has in good faith given value to B. The latter cannot lose anything as long as his original burden is not increased. These cases are well discussed in a note in (1910) 24 Harv. L. Rev. 161, the writer advocating the equitable remedy of subrogation where A has relied upon the authority of B's agent. He says, "In certain cases where a stranger has satisfied the obligation of a debtor, equity, to prevent unjust enrichment, will revive the obligation and enforce it for his benefit. But where an attempt has been made to extend this doctrine beyond payments to protect actual interests of the third party [i.e. A], or payments at the express request of the debtor, many courts have stumbled over the maxim that equity does not protect a volunteer... So too where the request was from one whom he erroneously supposed to have authority. It is submitted, however, that if one acts under a bona fide belief in a state of fact or law which, if true, would justify the payment, he ought not to be regarded by equity as a mere officious intermeddler. No new burden is created, and the debtor ought not to be allowed to escape the old obligation at the expense of an innocent third party. This doctrine is upheld by an increasing body of authority." See Woodward, op. cit. supra note 7, § 161, where the same line of argument is adopted even in the case of municipal corporations which have received A's money or services through the unauthorized contracts of their agents.
Distinctions made between mistakes of law and of fact: There are cases which make this distinction in determining the question of A's officiousness and his right to quasi contractual relief. One such case is Millard v. D. L. & W. R. R.,21 where by mistake of law A paid B's tax, erroneously assessed against A. A's plea was that, since his payment was made by mistake, it could not be called "intrusive". Judgment for B. The court said: "I do not understand that a mere mistake as to a legal right or liability where one has knowledge or means of knowledge of the facts will make such payment involuntary or warrant a recovery, even though it be against conscience for the defendant to retain its benefit."2 A was allowed to prevail in an action at law in Iron City Tool Co. v. Long,23 and in Govern v. Russ.21

The part taken by equity here: subrogation: This remedy is frequently sought in mistake cases. A common case is where A, believing himself to be the owner of land, pays the taxes or a mortgage debt. Title is later decreed to be in B. The mistake is usually regarded as one of law. The decisions swing back and forth, now for A, now for B, the result being reached on various considerations, such as a request or consent by B, inferred from his knowledge that A was making the payments, especially if these payments were over a considerable period; good faith of A; his duty to pay, believing as he did; public policy in encouraging the payment of taxes; A's protection of his fancied rights and interests; the necessity of the payment and its benefit to B; or, on the other hand, A's lack of care and diligence.24

224 Pa. 448, 73 Atl. 904 (1909).
22b Ibid. 451, 73 Atl. at 905. For this Keener, op. cit. supra note 2, at 85–112, is cited. But Keener shows doubt of the validity of the distinction between mistakes of law and fact, and Woodward, op. cit. supra note 7, c. 3, after a thorough historical review, rejects it as unsound, arbitrary, and unjust. He shows that it originated in mistake and misconception, and that it has already begun to give way both here and in England. Negligence in A, or his means of knowledge should not defeat him if it has not led B to a change of position that would make it inequitable to extend relief to A. The court admits that the "equities" are with A, but says that his right to recover in quasi contract is a close question. It intimates also that, if the mistake had been one of fact, A might have recovered.
234 Sadler 57 (Pa. 1886).
23b 125 Iowa 188, 100 N. W. 325 (1904). Of this case, the notewriter in (1908) 8 Col. L. Rev. (cited supra note 21) at 655 says: "this is a very questionable exception to the ordinary case of the discharge of any liability by a stranger." He says that only a few jurisdictions allow such recoupment in quasi contract.
24 The following are some cases allowing subrogation where the mistake is one of law: Kemp v. Cosart, 47 Ark. 62, 14 S.W. 465 (1885) (dispute as to ownership; payment of the taxes necessary and beneficial to B); Goodnow v. Moulton, 51 Iowa 555, 2 N. W. 395 (1879) (dispute as to ownership); Kelly v. Duff, 61 N. H.
In *Walker v. Walker*,\(^{25}\) the widow, who had paid off a debt which was a lien on the land, had no notion of being subrogated to the rights of the creditor, and the court therefore held that she was a volunteer.

435 (1881) (A thinks he has an interest); Coudert v. Coudert, 43 N. J. Eq. 407, 5 Atl. 722 (1886); Capehart v. Mhoon, 58 N. C. 178 (1859) (A negligently thinks he is surety); Brewer v. Nash, 16 R. I. 458, 17 Atl. 857 (1889) (A buys land under void power of sale, the money going to pay B's debt; B keeps the money after he learns the facts; held that A is not a mere stranger). In Harrison v. Harrison, 149 Tenn. 601, 289 S. W. 906 (1924), a widow, ignorant of law and business, had homestead and dower rights to preserve. She paid her husband's debts which were liens on the land. The court said: "The equitable remedy of subrogation is by no means confined to those personally bound on the obligation", and cited 5 Pomeroy, *op. cit. supra* note 8, § 2344, where those entitled to this relief are divided into three classes: "First, those who act in performance of a legal duty, arising either by express agreement or by operation of law; second, those who act under the necessity of self-protection; third, those who act at the request of the debtor, directly or indirectly, or upon invitation of the public, and whose payments are favored by public policy." The court also quotes from Walker v. Walker, 138 Tenn. 679, 681, 200 S. W. 825 (1918) where the court, after stating the formula that a volunteer is not entitled to subrogation, continues: "It is probable that all that is meant by the general rule is that, if a volunteer pays the debt of a third party, although it is a lien upon property, with the intention of extinguishing the debt, and is not induced thereto by fraud, accident, or mistake, or by contract with the payee, he is not entitled to subrogation." This seems to mean that where A pays, intending to *make a gift of the debt*, and in that case only, he is not entitled to subrogation.

Cases denying subrogation where the mistake is one of law are: Iowa Homestead Co. v. Des Moines Nav. and R. R., *supra* note 19; Garrigan v. Knight, 47 Iowa 525 (1877) (A had no reason to make the mistake; was negligent; held "officious and an intermeddler"); Dawson v. Lee, 83 Ky. 49 (1885); Norton v. Highleyman, 88 Mo. 621 (1886).

Cases allowing subrogation where the mistake is one of fact are: City of Chicago v. C. & N. W. Ry., 186 Ill. 300, 57 N. E. 795 (1900); Bateson v. Phelps' Estate, 145 Mich. 605, 108 N. W. 1079 (1906) (recovery denied in law, but equitable recourse suggested); Sampson v. Mitchell, 125 Mo. 217, 28 S. W. 768 (1894); Hotchkiss v. Williams, 44 App. Div. 615, 60 N. Y. Supp. 168 (2d Dept. 1899); Williams v. Williams, 2 Dev. Eq. 69 (N. C. 1831) (A, administrator, paid estate's debts from own resources; held not to be officious, emphasis being placed on the necessity of the act, the motive, and the benefit to B); Kershaw County v. Town of Camden, 33 S. C. 140, 11 S. E. 635 (1890); Walker v. Walker, *supra*. *Contra*: Evans v. Halleck, 83 Mo. 376 (1884). In the last named case A, an administrator, paid in advance of the court's order, a debt of the estate. Here, just as in Williams v. Williams, *supra*, A believed mistakenly that the personal property of the estate would be enough to reimburse him. The court held that A paid at his own risk and had misappropriated the funds of the estate. Other claims outranked the one paid. See a note on subrogation in these cases in (1909) 58 U. of Pa. L. Rev. 328; also the very able note in (1907) 5 L. R. A. (N. S.) 838.

\(^{25}\) *Supra* note 24.
But it also held that, as the doctrine of subrogation is steadily expanding in its practical administration so as to embrace all cases where complete justice cannot be done without it, she was entitled to this remedy.

I. D. A by mistake of law or fact does B's work, thinking it is his own: The principles stated in the last section control here as well. It is immaterial whether B owes money or work to C; subrogation should work equally well in either case. If B was doing the work for himself, A's beneficial interference therewith takes on the aspect of improvements made on another's property. In *Columbus, Hocking Valley & Toledo Ry. v. Gaffney*, A did B's work, thinking it to be a part of his own job, for which he received a stated wage from the government. Presumably, B knew that A was doing its work. A had done this for six years intending, naturally, to charge no one for it beyond what he was already being paid. The work was done under a mistaken sense of duty, and, rightly enough, the court does not even suggest officiousness in A, or that he was a volunteer. The case was decided on the point that A had brought his action in contract, and as the facts showed none could have existed because of A's lack of intent to charge B, relief was denied. This does scant justice

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26 *Ohio St. 104, 61 N. E. 152 (1901).*

27 A similar case is *Johnson v. Boston, etc. R. R.*, 69 Vt. 521, 38 Atl. 267 (1897), where it was B's duty by contract with the government to transfer mail at a certain point. B had failed to do this, and A, mistakenly thinking it his duty to the government, made the transfers. Instead of deciding the case on the ground taken in the Gaffney case, *supra* note 26, the court goes further and says at 527, 38 Atl. at 270: "But he [A], thinking that it might be his duty to make them [i.e. the transfers], voluntarily proceeded to perform such service... There was no such necessity for the plaintiff's interference... In this view of the case, he [A] must be taken to be an officious volunteer, and therefore precluded from recovering." It seems a remarkable conclusion that A was officious as to B when A performs what he thinks is his mere duty to C and intends to charge B nothing for the work. Moreover, B was in at least equal fault in not knowing the terms of his contract with the government. B negligently does less than his duty requires, and A in good faith does more while B stands by and allows A to do his (B's) work, and yet it is considered that B should prevail! There is also a public interest here to throw into the balance.

An opposite result fortunately was reached in *Blowers v. So. Ry.*, 74 S. C. 221, 54 S. E. 368 (1906), and *McClary v. Michigan, etc. R. R.*, 102 Mich. 312, 60 N. W. 695 (1897). See also *Grossbier v. Chicago, St. P. M. & O. Ry.*, 173 Wis. 503, 181 N. W. 746 (1921). Here the facts were similar, except that A did not believe that doing B's work was his duty, at least he was uncertain about this and did the work grumblingly and under protest, and intending to be paid for doing B's work. Here the court holds that B was bound to know the terms of his own contract with the government. It made no difference that B did not expect to pay A, since B knew that A was doing the work and had insisted upon...
to A because of the narrow ground of decision. No doubt had entered A's mind as to his duty here, so that he could not be considered to have done B's work merely out of policy. In such a case, it might be proper to say that A had "taken his chances". This was the thought of the court in some of the cases in the last section, where there was a lively dispute between A and B as to who was the rightful owner of the property on which A voluntarily paid taxes while the court's decision was pending. But even in such a case, it would hardly be proper to call A officious. One should be allowed to protect any interest he may reasonably suppose himself to have, or even the "sporting chance" of an interest.

A's doing it. The court says at 509, 181 N. W. at 748: "In doing this work plaintiff was not a volunteer, nor was he acting officiously... [H]e was performing duties in which the public were interested, and under the circumstances he very properly continued to do more than his contract required."

In Rohr v. Baker, 13 Ore. 350, 10 Pac. 627 (1886), A, a contractor, mistakenly supposing he was performing his own contract, excavated some earth in a part of a street which B, another contractor, had contracted to excavate. The court, denying relief to A, said at 352, 10 Pac. at 627: "The case presented is that of a stranger doing work on Baker's contract without Baker's consent. The case, in principle, is the same as though he had ploughed Baker's field, or done work on his house, under similar circumstances." As far as equity is concerned A's case seems a good one. Bright v. Boyd, 1 Story 478 (U. S. 1841) gives A compensation for permanent improvements to lands under mistake of title. True, recovery in quasi contract has been denied in such cases: Welsh v. Welsh, 5 Ham. 425 (Ohio, 1835); but see Clark v. Davidson, 53 Wis. 317, 10 N. W. 384 (1881), and Keener, op. cit. supra note 2, at 369, where in substance he says there is no sufficient reason for denying A a recovery at law in such cases. "While it is true that the plaintiff did not intend to benefit the defendant, the fact is that he did." The basis of recovery here is unjust enrichment. Ibid. 370, 379, 385, 386.

State v. St. Johnsbury, 59 Vt. 332, 10 Atl. 531 (1887) seems to be a mistake of law case. The village of St. Johnsbury claimed in good faith to be entitled to recover fines and costs for offenses under the Vermont liquor law, but these were in fact payable to the state. The village prosecuted several of these cases as its own expense. This was the state's attorney's business, but he and the state auditor knew what the village was doing and did not object. Held, that the village could not keep the money collected nor charge the state with the costs of collecting it. The court says at 341, 10 Atl. at 535: "If one undertakes my business claiming it to be his own, and therein makes expenditures, I am not liable to him therefor, although he has advantaged me thereby. This is so even when one undertakes my business for me, and on my behalf, without my request, express or implied, and benefits me; for his services are gratuitous. One cannot thrust himself upon me, and make me his debtor, whether I will or not." This is a clear denial that the Roman law principle of negotiorum gestio has any place in English law. There is no obligation conceivable outside of strict contract, nor does the court allow anything to mistake and good faith.
OFFICIALNESS

I.E. A, relying upon the authority of B’s supposed agent, renders money or service values to B: Here, unlike the cases in the preceding section, A does not think he is paying his own debt or doing his own work, but believes he is giving values to B upon B’s request that he should intervene in his affairs. The principles that should here govern the question of A’s officiousness or the voluntariness of his conduct are in nowise different from the other mistake cases already shown, and nothing would be gained by a further consideration of these agency cases. Woodward well remarks that “so long as the plaintiff’s enrichment of the defendant is the result of honest mistake and not of malicious interference with the defendant’s affairs, there is no harm in compelling restitution.”

On the whole, it seems that, while there is some desultory talk of officiousness in these mistake cases, the courts in general have instinctively (or perhaps upon full consideration) felt that these are cases where that term cannot properly be used.

II. A performs B’s contract with C: Examination has shown the aversion that the common law has to A’s paying B’s debt to C. If A cannot do this unofficiously, there is equal reason to suppose that he cannot perform B’s contract with the law’s approval, provided he does this under all the limitations stated for the debt cases. As far as theory goes, the two things seem to be upon the same plane and to require an application of the same principles. The actual decisions thoroughly justify this conclusion by overwhelmingly denying A the right of recovery where he intervenes to perform B’s contract. Nor do we find that in this field equity takes the important part it assumed in the debt cases.

We are here considering only those contracts between B and C in which, according to present estimates, the public has but a slight interest, either in the subject matter thereof, or the promptness of their performance. There is the difficulty, already alluded to.

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28Op. cit. supra note 7, § 72. For enforcement of restitution in cases of ultra vires contracts of municipal corporations, see ibid. § 161; and for such contracts of private corporations, see ibid. §§ 154-160. For instances of where a subordinate agent of a railroad calls in a physician to attend one whom the railroad has injured, see ibid. § 201. For unauthorized borrowings by school directors, see infra p. 232-233.
29Supra p. 205 et seq.
30Supra p. 205.
31WOODWARD, op. cit. supra note 7, § 209: “The prompt discharge of a contractual obligation is not ordinarily a matter of grave public concern. As a rule, therefore, the default of a contractor will not warrant the intervention of a stranger to the contract.” KEENER, op. cit. supra note 2, at 351, agrees.
32Supra Part I (1929) 15 CORNELL LAW QUARTERLY 25, 47 et seq.
of measuring public interest in any given case. Suppose that B has made a contract with C to mend his decaying fences, or to gather and store his hay crop, or to attend his cow which lies sick with a colic, and that B defaults in each case. Suppose further that A is the only man willing, able, and available in the neighborhood to do these jobs. In which, if any, of these situations is the public interest strong enough to dispense with B's consent (privity of contract) and justify A's interference, C himself being absent and the need for action pressing? There is the other difficulty, already pointed out, of harmonizing and properly weighing these three factors of public interest, B's obligation, and benefit to B. There is the theoretical danger of so over-stressing public interest that the true quasi contractual gauge—benefit to B—is lost to view, and the whole case lifted out of quasi contract. Is not B benefited by A's performance of his private contractual obligation, as well as if it were an obligation which the public wants performed, or has the performance of a legal obligation ceased to be a benefit in these cases? Why should equity not lend its help to A, as long as it does so in cases of debt payment irrespective of any benefit B may have from the payment? Since in debt cases it is the creditor's rights that seem to govern, it would seem logical and proper in these contract cases, that if C wants A to perform B's contract and is satisfied with A's performance, A should be subrogated to C's rights against B, the defaulter. Confining C to the remedy of an action against B for breach of contract may be a poor remedy or no remedy at all, and specific performance, even if available, may be too slow. Or to take another angle, suppose in the three cases just suggested that C has not contracted with B or any one else to render these services, but that A, chancing by, sees the pressing need, and no one else being at hand, renders the service. There is no want of courts which would allow a recovery, and some cases already considered in this paper have said it would not be a trespass for A to go upon C's property to perform the service. Why should unrequested interference with B's contract be discouraged any more than unrequested interference with C's property? After all, privity of contract has nothing to do with the case, though everything seems to be made of it.

II.A. A performs B's contract with C, the public having a vital interest in its prompt performance: We here widen the scope of A's act by removing one of the limitations imposed. A's act is now, we are supposing, one of public interest. It has had, in this particular

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33Ibid.  
34Ibid.  
35Supra p. 205.
instance, little effect. So insistent is the continued demand that privity of contract be the only door to proper intervention when the thing intervened in is itself a contract, that even grave public interest has had to yield place to it. A few cases, however, have opposed the flood. One such is the early New York case of Forsyth v. Ganson, where B was bound by contract to support C for life, and upon his failure to do so, A, a son of C, fulfilled the contract. The court denied the need for privity between B and A and based its decision on the ground that the performance of his legal duty was a benefit to B, from which the law would raise his promise to repay A. This case seems not to have been followed in New York or elsewhere, sound as it is in principle. Indeed, a later New York case, on the same facts, held A could not recover because of his lack of privity.

II.B. Under assignment from C, A performs C's contract with B: Probably the most prominent of this type of cases is Boston Ice Co. v. Potter. The facts of this celebrated case are too well known to need restatement here. Quite similar is the case of Boulton v. Case v. Case, 263 N. Y. 263, 96 N. E. 440 (1911), where there was a sealed contract, and the court made much of that fact. Of course, if it be true that quasi contract, and not contract, is the basis of recovery, it can make no difference whether the contract acted upon by A was sealed or unsealed. Moody v. Moody, 14 Me. 307 (1837) shows the same facts, and a sealed contract. No emphasis was laid on the seal, but merely on the lack of privity. See Mathney v. Chester, 141 Ky. 790, 133 S. W. 754 (1911) (recovery denied for same reason); Savage v. McCorkle, 17 Ore. 42, 21 Pac. 444 (1888) (same facts; unsealed contract; recovery denied for same reason). In Lockwood v. Smith, 81 Misc. 334, 143 N. Y. Supp. 480 (Sup. Ct. 1913), B was bound by unsealed contract to support C for life, and to bury him. A claims under the undertaker who bore the burial expenses. Recovery was denied on the ground that there must be not only a contract, but A or the undertaker must be made a third party beneficiary of it, just as in Lawrence v. Fox, 20 N. Y. 268 (1859). There was no legal duty from C to A here, the court says, since C was under no duty to A to preserve enough of his property to pay his funeral expenses. For the different views entertained by Woodward and Keener in regard to these cases, see supra Part I (1929) 15 CORNELL LAW QUARTERLY 25, 48, n. 56.

Woods, op. cit. supra note 7, §§ 54-56, comments on it at length; also Keener, op. cit. supra note 2, at 360-361. See also an interesting and full analysis.
Jones, except that here A was in the employ of C when he (A) took the assignment of the contract to supply B, and B had a set-off against C, and also there had been no ill feeling between B and A before the assignment, as in the Potter case. Woodward thinks the value of the goods above the set-off is clearly recoverable, for the defendant must have expected to pay for that part, "and it can hardly be said that the plaintiff acted officiously in the premises." In Barnes v. Shoemaker, the facts were practically the same as in the Boulton case, but here A, in performing the assigned contract to supply books to B, sent along with the goods a letter telling B how the order came to be filled by him. B omitted to read the letter at the time, and later finding out that A had sent the books, refused to pay for them. The court held that B must pay, but added that it would have been otherwise if A had not sent the informative letter with the books. This last statement seems wrong: A would not have acted officiously had he omitted to inform B of the facts, and as B was

of the case by Costigan, op. cit. supra note 12, at 43, who there says: "Undoubtedly the inexcusable officiousness of plaintiff is always a defense in our law to a claim of quasi-contract liability, but is it true that one who in good faith believes himself to be assignee of an express contract and entitled to perform thereunder, and who out of consideration for the other party's feelings conceals his claims to be assignee, is to be rated as so officious that he has no equity against the one who has received and consumed satisfactory goods furnished in fulfilment of the contract? It cannot be true..." The Potter case itself does not mention officiousness, and Keener, alone of the writers just mentioned, thinks A was officious in not informing B of the assignment before supplying him with ice. He thinks A should have done so because of B's quarrel with A before the assignment. The other two writers think A deserved commendation for this concealment under the circumstances.

42op. cit. supra note 7, § 58. See ibid. § 56, where Woodward says that: "the mere fact that A is persona non grata, or that for some other reason B does not wish to deal with him, is insufficient, without other evidence, to convict A of officious meddling. Knowledge of B's feeling, on the part of A, must also be shown, and even then the proof may not be conclusive. Let it be supposed, for example, that A is aware of B's feeling, but confers the benefit in performance of a contract, believed to be valid, between B and C, of which he is the assignee. Is A guilty of officiousness? Under some circumstances, no doubt, it would be an impertinence for A to acquire by assignment a contract with B, who, to his knowledge, does not wish to deal with him. Under other circumstances, as for instance where the assignment of the contract is involved in the sale of a business or is taken in satisfaction of a debt, the act would be entirely free from impropriety. Rarely, it is believed, would it be fair to regard the purchase and performance of the contract by A as conduct so inexcusably officious as to justify B in refusing to make restitution." See Keener, op. cit. supra note 2, at 358-360.
4112 Ind. 512, 14 N. E. 367 (1887).
benefited and expected to pay, he could not have retained the books justly without paying for them.  

III. A by expenditure of time and labor saves B's property: Just as in the case where A pays B's money debt to C, it will aid clearness to state the limitations or conditions under which the act is done. In this case, these are the conditions: (a) A means to benefit B; (b) A means that B shall repay him; (c) there is no actual prior request for the service, or actual ratification or subsequent express promise of reimbursement by B; (d) A saves (keeps, or repairs) the property voluntarily, and not by (1) mere unconscious inadvertence, or (2) mistake of fact, thinking it to be his own property, or (3) mistake of law, thinking he is legally liable to save or preserve it at his own expense, or (4) necessity of self-protection or the urge of self-interest, or (5) the invitation of public interest.

This is one of the occasions when A may “dutifully intervene” in B’s affairs, and it is the one occasion where the English law seems

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44See Mudge v. Oliver, 1 Allen 74 (Mass. 1861); Woodward, op. cit. supra note 7, §§ 54-5; Cardozo, A Ministry of Justice (1921) 35 Harv. L. Rev. 119; and comment by Costigan, op. cit. supra note 12, at 42, n. 3, to the effect that, where A has not been “really very bad” in his enrichment of B, he may recover in a number of states including Massachusetts. The language of the court in the Shoemaker case, supra note 43, at 514, 14 N. E. at 368, seems far too strong for the ordinary assignment situation: “The right of a party to select his own patrons or to determine with whom he will deal, cannot be frustrated by a mere interloper who fills an order never sent to or intended for him, without the knowledge or consent of the person to whom the goods are supplied.” Pittsburg Plate Glass Co. v. MacDonald, 182 Mass. 593, 66 N. E. 415 (1903) is distinguishable from the foregoing cases, in that here B received no benefit from A’s act, and in addition, B had warned A beforehand not to do the work. Note that B’s protest after A has done the work and after B has claimed the goods is useless. Orcutt v. Nelson, 1 Gray 536 (Mass. 1854); Chase v. Corcoran, 106 Mass. 286 (1871); Randolph Iron Co. v. Elliott, 34 N. J. L. 184 (1870); Belfield v. National Supply Co., 189 Pa. 189, 42 Atl. 131 (1899) (here B knew that A was the seller before he actually received the goods); Wellauer v. Fellows, 48 Wis. 105, 4 N. W. 114 (1879). Cahill v. Hall, 161 Mass. 512, 37 N. E. 573 (1894) and Schmaling v. Thomlinson, 6 Taunt. 147 (1815) are also distinguishable, since in each case A was denied recovery because he already had a recourse against C, who had employed him to do the work.

45Supra p. 205.

46Woodward, op. cit. supra note 7, § 197: “The preservation of another’s property may be regarded as dutiful if it appears that the danger to the property is so imminent that notice probably cannot be given to the owner in time to enable him to take the necessary steps to preserve it.” Keener, op. cit. supra note 2, at 354: “If . . . when the service was rendered, it was the intention of the plaintiff to receive compensation for the service rendered, it would seem that the plaintiff could, in no sense, be said to be an officious volunteer in charging the defendant for the preservation of property which would have been destroyed
to come nearest to the principle of *negotiorum gestio* in the Roman law. Here, simple benefit to B is unmixed with other possible factors of decision and perforce becomes determinative. There is no legal obligation on B to save his property, if we exclude any public interest in the matter; there is no contract or debt; and there is no chance for subrogation, if A does the work alone and does not hire a third person to do it, as in *Hoover v. Epler.* For the sake of clearness we will divide the cases under the following headings, giving consideration under each to certain modifying circumstances:

1. **Cases where public interest in the saving of B's property has not entered into the court's decision:** At the outset we presuppose that A neither knows nor has reason to know that B would not wish the property to be preserved.

   (a) **Cases allowing recovery:** In *Nicholson v. Chapman,* A finds B's timber, which was washed up by the tide, and carries it to safety. The court sees no officiousness in A, saying: "This is a good office, and meritorious, at least in the moral sense of the word, and certainly intitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go, towards enforcing the payment. So it would if a horse had strayed, and ... was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner." Notice that the court does not conclusively presume that A intended a gift of the service, although the property was in instant danger of being lost, and there was therefore an "emergency". *Chase v.*

but for his intervention. It must be admitted, however, that the right of recovery is denied by the weight of authority." (This was written in 1893.) Bisnor, *op. cit. supra* note 15, § 236: "The duty to save the property of a third person is so absolute that he who does it in an emergency when otherwise it would be lost, not in mere voluntary kindness, but expecting to be paid, can recover from the owner compensation for his outlay or labor, on a contract created by law." See Heilman, *The Rights of a Volunteer Agent against his Principal in Roman Law and in Anglo-American Law* (1926) 4 Tenn. L. Rev. 34, 83.

4752 Pa. 522 (1866), where A, the servant in charge of B's horse, acting outside of his contract, had C shoe the horse and paid the bill with his own money. Held, that A was subrogated to C's rights. The facts that weighed with the court were that the act was necessary and that the benefit of it all went to the owner and none to A. If A had done the work himself, he should have been able to recover in his own right on the same principle.

48H. Bl. 254, 258 (1793).

49See *supra* note 46, where Bishop sees in an "emergency" a proper place for A to act—not for the court to presume that he meant a gift. See *supra* Part I (1929) 15 *Cornell Law Quarterly* 25, 36, 38.
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Corcoran\textsuperscript{50} follows the preceding case and is essentially the same in principle. The court in more definite terms stated that, when B retook his property from A, B's promise would be implied by law to repay A the necessary expenses of preserving it. No officiousness or gift is seen, and it is an emergency case. In Reeder v. Anderson's Adm'r\textsuperscript{s},\textsuperscript{51} A apprehends and restores B's runaway slave. The court said that while such friendly offices were frequently intended as a gift, nevertheless there is an implied request from the owner to all other persons to secure to him the lost property he is anxious to retrieve, and there should be an implied undertaking to indemnify another for his costs in so doing.\textsuperscript{52}

Two cases are of special interest. One is In re Bryant's Estate,\textsuperscript{53} where A had been agent and adviser of B. B died suddenly, and without known heirs, thus leaving A in sole charge of the estate. By the death of his principal it must be true that whatever A did in carrying on was done as an "uncommissioned agent" in the exact situation of the \textit{negotiorum gestor} in the Roman law. The court said\textsuperscript{54} that A was left "in charge and quasi possession as an agent

\textsuperscript{50}Supra note 44. It is noteworthy that B protested \textit{after} A had done the work. It availed him nothing. See Boston Ice Co. v. Potter, supra note 39; see supra note 44.

\textsuperscript{51}\textsuperscript{4} Dana 193 (Ky. 1836).

\textsuperscript{52}Like cases are: Armory v. Flynn, 10 Johns. 102 (N. Y. 1813), and Watts v. Ward, 1 Ore. 87 (1854), where A intervened to save B's property (geese and horses) and was allowed his expenses of preservation. Slightly different are cases where B's property is cast upon A's land by wind or wave and A merely lets it stay there. Such a case is Sheldon v. Sherman, 42 Barb. 368 (N. Y. 1864), aff'd, 42 N. Y. 484 (1870). A was allowed all damages and expenses when B retook his logs, but the court distinguished this from cases where A renders voluntary service, adding that A in such cases can recover nothing. Of course A does not intervene at all here. Another type is shown in Preston v. Neale, 12 Gray 222 (Mass. 1858), where B, an outgoing tenant, leaves his trunks without any agreement on the hands of A, an innkeeper. The court likened the case to where goods are found, or where they are deposited by wind or flood. The same facts appear in Moline, Milburn & Stoddard v. Neville, 52 Neb. 574, 72 N. W. 854 (1897). In the three last cases A may be said to be an "involuntary bailee". In the last two, anyway, where A could easily have removed the property, can it not be said that by voluntarily keeping it after knowledge of its presence he voluntarily intervened to preserve it? Here the language of an old authority is pertinent: "... [T]hough a man waive the possession of his goods, and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seise them after when he will. And if any man in the mean time put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found." SAINT GERMAINE, DOCTOR AND STUDENT (Muchall's 18th ed. 1815) c. 51.

\textsuperscript{50}\textsuperscript{180} Pa. 192, 36 Atl. 738 (1897).

\textsuperscript{53\textsuperscript{a}}Ibid. 195, 36 Atl. at 738.
without a known principal, and therefore with at least a moral duty to look after the property for the real owner whoever he might prove to be.” In the other case, *Beckwith v. Frisbie*, A, a private carrier, contracted to carry B’s goods to New York. A freeze held up the transportation, and A stored the goods to preserve them. No such contingency had been foreseen by either A or B. Held, that it was A’s “duty” to store the goods, and that equity demands that B repay A the storage costs, as it benefited B’s property and did not advantage A. This, too, fully exemplifies the Roman doctrine.

(b) Cases denying recovery: It has been said that the weight of authority denies recovery. If true, this is doubtless only true because of the “irrebuttable presumption” of a gift indulged in by the courts. Other cases so decide because there is no contract, or because A has forced his service, or for other reasons, some justifiable, others not.

2. Cases where the public might well be held to have an interest in the saving of B’s property: (a) Slave cases: In *Dunbar v. Williams*, A, a

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5423 Vt. 559 (1860).

55The principal [dominus negotii] was bound to make good to the negotiorum gestor all expenditure properly incurred by him for the other’s benefit, and to relieve him from all obligations reasonably undertaken in the course of his management.” But if the expenditure was not beneficial, it could not be reclaimed by the gestor. *Melville, A Manual of the Principles of Roman Law* (3d ed. 1921) 439, and n. 3. The gestor can recover only his actual costs and expenses and interest on the outlay from the date of expenditure. *Mackelday, Handbook of the Roman Law* (Dropsee ed. 1883) 373. If the common law allows more than this, it goes beyond the Roman law. In salvage cases under our law, and in general throughout the law of quasi contracts, the right to recover depends upon benefit actually conferred. In maritime salvage an unsuccessful attempt to save warrants no recovery. *Woodward, op. cit. supra* note 7, § 206 and p. 324, n. 3. So, it appears, in the cases of saving property on land, that, if the owner disclaims his property, he need not pay A for saving or keeping it. Chase v. Corcoran, *supra* note 44. But there is one case where an attorney was allowed to recover for services in the attempt to secure the release of one from an insane asylum, the services being faithfully and intelligently performed, though unsuccessfully. Lyon v. Minor, 174 Mich. 114, 140 N. W. 517 (1913); *Ann. Cas. 1915 A, 726*. In the Roman law, the principal must repay useful expenditures, “though in the event they may have come to no good” the measure of repayment would be the benefit at the time to the principal, not the cost to the gestor. *Buckland, A Text-Book of Roman Law from Augustus to Justinian* (1921) 535.

56*Supra* note 46.

57See *Woodward, op. cit. supra* note 7, § 207; see also *supra* Part I (1929) 15

58So the case of Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234 (1886).

5910 Johns. 249 (N. Y. 1813).
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physician, attended upon a slave of B’s, at the slave’s request but not at B’s, who knew nothing of A’s act till it was done. There was no emergency. The illness was slight, there was time enough to consult B before doing anything, and B was presumably ready to do what it was his duty to do. So, although it was a benefit to B to have his slave treated, it was not a necessary act, nor was A reasonable in performing it as he did. Recovery was denied. Another slave case is Force v. Haines. The facts are important since they recur in other cases involving the care of domestic animals and have caused doubt and discussion. In the Force case, B rented a slave to A for a stated period. At the end of the period A tendered back the slave to B, who refused to receive her or to pay for her maintenance. The slave was old, infirm, and helpless. A therefore took care of her for some years, but the court refused to allow A to recover from B. We omit discussion of the various grounds given for the ruling and will consider one only, viz., that B had positively refused to pay for the slave’s maintenance before A undertook this. This is the “against the teeth” argument. But here there is public interest in a human life arrayed on the other side. The human being is, by the mores then in force, also a mere chattel, the property of B. A’s case, it seems to the writer, can be made out from the following considerations. Not forcing the moral argument that the slave is a human being, but taking her as merely a piece of property, it may then follow that B is under no obligation to preserve his property, and if he is known to A to be thus unwilling, it would be officious for A to preserve it for him with the intention of charging him. But, admitting this, it does not follow that B can force A to keep his property for nothing. If B does not want his property, B, not A, is the one bound to make some proper disposition of it. B cannot place that burden upon A by merely refusing a responsibility that is B’s. Here B was under an obligation to resume possession of the slave at the end of the bailment period. He refused to take her, thus leaving her on the hands of A, who is now in the position of an involuntary bailee, and made such by B’s wrong. Has B any right

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60Keener, op. cit. supra note 2, at 348, styles A an “officious volunteer”. See Woodward, op. cit. supra note 7, § 195.

6117 N. J. L. 385 (1840).

62Cf. Rundell v. Bentley, supra note 37, where the age and infirmity of the person B had contracted to support weighed with the court in justifying A’s intervening to perform B’s contract.

63Keener, op. cit. supra note 2, at 346, answers the arguments of the court and insists that this case is quite the same in principle as where a husband wrongfully abandons wife or child and A provides them with necessaries.
to suppose that A consents thereafter to keep the slave without cost to B, simply by virtue of his denial in advance that he will pay for such keep? It is a strange legal argument that says one may get rid of an obligation by a full organ-toned denial that he will be bound by it, and a stranger one that he may by such procedure dictate for another person a particular line of conduct which he thinks will be favorable for him. A is in forced possession and is therefore a "proper person" to intervene in B's affairs. B can at any time he sees fit to do his duty stop the expense. A is not forcing service upon B, but B has forced a responsibility on A that he should have shouldered himself.

(b) Animal cases: In Mathie v. Hancock,\(^6^4\) A was in charge of B's horses. B died suddenly, and A continued to care for the horses until an administrator was appointed. The Vermont court denied A's claim to be reimbursed from B's estate. It is seen that this is very much the same case as In re Bryant's Estate,\(^6^5\) where A recovered. The court gives six reasons for its holding, none of which seem at all compelling. It certainly makes no difference that C (the administrator, not yet in office) had not contracted with A, or that C had no duty as to the horses at the time A acted. It cannot be true that A had no humanitarian duty toward the horses, for he had the care of them when B died and was therefore the appropriate person to go on feeding them. The court says it did not appear that A expected compensation, or that his action was necessary, since it did not appear that others were not at hand to give the care. A might be reasonably presumed to have expected compensation, but a jury should have found as to this. It would seem that the facts might be taken to make out a prima facie case for A on the question of the necessity for his service. If he had pushed aside those who were better entitled to act than he, that ought to be shown. The merely negative argument used seems hardly sufficient. The conclusion the court based on the foregoing reasons is that there was no unjust enrichment, notwithstanding the estate may have been benefited; for the plaintiff was a volunteer, and that defeats him, however it might be if he were not. The best commentary on this case is that of Todd v. Martin,\(^6^6\) which passes lightly over the difficulties mentioned by the Vermont court, and reaches an opposite conclusion.

(c) Public school cases: The following cases are somewhat out of line here, since in these cases A loans money (instead of bestowing

\(^{6^4}\)78 Vt. 414, 63 Atl. 143 (1906). For public interest in animals see supra Part I (1929) 15 CORNELL LAW QUARTERLY, 25, 49, n. 58.

\(^{6^5}\)Supra note 53.

\(^{6^6}\)4 Calif. Unrep. Cas. 805, 37 Pac. 872 (1894).
time and labor) for the completion (as well as repair) of school buildings, and for furnishing the equipment necessary to their greatest public utility. However, this is in a true sense the saving of property. The cases could well have been included among those dealing with mistake as to the powers of agents.\textsuperscript{67} In \textit{Baggerly v. Bainbridge State Bank},\textsuperscript{68} A loaned money to C (school district trustees) to pay the current operating expenses of the schools. C had no power to borrow for this purpose, and so there had been technically no request from B (the school corporation) for the loan. While A was not allowed to recover on C’s notes, he was allowed to recover for all his money which had been received and actually used to defray school expenses, being subrogated to this extent to the rights of the creditors. But relief was denied in \textit{Strickler v. Consolidated School District},\textsuperscript{69} on similar facts. A, the school directors, being forbidden by the state constitution to borrow beyond a certain amount, advanced of their own resources the additional money which was needed to complete a school house. A was denied recovery from B (the consolidated school district) on the ground that permitting this would be evading or nullifying the constitutional mandate. “Appellants [A] were volunteers pure and simple, and it is well settled that a court of equity will not aid a pure volunteer... Evidently they had the interest and welfare of their community very much at heart. It is to be regretted therefore that they should become the victims of their own misguided zeal for the public good.”\textsuperscript{70a}

3. \textit{A preserves B’s property in the face of B’s neglect thereof or his positive refusal of such service:}\textsuperscript{70} The neglect of an owner to protect his property may have two aspects. He may know that it is imperiled, and yet not care to save it; or he may have intended to act, and later forgotten or “neglected” to take action. The first shows unwillingness to save; the second does not. In the former case, A’s intervention would be unnecessary and without benefit and therefore officious, meddlesome. In the latter case, it might well not be such. Where B intentionally neglects his property, as well as where he

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\textsuperscript{67}Supra p. 223.  \textsuperscript{68}160 Ga. 556, 128 S. E. 766 (1925).

\textsuperscript{69}291 S. W. 136, 50 A. L. R. 1287 (Mo. 1927) (note collecting cases). The note says this case stands practically alone in such holding, the other cases in point being practically unanimous in allowing reimbursement to one who has loaned or advanced money for strictly public school purposes. The few cases agreeing with the Strickler case are readily distinguishable from the Baggerly case, supra note 68, in that either the loan was not necessary, or the money was not used for school purposes and therefore was of no benefit to the taxpayers.

\textsuperscript{70a}Ibid. 138.

\textsuperscript{70}WOODWARD, \textit{op. cit. supra} note 7, § 197, and n. 3.
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openly refuses A's services regarding it, A's intervention would be a "forcing of his services", and unless public interest or sentiment demanded his action, it would be inexcusably officious. The old case of Stokes v. Lewis illustrates the situation where public interest is lacking. A, one of two united parishes, paid the whole of the salary of a joint sexton, one-half of which had been customarily paid by B, the other parish. Before A paid, B had given A notice that it did not wish to pay its half. Lord Mansfield, C.J., denying A recovery for money paid, said that A had paid the quota of the other "in spite of their teeth".

Public interest cases: A preserves B's animal against B's express refusal to care for it or pay A for so doing: In Great Northern Ry. v. 

The Roman law did not allow the gestor to act if the principal had forbidden him. RADIN, HANDBOOK OF ROMAN LAW (1927) 303: "By the weight of ancient authority, the contrary action of negotiorum gestio never lay, if the principal did not wish the act to be done, or expressly forbade it, or if he objected to the volunteer for personal reasons. Justinian finally determined that, to free himself from liability, notice of the principal's refusal must actually reach the agent, and that for services rendered before such notice the principal was liable." The Roman law did not distinguish a special class of cases involving public interest in a high degree, as the English law does. The public interest underlay the whole doctrine evenly, but apparently was not allowed to override the principal's veto in the saving of his property. The confusion and uncertainty of the English law is thus notably absent from the Roman system. Probably it is true to put it thus: The Roman law saw the public good in the good of the individual; while the English law saw the individual's good in the public good.

See Mulligan v. Kenny, 34 La. Ann. 50 (1882). But in Gillette v. Ins. Co. of N. America, 39 Ill. App. 284 (1890), A, an insurance agent, probably for self-interested reasons, paid a premium on B's policy, B having neglected to pay it. The company brought an action against B for A's benefit. Held, that A was subrogated to the company's rights, and that no assignment was necessary for A to recover the premium from B. In Stern v. Haas, 54 N. D. 346, 209 N. W. 784 (1926), A and B occupied halves of a house separated by a common stairway and hall. Each tenant occupied her half of the stairs and hall and had an easement in the other half. An ordinance required that halls and stairs should be kept clean and lighted, but the manner and degree of doing this was left uncertain. A, a tidy person, thought B too slovenly in the care of her half and spent time and labor, and also money, in cleaning and lighting the whole hall and stairs. The court denied A reimbursement from B for her extra effort in the common cause on the general ground, as the writer understands, that A could not thus force her superior notions of housekeeping on her negligent neighbor and make the latter pay for them. The question of whether B benefited from A's work might be an open one. Also, was not the benefit of the light an incidental benefit? The better conditions were obviously not necessary to B. See opposed views on the case in (1927) 25 MICH. L. REV. 799, and (1927) 27 COL. L. REV. 220. Public interest is suggested as a factor. The court does not term A officious.
Swaffield, A was allowed recovery, but Earle v. Coburn denied it and was followed in this by Keith v. De Bussigney.

IV. A saves B's life, health, or limb: Under the prevailing ideas of western civilization it could probably seldom or never be accounted officious for any one to intervene to save another's life whenever an emergency threatens. "Danger invites rescue." Not only is public interest strongly engaged, but in normal cases there is the greatest conceivable benefit to him whose life is saved. The irrebuttable presumption of gratuitous service, which figures so largely in the saving of property, is apparently used without exception here, save in the case of professional persons such as physicians, surgeons, and nurses. Since it is their business to save life, health, and limb, the presumption is that they intend to charge, and that those treated

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74 L. R. 9 Ex. 132 (1874). B had a horse sent to himself over the plaintiff railroad (A). It arrived at night, and B was not there to accept it. A, having no place to keep it, placed it this first night in C's livery stable on B's credit. Dispute ensued, B refusing to accept the horse or to pay C. A paid C for keeping it there for some time, meaning to get its money back from B. Finally B accepted the horse, and A sued for reimbursement. The court said B failed his duty in not calling for the horse on its arrival, and that A had a duty of common humanity to take reasonable care of the horse. A was allowed to recover not only the charges for the first night but also those for the ensuing months, although A paid C the latter charges against B's express refusal to be answerable for them. Keener, op. cit. supra note 2, at 399, says: "The court put the case on the short ground that, as the plaintiff had acted reasonably and in discharge of a duty," the defendant ought to reimburse him.

75 130 Mass. 596 (1881).

76 179 Mass. 255, 60 N. E. 614 (1901). The same arguments made in the case of Force v. Haines, supra pp. 231, 232, apply equally well against the decisions in these two cases. See Morse v. Kenney, 87 Vt. 445, 89 Atl. 865 (1914). See Page, Contracts (2d ed. 1920) § 1518: "The result of such decisions is, in many cases, to give to A the choice between letting the animal starve to death or feeding it at his own expense. . . . Should the case of animals be controlled by the principles which apply to the preservation of inanimate property, or should the fact that animals suffer from want of food, as well as deteriorate in value, be sufficient to justify a departure from the ordinary rules of law? If provision were made generally for feeding deserted animals by some public officer at the expense of their owner, it might be proper to hold that the duty of A, on finding that B has left his animal without food, is to report that fact to the proper officer, and not to feed them at B's expense. If no such provision is made, the only humane rule is to permit A to feed them, and to allow him to recover the expense therefrom of B." See also Costigan's criticism of the Coburn case, supra note 75, in op. cit. supra note 12, at 43, 45. For a case somewhat like that of Morse v. Kenney, supra, but distinguishable therefrom, see First Nat. Bank v. Matlock, 99 Okla. 150, 226 Pac. 328 (1924), 36 A. L. R. 1088 (1925).

77 Woodward, op. cit. supra note 7, § 197.

78 Ibid. § 201.
by them expect to pay. All other persons, however, are presumed by the common law to give their services in life emergency cases without expectation of pay, nor at the common law, seemingly, was there ever any obligation on others apart from contract to pay them for such emergency services. For two reasons, therefore, a non-professional, acting in emergency, can never be called officious as to the one imperiled, for (1) action is invited by the endangered person and the public, and (2) the intervener, supposedly, never intends to charge such person. This would not hold true, however, if he intended to charge some third person whose duty he was performing in saving the life, as in the case of paupers.

In non-emergency cases, professional persons and laymen would be judged by the same rules as to their officiousness. Nor is there any longer a presumption that the layman means to make a gift of his services.

An interesting question still remains: Can a physician acting in an emergency ever be considered officious? A number of tort cases serve to throw some light on this question. Since the use of anesthetics became general in surgery, there have been cases where a contract has been made with a patient to perform a definite and limited operation upon him, and later, when he has become unconscious, and exploratory incisions have revealed another and unsuspected danger requiring immediate action, the surgeon in the exercise of his best judgment has extended the operation agreed upon or cut out some other more diseased organ. To this the patient's previous consent was never given, and since he was unconscious at the time the operation had to be performed, the act was done without getting his later consent to it. The question is: Should not the old common law rule requiring the patient's consent to everything done be changed now to conform to these new conditions? Is it not to the interest of the public and the patient that the skilled and responsible surgeon should be given a free hand to do what is necessary to save life and health with the least danger and suffering and expense, without the express consent of the patient being had beforehand? Some courts have already answered this in the affirm-
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ative. These are tort cases, it is true, the surgeon (A) being defendant in all of them and never a plaintiff asking remuneration for the voluntary performance of an act necessary and beneficial to the patient (B). But the fact that some courts have held A to have been justified in doing the unrequested act doubtless means that A could have reimbursement from B for work and labor performed. If A was thought to have been officious, he could not recover, as B, in that case, would not be unjustly enriched, though he had benefited by the operation. Evidently, the idea that A was officious never occurred to court or counsel.

If such should prove to be the law in these cases, it would be in strict conformity to the principles of the Roman doctrine of negotiorum gestio, or rather to that doctrine extended, for apparently that rule was never applied to cases of saving life, but only to property cases. Nevertheless it is a true "uncommissioned agency". The service was necessary and useful and reasonably undertaken, since B could not do it for himself, and there was no time or opportunity to consult with him. True, A is a volunteer, as B did not know the act was being done, or request it. All that, however, is immaterial, since it was done to benefit B, and he was actually benefited. A was under no legal obligation to do the act, nor was B under any legal obligation to allow the act to be done. No case could better show the fallacy of bringing contract and the requisites of contract into these quasi contractual situations.

Would it be officious for a physician to attempt to prolong the life of a person in extremis against the protest of such person? Suppose (a) B is unconscious when A (physician) arrives, but before that B, who is in the last stages of cancer, had been often heard by A to express the wish to die. (b) B is conscious when A arrives, but protests against A's doing anything to prolong his life and agony. (c) B is a Christian Scientist and does not desire A's services, or his presence, or that of any regular practitioner. (d) B's wife is in extremis. She requests A's services, but B dissents in A's presence, either because B is a Christian Scientist, or because B does not believe that A is a competent physician. Would A, meaning at the time to charge B, be officious in treating B's wife at her request, but against B's protest? Here, B owes a legal duty of care to his wife, while

recovery was allowed. No element of contract, of course, could be found here. See Bishop, op. cit. supra note 15, § 231; (1908) 8 Col. L. Rev. 58. See Brandner v. Krebs, 54 Ill. App. 652 (1894), where recovery was denied, but only because A had given credit to a third person, and not because the court thought him officious. For other cases, see Woodward, op. cit. supra note 7, § 201.
in the case of his own life, he owes no legal duty to any one to prolong it. In the first three cases, would the law "raise" an implied promise in B to repay A, against B's own protest? According to the language of the court in Earle v. Coburn it would seem not.

V. Where officiousness does not attach to A's act because of its public interest: (a) Where A buries B's wife: This subject has been sufficiently discussed when we considered the matter of "proper person". It may be added that the Roman law protected A in such cases by allowing him to recover in an action called the actio funeraria, which differed from the ordinary negotiorum gestio mainly in that it lay even "when he on whom the duty of burial lay forbade it to him who made the burial."

(b) Where A furnishes necessaries to B's wife or child: Here the question of officiousness may be said hardly to exist. Scarcely a reference is made to "proper person", any person being allowed to act. As the husband in such cases is in the wrong, having abandoned or failed to provide for his family, no notice to him is requisite before supplying the necessaries. The law does not require vain acts. So, also, A may act even against B's express prohibition and refusal to pay, though given in advance.

—supra note 75. See also the Falcke case, supra note 58, where it is said that benefits cannot be conferred upon a man against his will.

—supra Part I (1929) 15 CORNELL LAW QUARTERLY 25, 42 et seq.

In Skinner v. Tirrell, 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673 (1893), it was held that money loaned to B's wife to buy necessaries and actually so used was not itself a necessary. The point was also made that, as B's wife paid cash for the goods, there was never any debt against B which was paid with A's money, and therefore nothing for A to be subrogated to. The decision seems rather technical. If A had had B's wife buy upon B's credit, and then paid the bill, or if A had given her the necessaries out of his own stock, or had allowed the dealer (C) to charge him (A) for them, or if A had bought the goods outright and then handed them to B's wife, doubtless he could have recovered from B. See Mayhew v. Thayer, 8 Gray 172 (Mass. 1857); Wells v. Lachenmeyer, 2 How. Pr. (N. S.) 252 (N. Y. Sup. Ct. 1885). The distinction between necessaries and money to buy them with was rejected in Kenyon v. Farris, 47 Conn. 510 (1888), and this has found general acceptance in the United States. In this case recovery was allowed against B in equity but not in law. In De Brauwere v. De Brauwere, 203 N. Y. 460, 96 N. E. 722 (1911), B's deserted wife supported herself and children by labor and the expenditure of her own money. She was allowed recovery against her husband in a direct action. In neither case is officiousness spoken of. In Turner v. Woolworth, 165 App. Div. 70, 151 N. Y. Supp. 93 (2d Dept. 1914), A, the attorney for B's wife in a suit for divorce and alimony, furnished the wife money for necessaries pending the trial and was subrogated to her rights in the alimony.
(c) Where A furnishes necessaries to a pauper. The same principles are here involved. The county or municipality usually has the legal duty of providing such necessaries. This legal duty is usually imposed by statute, though these vary considerably in their import or the interpretation put upon them. Usually it has been held that, if the public authorities have failed after due notice and demand to perform this duty, anyone may supply the pauper with necessaries and recover from the officials charged with the duty. Probably even such notice would be excused in a case of great emergency, especially where it is medical services that are required, though it is hard to see why food and shelter might not be as instantly imperative in certain cases. In the same way, if one public corporation provides for a pauper or poor person whose support is legally a charge upon another public corporation or certain individuals, the former may recover from the latter.

VI. A under the compulsion of self-interest or self-protection performs B's legal obligation: In this relationship, where B is primarily liable to satisfy a debt or other legal obligation, and A is only secondarily liable upon it and fulfills it only to protect his own interests which are threatened by B’s default, the courts are nearly unanimous in considering A to be neither a volunteer nor officious. In such cases, neither request nor ratification by B is required. Self-protection needs no contract, A's act being regarded in the same light as where he is compelled to act by a contractual obligation, of which the relation of suretyship is a standard example.

The assent of the courts to this proposition being so general, it would be useless to cite cases in support of it. But it is of interest to inquire what kind or degree of interest A must have to bring him within the protection of this principle. A brief summary of some cases will indicate the mind of the courts on this point: (1) A owns an article which is in B's possession, and A pays B's debt to C to save his property from seizure or detention by C in the latter's collection of his claim against B; (2) A, a mortgagee, pays B's mortgage debt, or taxes, or, as a junior lienor, pays B's debt to C, a senior lienor; (3) A, a tenant for years, pays off an encumbrance on land, of which B is the tenant in remainder. The above three cases are those of most frequent occurrence. A recovers regularly, and officiousness

Woodward, op. cit. supra note 7, § 204, cites many cases on this point.

Wells v. Porter, 7 Wend. 119 (N. Y. 1831); Exall v. Partridge, 8 T. R. 308 (1799).


would hardly ever be charged. Other similar situations are given by Woodward. In general, it may be said that any vested interest which the law recognizes will justify A's intervening in self-protection. But the cases go even further, some of them allowing A to come in although his "property" interest has become very thin, being one in expectancy merely, or even existing in A's belief or fancy and not in actuality, as the event turns out to be. Such a case is: (5) A, after assignment of a lease to B, pays taxes for which B is primarily liable, A being bound to pay them only by reason of his covenant with a third person. A's interest in the land ceased entirely with his assignment of the lease to B. (6) A, having merely a future and contingent interest in the real estate under a will, pays off a mortgage on it with her own money, in order to save such interest from a present loss. The real estate never vested absolutely in A, but in her brother. A was subrogated to the rights of the mortgagee who had been paid with her money. A was held not to have been a volunteer any more than if the real estate had been absolutely hers at the time she paid. (7) A, a widow, by mistake of foreign law thought she had an interest in her deceased husband's land in the foreign state, whereas she had none at all. Held, that her discharge of the husband's purchase money notes with her own money entitled her to be subrogated to the rights of the payee. Of course, this coalesces with the mistake cases, and the court, as the whist phrase goes, "takes A out" on that score.

The above cases show a range of interest in physical property that reaches all the way from ownership to no actual interest at all but merely a supposed one. Compare, now, such cases with one like Boston Safe Deposit & Trust Co. v. Thomas, where an insurance...
agent, compelled only by a self-serving rule of his company and his own natural desire to get his commissions and build up his business, pays a premium on which B, the policy holder, had defaulted or was about to default. In this case, the agent was allowed to be subrogated to the rights of his company against B, who, by the court's interpretation of the contract, had covenanted to pay the premiums to the company (C). Of course, there was no privity of contract between B and A, but the court thought this was unnecessary, for equity did not require it, and since B had the benefit of A's money in the protection of the policy which A had prevented from lapsing, equity will subrogate A to C's rights. It was said that A was not a mere volunteer in so paying and may proceed against B and recover in his own name and right.

What can be said for this decision? Was A "required" or "compelled" to pay because his material interests urged him strongly to do so? If we suppose B to have "neglected" the payment of the premium in the sense of having forgotten to pay it, A's payment would be of benefit to B in keeping his property protected, and if the property had happened to be destroyed by fire just after A's paying, the benefit would have been very great. The policy itself may be regarded as a valuable piece of property. A and B are both interested in this piece of property—from different standpoints, it is true. The lapsing of policies is a bad thing for the insurance agent and his company. A's interest in B's policy is represented by the labor, time, and skill invested in the effort to get B to take it in the first place. A will also get renewal premiums if the policy is kept in force and will lose them if it is allowed to lapse. Public policy, too, is perhaps an element to be considered. It is for the public good that losses should be evenly distributed and borne by the united strength of many, rather than that a loss should overwhelm an individual. Is A's "interest" in this contract so much less than where a widow has no interest at all in her dead husband's property and pays her money because she merely thinks she has an interest?

Another case similar in principle is Noble v. Williams,55 where A, a school teacher, in order to perform his contract to the advantage of himself and the community, was obliged to advance out of his own pocket the money necessary to pay for school rent and equipment,
which money it was the statutory duty of the school board to provide and thus apply, but which they had failed to do after due notice. The court here refused relief: "No man entirely of his own volition can make another his debtor." It said that A should have brought mandamus against the school board or sued them on his contract. But in certain other cases, identical in principle, this argument has not prevailed, notably in *Eastgate v. Osage School District*,\(^9\) where B, the district board of education, was under a statutory duty to transport children from their homes to school. B, after request, refused to perform this duty, and A, who was the father of certain of these children entitled to transportation at the public expense, carried them to school himself in his own wagon. Here, recovery at law was allowed, and it was held that A was not required first to resort to the action of mandamus.

From this study of officiousness it will be seen that A's intervention in B's affairs will meet with constant favor at the hands of English and American courts only when there is some special public interest at stake, or when because of B's default A must act to protect himself. With respect, it is suggested that the principles governing approved action in an intervenor should be so extended in the direction called for by equity and the true principles of quasi contractual law, as to insure reimbursement for useful and necessary services reasonably rendered another, though without his request, or ratification, or subsequent promise to pay.

\(^9\) 41 N. D. 518, 171 N. W. 96 (1919). See the same holding in Sommers v. Putnam County Board, 113 Ohio St. 177, 148 N. E. 682 (1925), and a note commenting thereon in (1919) 28 YALE L. J. 832, where the writer quite properly observes, it would seem, that, where there is a strong moral obligation in A, united with a pronounced public interest, the decision should be for A. See also (1926) 26 COL. L. REV. 114; (1926) 24 MICH. L. REV. 511.