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Restitution for Benefits Conferred Without Request

*John W. Wade**

I. INTRODUCTION

The principle is now fully recognized in this country that a "person who has been unjustly enriched at the expense of another is required to make restitution to the other." This is the language of the first section of the *Restatement of Restitution*.¹ When one person confers a benefit upon another without the latter's solicitation, the benefit received constitutes an enrichment—a windfall, so to speak. This benefit may take one of several forms. It may involve (1) transferring property to the defendant, (2) saving, preserving or improving his property, (3) rendering personal services for him, or (4) performing for him a duty imposed directly by law or by his own contractual arrangements. In any of these situations there is an enrichment, and the principle quoted above comes into play if the enrichment is "unjust." When is it unjust? Obviously, it would not be so characterized if it were intended as a gift; just as obviously, the opposite is true if the plaintiff acted under legal compulsion and against his will. In making the determination, considerable weight is given to the circumstance that the benefit was not requested by the defendant.

The common law has long had a pronounced policy that benefits may not be forced upon a party against his will, so as to require him to pay for them. This idea has been forcefully expressed on a number of occasions.² Said the court in the leading English case, "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."³

* Dean, Vanderbilt University School of Law; author, *CASES AND MATERIALS ON RESTITUTION* (2d ed. 1966).

1. *RESTATEMENT, RESTITUTION* § 1 (1937).

2. Sometimes the viewing-with-alarm approach is used. Thus: if recovery should be allowed, "the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin." *Isle Royal Mining Co. v. Hertin*, 37 Mich. 332, 338 (1877) (Cooley, C.J.). "No man's private business, in the mode or time of it, would be under his control, or free from the interference of strangers, perhaps, idlers, drunkards, and perhaps enemies, under such pretences, drawing him from business into litigation." *Force v. Haines*, 17 N.J.L. 385, 387 (Sup. Ct. 1840).

3. *Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. D. 234, 248 (C.A. 1886) (Bowen, L.J.). The sentence immediately preceding this reads: "The general principle is,

Most of the time this idea has been indicated by applying an epithet to the plaintiff. The term most frequently used is that of "volunteer." Applied to the plaintiff, particularly if it carries the adjective "mere," it has proved the "kiss of death" and the sure indication that he will not be allowed to recover.⁴ Other derogatory terms used include meddler, intermeddler, interloper, mere stranger, mere impertinence.⁵ The *Restatement* uses the adjective, "officious," which carries a somewhat more restricted connotation.⁶ All of these terms embody the policy that one should not be required to pay for benefits which he did not solicit and does not desire.

It would not be inappropriate to regard this policy as conflicting with the unjust-enrichment principle, so that the two vie for dominance in general and for application in each fact situation in particular. Most statements of a rule have indicated that the volunteer-policy has prevailed over the unjust-enrichment principle, but a study of the cases indicates that there is a fairly delicate, and somewhat precarious balance between them and that the line of demarcation

beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure." Though the whole paragraph has been frequently quoted, it has been suggested that the last clause of the sentence above, regarding the existence of an "obligation to repay" is mere dictum, since the plaintiff was actually seeking a lien, and the law is clear that a lien is not available. GORF & JONES, *RESTITUTION* 237, 239 (1966). The succeeding paragraph, contrasting the maritime law of salvage, is quoted note 146 *infra*. Lord Kenyon expressed the idea first in *Exall v. Partridge*, 8 T.R. 308, 310, 101 Eng. Rep. 1405, 1406 (K.B. 1799): "It has been said that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor [*sic*; creditor], *volens volens*." For American quotations: "One cannot thrust himself upon me, and make me his debtor, whether I will or not." *State v. Village of St. Johnsbury*, 59 Vt. 332, 342, 10 Atl. 531, 535 (1887). "The law does not permit the liability of a party for a debt to one person to be shifted so as to make him debtor to another without his consent." *Inhabitants of South Seiuatue v. Inhabitants of Hanover*, 75 Mass. 420, 421 (1857). Perhaps it is significant that these are all early quotations.

4. *Cf.* Pomeroy: "The term is applied somewhat indiscriminately in the reports to almost anyone who applies for subrogation and is refused, no matter what the reason be, so that many statements of the courts are misleading." 5 POMEROY, *EQUITY JURISPRUDENCE* § 2348 n.91 (4th ed. 1919). As used here the word "volunteer" has a different meaning from that involved in the maxim: Equity will not aid a volunteer. There it means a donee or person who has not paid consideration. But by a confusion of the two ideas the maxim is sometimes used to prevent equitable relief to a person seeking restitution.

5. See, *e.g.*, *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453 (1886); *In re Leslie*, 23 Ch. D. 552 (1883).

6. "A person who officiously confers a benefit upon another is not entitled to restitution therefor." *RESTATEMENT, RESTITUTION* § 2 (1937). "Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place." *Id.*, comment *a*.

is a difficult one to draw. Instead of posing the problem in this fashion, however, it may be more accurate, and certainly more illuminating, to explain that the enrichment-principle provides for restitution only when the enrichment is unjust and that the volunteer-policy is a factor of consequence in determining whether or not the enrichment is unjust.⁷

On this basis, the principle that restitution is granted the plaintiff whenever the defendant is unjustly enriched at plaintiff's expense may be regarded as fully applicable to the cases of benefits conferred without request. The task is to determine whether the enrichment is unjust. Perhaps the best way to treat this problem is to examine the cases to see what restrictions they indicate on recovery.⁸ These restrictions are somewhat numerous and they may properly be given detailed consideration.

Preliminary reference should be made, however, to another factor which has sometimes played a part. This is the assumption that the granting of restitutionary relief may prove an inducement to a party to act. For this reason, when there is a recognized public interest in having one party intervene to perform another's neglected duty—supplying of necessaries to children, for example, or burial of the dead—restitution is normally granted.⁹ This is the purported reason, also, for the maritime law of salvage—to encourage the rescue of an endangered ship and cargo.¹⁰ This element may therefore tip the balance whenever the court or the legislature feels that intervention should be encouraged.

At an earlier time another factor also influenced results. This was the circumstance that there was no actual contractual relationship between the parties. Today, however, we recognize that there is an obligation imposed by law, not by consent of the parties, and that privity of contract is entirely unnecessary.¹¹ Other factors may also

7. See *id.* § 1, comment c; § 2, comment a, ¶2.

8. The leading article on the general subject is Hope, *Officiousness*, 15 CORNELL L.Q. 25 & 205 (1929); see also Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817 & 1073 (1961); Heilman, *The Rights of the Voluntary Agent against His Principal in Roman Law and in Anglo-American Law*, 4 TENN. L. REV. 34 & 76 (1925). For text treatments see RESTATEMENT, RESTITUTION, ch. 5 (1937); GOFF AND JONES, RESTITUTION, ch. 14 (1966); KEENER, QUASI-CONTRACTS, ch. 7 (1893); MUNKMAN, QUASI-CONTRACTS, chs. 5, 7 (1949); STOLJAR, QUASI-CONTRACTS, ch. 7 (1964) WINFIELD, QUASI-CONTRACTS §§ 18, 19 (1952); WOODWARD, QUASI-CONTRACTS, ch. 14 (1913).

9. For more detailed treatment, see pp. 1195, 1203 *infra*.

10. The law of salvage is considered in detail at pp. 1208-10 *infra*.

11. See Hope, *supra* note 8, at 30. For a recent presentation of the earlier viewpoint, see STOLJAR, QUASI-CONTRACTS 160 (1964). In this connection it is well to bear in mind that when there is actual consent of the parties, even though not set forth in express words, the recovery is on the contract rather than on the basis of restitution, as an obligation imposed as a matter of law. See discussion in *Kellum v. Browning's*

be of importance in individual cases.¹²

II. RESTRICTIONS ON RECOVERY

A. *No Recovery Unless Defendant Has Received a Measurable Enrichment*

This may appear to be a self-evident proposition, and indeed it is implicit in any statement of the enrichment principle. A benefit to the defendant is obviously necessary before he can be held liable. There are, however, certain embellishments on the requirement and explanations of its meaning.

The enrichment may be negative as well as positive. One is enriched not only when he receives an asset but also when someone else performs for him a duty which would be a burden to him. The clearest case is that of one person paying another's debt. The elimination of this obligation is clearly a benefit, and meets this requirement.¹³ Of course, other restrictions may still prevent recovery.

But a recovery, when granted, is normally restricted to the net enrichment. This is unlike the case of a benefit which was requested by the defendant, where the cost of purchasing or conferring it is often the measure of recovery, whether the defendant actually realized that amount of net gain or not. The cases most aptly illustrating this point are those involving improvements made on defendant's land under a mistake as to ownership. Here the measure of recovery is generally regarded as the net increase in the value of the land, rather than the cost of making the improvements, if it was more.¹⁴

If the plaintiff's services did not produce any net value for the

Adm'r, 231 Ky. 308, 21 S.W.2d 459 (1929); *Hertzog v. Hertzog*, 29 Pa. 465 (1865). The so-called agency by necessity usually involves an inference that the agent was authorized to act in the emergency. See RESTATEMENT (SECOND), AGENCY § 47 (1958); contrast this with § 14-I, involving a "restitutional power."

12. See, e.g., *Scoville v. Vail Inv. Co.*, 55 Ariz. 486, 103 P.2d 662 (1940); *Stein v. Simpson*, 37 Cal. 2d 79, 230 P.2d 816 (1951); *Mehl v. Norton*, 201 Minn. 203, 275 N.W. 843 (1937).

13. *But cf.* Hope, *supra* note 8, at 206, n.3. Mr. Hope suggests that there is actually no benefit since one creditor is simply being substituted for another, and the only thing that occurs is that defendant's burden is not increased, citing *Butler v. Rice*, [1910] 2 Ch. 277. This argument involves a logical lapse in an otherwise extremely valuable article. Applied literally it would mean that there is never an unjust enrichment. Whenever the defendant has received a positive benefit, if he is required to pay for it he is no better off and his situation has not changed. The time to determine whether there is a benefit is before an obligation is imposed from defendant to plaintiff, and the very purpose of making the determination is to decide whether to create the obligation.

14. See, e.g., *Combs v. Deaton*, 199 Ky. 477, 251 S.W. 638 (1923); *Reinmann v. Baum*, 115 Utah 147, 203 P.2d 387 (1949); RESTATEMENT, RESTITUTION §§ 42(1), 53(2) (1937).

defendant, then recovery is usually not justified.¹⁵ A possible exception to this involves personal services to an incapable defendant. Thus, when an unconscious patient was given emergency treatment by a doctor who failed to save him, recovery was allowed.¹⁶ So also when an attorney failed in an action of habeas corpus to release the defendant from an asylum, and she died while he was working on other relief.¹⁷

There may be other factors which affect the determination of whether there was a true benefit. Thus, when the defendant was contesting the validity of a debt and might have been relieved from paying it, the court held that it was not clear that payment by the plaintiff was beneficial.¹⁸ In another case, the court explained that payment of another's debt is beneficial, "provided no option or privilege of the person primarily or actually liable is thereby intercepted, or abridged or substantially altered."¹⁹ Other situations may easily be conceived where a detriment connected with the benefit causes its value to be outweighed.

A reasonably certain measurement of the enrichment is also needed. Thus, where the plaintiff saves the defendant's life, it certainly would not be thought that the total value of the defendant's life expectancy is the measure of the enrichment. There is, indeed, no accurate basis for measuring the benefit, and this may well be an important reason why courts have been slow to grant recovery in this situation.²⁰ On the other hand, if the plaintiff is a doctor who has regular fees for treating a patient, this difficulty does not exist and recovery is more freely granted. Similarly, in the case of action to save property from destruction, recovery should not be granted for the full value of the property, and if there is no other way of determining the value of the services, recovery is unlikely.

In this type of situation courts sometimes resort to a device used in actions for breach of contract when the normal measure of damages

15. See, e.g., *Mulligan v. Kenny*, 34 La. Ann. 50 (1882), where plaintiff replaced some rotted beams and other timbers in a church tower, without consent or approval of defendant. On the basis that the work to repair the tower adequately would still need to be done and would cost as much as if the plaintiff had done no work, the court held that there could be no recovery. There were other bases, in addition, for a holding for the defendant.

16. *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907); *Matheson v. Smiley*, 40 Man. 247, [1932] 1 West Weekly R. 758, [1932] 2 D.L.R. 787.

17. *Lyon v. Freshour's Estate*, 74 Mich. 114, 140 N.W. 517 (1913).

18. *Kenan v. Holloway*, 16 Ala. 53 (1849).

19. *Love v. Robinson*, 161 Miss. 585, 591, 137 So. 499, 500 (1931). The court went on to explain that if a tax collector paid taxes for a property owner he would deprive him of the two-year period of redemption and thus injure him.

20. See Dawson, *Rewards for the Rescue of Human Life?*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 142 (1961).

(what the plaintiff would have received if the contract had been carried out) is so vague as to be almost useless; they take the test of the expense to which the plaintiff has been put—his out-of-pocket loss.²¹ Thus, in *Chase v. Corcoran*,²² where the plaintiff found a damaged boat adrift on the river and recovered and repaired it, he was allowed a reimbursement of his “reasonable expenses of keeping and repairing it.”²³ Several other cases are in accord.²⁴ There are some indications that this approach may also apply to damages incurred by the plaintiff in rendering his service. Thus in *Sheldon v. Sherman*,²⁵ defendants’ logs broke loose from a boom and came to rest down the river on plaintiff’s land, where they remained for several months before being reclaimed. The court held that although the defendants were not originally at fault so as to be liable in tort, when they removed the logs, they became responsible for payment of damages on the basis of a promise raised by law. Application of this measure of recovery is less likely to be generally adopted, however, than that of out-of-pocket expenses in rendering the service to the defendant.²⁶

An interesting question arises when the plaintiff prevents what would normally be a loss to the defendant, but a third party would have been under a duty to replace that loss. Suppose, for example,

21. See McCORMICK, DAMAGES § 142 (1935).

22. 106 Mass. 286 (1871).

23. *Id.* at 288.

24. See, e.g., *Reeder v. Anderson’s Adm’rs*, 34 Ky. 193 (1836) (“implied undertaking to (at least) indemnify any person who shall by the expenditure of time and money, contribute to a reclamation of the lost property”); *Beckwith v. Frisbie*, 32 Vt. 559 (1860) (amount that bailor “might be obliged to expend in preserving his property”); cf. *Amory v. Flynn*, 10 Johns. R. 102 (N.Y. Sup. Ct. 1813) (“expense in securing” the property). *But cf.* *Bryan v. Akers*, 177 Ark. 681, 7 S.W.2d 325 (1925) (deputy sheriff’s expenses in recovering stolen car).

25. 42 N.Y. 484 (1870), *affirming* 42 Barb. 368 (N.Y. Sup. Ct. 1864).

26. Several jurisdictions have enacted “Good Samaritan indemnification legislation,” providing for governmental reimbursement to a private citizen injured or damaged in attempting to prevent the commission of a crime against the personal property of another.” See, e.g., CAL. PENAL CODE §§ 13600-03 (Deering, 1965 Supp.). There is similar legislation in Delaware, New York City and New Zealand. See also *Webb v. McGowin*, 232 Ala. 374, 168 So. 199 (1936), *affirming* 27 Ala. App. 82, 168 So. 196 (1935), where plaintiff was seriously injured in saving defendant’s life, and a promise to pay a weekly sum for support was held binding on the basis of a moral consideration. *Contra*, *Harrington v. Taylor*, 225 N.C. 690, 36 S.E.2d 227 (1945). See generally Note, *Promissory Obligations Based on Past Benefits or Other Moral Consideration*, 7 U. CHI. L. REV. 124 (1939). If the rescued person was negligent in getting himself in the dangerous position, a plaintiff who was injured in seeking to aid him is entitled, under modern law, to recover in a tort action. See, e.g., *Ruth v. Ruth*, 213 Tenn. 82, 372 S.W.2d 285 (1963); *Longacre v. Reddick*, 215 S.W.2d 404 (Tex. Civ. App. 1948), 2 VAND. L. REV. 491 (1948); cf. *Talbert v. Talbert*, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960) (son rescuing father from suicide); *Rushton v. Howle*, 79 Ga. App. 360, 53 S.E.2d 768 (1949) (attempt to save defendant’s car).

that the plaintiff saved the defendant's property from fire, but the property was insured or the defendant would have been able to recover the value of the property from the person who negligently started the fire. What is the enrichment under these circumstances? There seem to be no authorities directly in point, but several cases involving maritime salvage²⁷ are analogous. The holding in *The Meandros*²⁸ would suggest that defendant is liable for the value of the services in saving the ship.²⁹ On the other hand, there are several cases which indicate that the insurance company should be liable since it received a substantial benefit in the prevention of the loss. This is strongly suggested in the case of *The GL 40*,³⁰ and other cases imply as much.³¹ Several cases indicate that when the salvor's action prevented or reduced a third party's liability to the owner in negligence, he is entitled to salvage from that party.³² There are helpful

27. For detailed discussion of the relationship of the law of salvage to the common law of restitution, see pp. 1208-10 *infra*.

28. [1925] P. 61 (1924).

29. Defendants, a Greek company, owned a steamship which was requisitioned during the war between Greece and Turkey, under terms of requisition providing that the master and crew were to be conscripted into the Greek forces, and the vessel was to be returned after the period in the same condition as before the period. The vessel stranded and was saved from likely total loss by the plaintiffs. To defendants' contention that they received no benefit since they would have had a claim against the Greek government for the value of the ship, the court answered: "As a result of the salvage they have their ship and not a claim, and to say that they received no benefit from the salvage services seems to me to be illusory. In my judgment benefit was denied by the services." *Id.* at 67. *Cf.* *Seaman v. Erie Ry.*, 21 Fed. Cas. 918 (No. 12, 582) (E.D.N.Y. 1868).

30. 66 F.2d 764 (2d Cir. 1933): "The insurer had a direct interest in the raising of the barge, requested the libellant to perform the service and is therefore liable in an action in personam by the salvor to recover the value of the services The only benefit the insurer could derive from salvage of the barge was diminution of its liability under the policy." *Id.* at 766-67. Note that the insurer had requested the action of the salvor in this case; it had already paid almost the full value of the barge.

31. See, *e.g.*, *The Cargo ex Port Victor*, [1901] P. 243 (C.A.) (charterer liable for salvage of goods when it was responsible for their safe delivery); *cf.* *United States v. Cornell Steamboat Co.*, 202 U.S. 184 (1906) (United States liable for salvage on bags of sugar saved from fire because custom duties saved; salvage 10% of custom duties). See also *Five Steel Barges*, 15 P.D. 142 (1890); *Duncan v. Dundee Shipping Co.*, [1878] Sess. Cas. (5 Rettie) 742 (Scot. 1st Div.).

32. This is held in *Tice Towing Line v. James McWilliams Blue Line*, 51 F.2d 243 (S.D.N.Y. 1931), where the court said, "A claim for salvage may be maintained in personam against any party whose relationship to the vessel or thing salvaged is such that he might have been liable in respect of its damage or loss . . . or who, though not its owner, is benefited by its being salvaged. . . ." *Id.* at 246. On appeal the holding was modified because the claim against the tortfeasor, the Director General of Railroads, was not made within the statutory period, but the court was ready to "assume, arguendo, that the libellant had such a claim; that through its services the tort to the cargoes was parried; and that the tort-feasor's consequent relief from liability was a benefit which brought him within the same class as those whose property had been salvaged." *Tice Towing Line v. James McWilliams Blue Line*, 57 F.2d 183, 184 (2d Cir. 1932).

analyses, also, in some decisions outside the maritime area. In *Leebov v. United States Fidelity & Guaranty Co.*,³³ where a construction contractor with insurance against his liability for damage to land went to considerable expense to avert an impending landslide, he was allowed to recover expenses against the insurance company.³⁴ In *Schneider v. Eisovitch*,³⁵ plaintiff and her husband were negligently struck by the defendant in France, the husband being killed and plaintiff seriously hurt. Her brother-in-law and his wife came from England to make arrangements for bringing her and her husband's body back. The court held that, even assuming the plaintiff was not legally bound to pay the brother-in-law, she might recover from the defendant a sum sufficient to reimburse the brother-in-law for his out-of-pocket expenses so long as they were reasonable. Pertinent also are the numerous cases holding that one who is injured in seeking to rescue another's person or property from danger created by a tortfeasor can recover from the tortfeasor for his negligence.³⁶ Although there are gaps in the combined coverage of these cases, the net effect of the combination is the suggestion that if the defendant is held liable for the value of the plaintiff's services, he may recover from the third party whose liability in contract or tort was averted, and that the plaintiff might perhaps have a direct action against that third party. It seems likely that if all three parties are joined in a single suit, plaintiff's chance of recovery would be good. At least, he would be able to show a net benefit in the two defendants.

B. No Recovery if Plaintiff Intended To Act Gratuitously

Quite obviously an enrichment is not unjust if it was bestowed upon the defendant as a gift.³⁷ Nor should one be allowed to recover

See also *Shamrock Towing Co. v. Schiavone-Bonomo Corp.*, 275 F.2d 338 (2d Cir. 1960); *The Public Bath No. 13*, 61 Fed. 692 (S.D.N.Y. 1894).

33. 401 Pa. 477, 165 A.2d 82 (1960).

34. Said the court: "It would be a strange kind of argument and an equivocal type of justice which would hold that the defendant would be compelled to pay out, let us say, the sum of \$100,000 if the plaintiff had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the plaintiff actually expended to avoid a foreseeable disaster." *Id.* at 481, 165 A.2d at 84. *But cf.* *Fair v. Traders & Gen. Ins. Co.*, 235 Ark. 185, 357 S.W.2d 544 (1962), when an oil driller acted to minimize damage to adjoining property and was not allowed to recover for his expense from the insurance company on the ground that the possible damage was too speculative.

35. [1960] 2 Q.B. 430, [1960] 1 All E.R. 169 (1959).

36. The leading case is *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921).

37. "Thus . . . one who makes a gift . . . confers a benefit; . . . he [is not] entitled to restitution." RESTATEMENT, RESTITUTION § 1, comment c (1937). See *Ryan v. Johnson*, 220 Md. 70, 150 A.2d 906 (1959).

for services which he rendered without any intent to charge for them.³⁸ A change of circumstances so that the plaintiff does not now wish to render a gift is normally held not to alter the result. Once having made the gift or rendered the gratuitous service he cannot now change his mind and seek to recover because of new conditions.³⁹ On the other hand, if a gift is made under a mistake as to existing circumstances, although earlier cases denied restitutionary relief,⁴⁰ the more recent cases usually permit recovery when the actual circumstances make it equitable.⁴¹ If the mistake is to a material fact inducing the making of the gift, the donative intent should no longer be controlling and restitution may be granted.

Perhaps a majority of the cases in which the presence or absence of intent to charge is involved are concerned with services rendered to relatives living in the home. Courts have declared that while it is normally presumed that one who renders services intends to charge for them, the presumption is that they are gratuitous when they are rendered to a relative.⁴² Other factors, such as the reciprocal

38. See, e.g., *St. Jude's Church v. Van Denberg*, 31 Mich. 287 (1875), where a churchman who was senior warden and vestrymen, also served as sexton; but was unable to recover for his services in the latter capacity because "the circumstances not only fail to indicate that the services were rendered or received for compensation, but clearly repel the idea that payment was to be made or asked for." *Id.* at 289. See also *Osborn v. Boeing Airplane Co.*, 309 F.2d 99 (9th Cir. 1962): "Thus an obligation to pay, ordinarily, will not be implied in fact or by law if it is clear that there was indeed no expectation of payment, that a gratuity was intended to be conferred, that the benefit was conferred officiously, or that the question of payment was left to the unfettered direction of the recipient." *Id.* at 102. See also *Dusenka v. Dusenka*, 221 Minn. 234, 21 N.W.2d 528 (1946).

39. See, e.g., *Silano v. Carosella*, 272 Mass. 203, 172 N.E. 216 (1930), where plaintiffs looked after defendant's small daughter from the death of his wife until his remarriage some years later. "Subsequent conditions which cast an appearance of injustice over the transaction as a gift do not afford ground for legal liability. A gift flowing from unalloyed good will commonly promotes friendship and stimulates thankfulness, but ingratitude cannot transmit a gift into an obligation enforceable at law." *Id.* at 206, 172 N.E. at 218. See also *Done's Estate*, 54 York Leg. Rec. 93 (Orphans' Ct., Pa. 1940). Many of the cases illustrating this rule are those where the plaintiff acted in anticipation of a later gift or legacy and was later disappointed. See, e.g., *Payne v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 128 Cal. App. 2d 295, 275 P.2d 128 (1954); *Brown v. McCurdy*, 278 Pa. 19, 122 Atl. 169 (1923); *Osborn v. Governors of Guy's Hosp.*, 2 Strange 728, 93 Eng. Rep. 812 (K.B. 1727).

40. See, e.g., *St. Joseph's Orphan Soc'y v. Wolpert*, 80 Ky. 86 (1882); *Chariton County v. Hartman*, 190 Mo. 71, 88 S.W. 617 (1905).

41. See, e.g., *Old Man's Home, Inc. v. Lee's Estate*, 191 Miss. 699, 4 So. 2d 235 (1941); *Deskovick v. Porzio*, 78 N.J. Super. 82, 187 A.2d 610 (App. Div. 1963), 42 N.C.L. Rev. 247 (1963); *In re Agnew's Will*, 132 Misc. 466, 230 N.Y. Supp. 519 (Surr. Ct. 1928); *Conkling's Estate v. Champlin*, 193 Okla. 79, 141 P.2d 569 (1943).

42. See, e.g., *In re Tilghman's Estate*, 240 Minn. 494, 61 N.W.2d 743 (1953); *Twiford v. Waterfield*, 240 N.C. 582, 83 S.E.2d 548 (1954); *Ibach v. Hoffman*, 184 Ore. 296, 198 P.2d 266 (1948); *Hendryx v. Turner*, 109 Wash. 672, 187 Pac. 372 (1920). See Comment, *Quasi-Contracts—Relationships Raising Presumption of Gratuity*, 6 *FORDHAM L. REV.* 417 (1937).

rendering of services, the nature of the services, the closeness of the relationship of the parties, may affect the determination.⁴³ Actually, most of these cases turn upon the question of whether there is a true contract between the parties to pay for the services—a contract implied-in-fact from the circumstances. But these same circumstances also affect the determination as to whether quasi-contractual or restitutionary relief should be granted.⁴⁴ For, even though there is no contract implied in fact, a restitutionary remedy may be available. If the recipient of the services is incapable of contracting, for example, the same question is present as to whether or not a gift was intended.⁴⁵ Gratuitous services may also be the basis for a quasi-contractual recovery, if mistake vitiates the reason for the gratuity.

When the courts speak of presumptions in family-services cases, they are speaking of presumptions of fact, which are subject to being rebutted by a showing that the facts are actually otherwise.⁴⁶ In a different group of cases, however, the presumption is treated as a rule of law. The first case of significance is *Bartholomew v. Jackson*,⁴⁷ where plaintiff, having saved defendant's wheat stack from a fire, received a jury verdict of fifty cents as the value of his services. The court reversed, saying: "If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action."⁴⁸ The Louisiana court applied the same approach to a flood,⁴⁹ and the Oregon court in a flight of eloquence seemed to apply it more broadly.⁵⁰

43. See generally Havinghurst, *Services in the Home—A Study in Contract Concepts in Domestic Relations*, 41 YALE L.J. 386 (1932). The numerous cases are collected and organized in the extensive annotation in 7 A.L.R.2d 8-191 (1949).

44. See, e.g., *Kellum v. Browning's Adm'r*, 231 Ky. 308, 21 S.W.2d 459 (1929); *Thompson v. Hunter's Ex'r*, 269 S.W.2d 266 (Ky. 1954); Comment, 6 FORDHAM L. REV. 417 (1937).

45. See *In re Rhodes*, 44 Ch. D. 94 (C.A. 1889), involving an insane person, where it is made clear that recovery would be in quasi-contract. Under the circumstances of the case, it was held that the contributions amounted to a gift. Cf. *Schaefer v. Schaefer*, 255 Mass. 175, 151 N.E. 119 (1926).

46. See discussion in the cases cited in note 42 *supra*.

47. 20 Johns. R. 28 (N.Y. Sup. Ct. 1822). In the earlier New York case *Dunbar v. Williams*, 10 Johns. R. 249 (N.Y. Sup. Ct. 1813), a physician had treated the defendant's slave for a "foul disease" without notifying the defendant, and the court said that so long as he did the work without taking care that the owner's consent was obtained, "the service must be deemed gratuitous." There was no emergency here, and no reason to assume that the presumption of gratuity is irrebutable. But this case seems to have influenced the holding in *Bartholomew*.

48. 20 Johns. R. at 23.

49. *Watson v. Ledoux*, 8 La. Ann. 68 (1853); cf. *New Orleans, Ft. J. & G.I.R.R. v. Turcan*, 46 La. Ann. 161, 15 So. 187 (1894).

50. *Glenn v. Savage*, 14 Ore. 567, 13 Pac. 442 (1887). The plaintiff had saved some building materials of the defendant which had fallen into the Columbia River.

These are all early cases and their authority is now somewhat doubtful. More recent cases permitting recovery when a doctor renders emergency services to an unconscious person may perhaps be distinguished on the ground that the doctor is normally acting as a professional person and expecting to charge.⁵¹ Even so, this indicates that there is not an inflexible rule of law, but that the facts should control. The presumption should appropriately be treated as it is in the family-service cases, as an indication of the normal assumption to be drawn from the facts as to the plaintiff's intention—that he acted in the emergency without any thought of charging the defendant for his services—but subject to rebuttal by other available facts. And if the plaintiff incurs expenses in rendering the emergency aid, he would not normally be expecting to make a gift of this to the defendant. If there is any presumption as to this, it should be that the plaintiff is expecting reimbursement.⁵²

Said the court: "The law will never permit a friendly act or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand; it would be doing violence to some of the kindest and best effusions of the heart, to suffer them afterwards to be perverted by sordid avarice. Whatever differences may arise afterwards among men, let those meritorious and generous acts remain lasting monuments of the good offices intended in the days of good neighborhood and friendship; and let no after circumstances even tarnish or obliterate them from the recollection of the parties." *Id.* at 577-78, 13 Pac. at 448. In *Mathie v. Hancock*, 78 Vt. 414, 63 Atl. 143 (1906), where plaintiff supplied feed to the horses of a decedent, the court gave, among other reasons for holding for the defendant, that it did not "appear that he expected compensation, and that cannot be inferred." This is not a conclusive presumption but seems to deuy the effect of circumstantial evidence. See also *State v. Village of St. Johnsbury*, *supra* note 3; *cf. Kelley v. East Jordan Chem. Co.*, 162 Mich. 525, 127 N.W. 671 (1910).

51. *Cotnam v. Wisdom*, *supra* note 16; *Schoenburg v. Rose*, 145 N.Y. Supp. 831 (Munic. Ct. N.Y.C. 1914); *Matheson v. Smiley*, *supra* note 16. Contrast the case of *Caldwell v. Missouri State Life Ins. Co.*, 148 Ark. 474, 230 S.W. 566 (1921), where an attorney acted in behalf of an insurance company which was apparently being despoiled by its directors and was thus unable to aid itself, and induced the state superintendent of insurance to act to save the company. It was held that he could not recover for his services. Is there a difference between an attorney and a physician? Have the rules of champerty and maintenance any relevance?

52. Perhaps the same position should be taken regarding any injuries incurred by the plaintiff. There is an indirect relevance of certain tort rules to the general problem. Though the rule may have been otherwise at one time it is now well established that a tortfeasor is liable to a person who is injured while seeking to rescue the endangered person. See, *e.g.*, *Wagner v. International Ry.*, *supra* note 36; *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871). Rarely in recent times has a court refused recovery to one seeking to save property on the ground that he is a "mere volunteer," *e.g.*, *Glines v. Maine Cent. R.R.*, 94 N.H. 299, 52 A.2d 298 (1947); though conversely, it has been held that only a volunteer, and not one under a pre-existing duty, like a fireman, can recover. *Nastasio v. Cinnamon*, 295 S.W.2d 17 (Mo. 1956). The doctrine of the rescuer cases is now applied to the defendant who has jeopardized himself by his negligence, so that the plaintiff is injured in an attempt to rescue him. *E.g.*, *Carney v. Buryea*, 271 App. Div. 338, 65 N.Y.S.2d 902 (1946); for other cases, see note 26, *supra*. A "rescuer" who was negligent is therefore clearly liable for an injury to the rescuer.

In most of the cases involving emergency services, the plaintiff's activities are completed before the defendant learns about them. On some occasions, however, the defendant knows that they are being rendered. Suppose that the plaintiff intends to charge but the defendant believes they are being rendered without charge to him. In *Merritt v. American Dock & Trust Co.*,⁵³ defendant's warehouse caught fire, and plaintiff brought up two fireboats to assist in putting out the fire. Although the plaintiff's action was observed by the defendant's officers, the court held the defendant not liable on the ground that defendants could have assumed that the fireboats had been ordered by the insurer of the warehouse or the owners of some of the goods in it.⁵⁴ Conversely, in *Elliot Hospital v. Turcotte*,⁵⁵ the injured defendant was brought to the plaintiff hospital by his employer. The defendant assumed that the employer would pay for his treatment, but was held liable to the hospital. Perhaps the correct test was offered by the Washington court when it indicated that the determination depends not simply upon whether the defendant believed there was no charge against him but whether he reasonably so believed.⁵⁶

A final case in this connection is *Thomas v. Thomasville Shooting Club*,⁵⁷ where plaintiff rendered services in obtaining certain hunting leases, not intending to charge for them because he expected to be hired as a steward. Disappointed in this expectation, he was allowed to recover because the defendant club had not known his intent and had expected to pay him. This case is not likely to modify the general rule that one is not entitled to restitutionary relief for services which he rendered with no intent to charge for them. In addition, he may not recover if he caused the defendant reasonably to believe that the services were rendered with no intent to charge for them.

53. 27 J.&S. (59 N.Y. Super.) 83, 13 N.Y. Supp. 234 (Super. Ct. N.Y.C. 1891).

54. Cf. *McKissick, Alcorn, Magnus & Co. v. Hall*, 23 Sask. 201, [1928] 3 West. Weekly R. 509, [1929] 1 D.L.R. 48 (C.A. 1928).

55. 79 N.H. 110, 105 Atl. 361 (1918).

56. *Western Asphalt Co. v. Volle*, 25 Wash. 2d 428, 171 P.2d 159 (1946). The case involved the supplying of figures for use in submitting a construction bid. The court was speaking of a contract implied in fact, but the same rule would appropriately apply in a quasi-contract. Cf. *Engle v. Terrell*, 281 Ky. 88, 134 S.W.2d 980 (1939), where plaintiff sought contribution from other children for their part of his expenses in supporting the parents. Though the statute required children to support their parents, the court held that plaintiff must give advance notice and an opportunity to contribute because they might otherwise reasonably assume that he was acting without intent to seek relief.

57. 121 N.C. 238, 28 S.E. 293 (1897).

*C. No Recovery if Defendant Refuses To Accept the Benefit,
Unless It Is an Appropriate Performance of a Legal Duty*

Benefits cannot be forced upon a party who declines to receive them. This is tacitly assumed in many cases and expressly stated in a few. Thus, in the early case of *Stokes v. Lewis*,⁵⁸ where one parish paid the quota of another, Lord Mansfield held that there could be no recovery when the payment was made "in spite of their teeth." And in *Stcrn v. Haas*,⁵⁹ where plaintiff lighted and cleaned a common passageway against defendant's will, contribution was not allowed. Several cases have held that a plaintiff may not charge the defendant with money expended in keeping the defendant's chattel, when the latter has indicated he no longer wants the chattel and will not be responsible for it.⁶⁰ In others, a plaintiff who obtained a temporary injunction preventing interference with his activities, was not permitted to recover for the enrichment thus created in the defendant.⁶¹ In all of these cases the plaintiff's conduct can be characterized as officious.

There is one recognized exception to this rule, although its precise scope has not been clearly delineated. If the defendant fails to perform a duty imposed upon him by the law, under suitable circumstances a plaintiff may perform it for him and be granted restitutionary relief.⁶² The most clearly established illustration involves the obligation of a man to provide necessaries for his family. Numerous cases hold that when he refuses to meet his obligation a third person

58. 1 T.R. 20, 99 Eng. Rep. 949 (K.B. 1785).

59. 54 N.D. 346, 209 N.W. 784 (1926). See also *Saltz Bros., Inc. v. Saltz*, 122 F.2d 79 (D.C. Cir. 1941) (plaintiffs continued to act as managers after being discharged); *Mulligan v. Kenny*, 34 La. Ann. 50 (1882) (plaintiff spent more in repairing church tower than expressly ordered).

60. *Keith v. de Bussigney*, 179 Mass. 255, 60 N.E. 614 (1901); *Earle v. Coburn*, 130 Mass. 596 (1881); *Force v. Haines*, 17 N.J.L. 385 (Sup. Ct. 1840). The first two cases involved a horse; the last, a slave. As applied to living creatures, especially a human being, the application of this rule seems very questionable. Cf. *Great Northern Ry. v. Swaffield*, L.R. 9 Ex. 132 (1874) (horse). "But no man can be compelled to pay salvage, unless he chooses to take the property back." *Cornu v. Blackburne*, 2 Doug. 641, 649, 99 Eng. Rep. 406, 410, (K.B. 1781) (Lord Mansfield). See also *Lambros Seaplane Base, Inc. v. The Batory*, 215 F.2d 228 (2d Cir. 1954).

61. *Mehl v. Norton*, *supra* note 12 (occupancy of land, with the planting of crops); *Zawada v. Pennsylvania Sys. Bd. of Adjustment*, 392 Pa. 207, 140 A.2d 335 (1958) (serving as officer of union).

62. See the statement of the rule and exception in *Keith v. de Bussigney*, *supra* note 60, at 259, 60 N.E. at 615: "The rule is that one cannot be held liable on an implied contract to pay for that which he declines to permit to be done on his account. The exception to the rule is that when the law imposes upon one an obligation to do something which he declines to do, and which must be done to meet some legal requirement, the law in some cases treats performance by another performance for him, and implies a contract on his part to pay for it."

may perform it and hold him liable.⁶³ Thus in the striking case of *Carr v. Anderson*,⁶⁴ where the defendant's wife had been committed to a mental institution and he apparently wanted to keep her there, he was held liable to an attorney for services rendered in having her declared competent and released.⁶⁵

Another group of cases has involved the failure of a local government, or its agency, to perform a duty imposed upon it by statute. Thus, recovery has been allowed to one who performed the defendant's duty of providing necessaries for a pauper⁶⁶ (especially in case of an emergency),⁶⁷ supplying transportation to school children,⁶⁸ preparing a public road⁶⁹ and arranging for publication in a county newspaper.⁷⁰

A study of these cases indicates several limitations on the scope of the exception. First, although there are a few cases to the contrary,⁷¹ relief will not ordinarily be given in the case of a duty created by private contract;⁷² for relief to be given, the private obligation must

63. See, e.g., *Davis v. Fyfe*, 107 Cal. App. 281, 290 Pac. 468 (Dist. Ct. App. 1930) (money supplied to purchase necessaries); *Ott v. Hentall*, 70 N.H. 231, 47 Atl. 80 (1900) (necessaries). Sometimes the court speaks of an agency of necessity, but the relief is truly in restitution. See WOODWARD, QUASI CONTRACT § 203 (1913). On the supplying of necessaries (medical services) to a child, see the excellent opinion of Vanderbilt, C.J., in *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953). Other cases are collected in the comments on this case in 3 DE PAUL L. REV. 121 (1953), 8 RUTGERS L. REV. 415 (1953), 4 SYRACUSE L. REV. 375 (1953), 27 TEMP. L.Q. 227 (1953), 16 U. DET. L.J. 206 (1953) and 14 U. PRIT. L. REV. 619 (1953). Starting with *Jenkins v. Tucker*, 1 H. Bl. 90, 126 Eng. Rep. 55 (C.P. 1788), there are many cases on funeral expenses. See Annot., 35 A.L.R.2d 1399 (1954). One may, however, act officiously in this regard. See, e.g., *Quin v. Hill*, 4 Dem. 69 (Surr. Ct. N.Y. 1866), where the mother of the decedent took complete charge out of the hands of the husband.

64. 154 Minn. 162, 191 N.W. 407 (1923).

65. Said the court: "It is unimportant that the husband, who does not furnish the necessary, does not want it furnished, or forbids its furnishing, or declares in advance that he will not pay. The law imposes the obligation, and enforces it by a contract remedy." *Id.* at 165, 191 N.W. at 407.

66. See, e.g., *Eckman v. Township of Brady*, 81 Mich. 70, 45 N.W. 502 (1890); *Trustees of Cincinnati Township v. Ogden*, 5 Ohio 23 (1831).

67. Compare *Burnham v. Lincoln County*, 128 Neb. 47, 257 N.W. 491 (1934), with *Sayre v. Madison County*, 127 Neb. 200, 254 N.W. 874 (1934). See Comment, 13 NEB. L. BULL. 325 (1934); Note, 19 TENN. L. REV. 365 (1946).

68. See *Sommers v. Putnam County Bd. of Educ.*, 113 Ohio St. 177, 148 N.E. 682 (1925); *Rysdam v. School Dist.*, 154 Ore. 347, 58 P.2d 614 (1936). *Contra*, *Bruggeman v. Independent School Dist. No. 4*, 227 Iowa 661, 289 N.W. 5 (1939).

69. *French v. Lewis & Clark County*, 87 Mont. 448, 288 Pac. 455 (1930), 29 MICH. L. REV. 119 (1930).

70. *Board of Comm'rs of Decatur County v. Greensburg Times*, 215 Ind. 471, 19 N.E.2d 459, rehearing denied, 215 Ind. 471, 20 N.E.2d 647 (1939).

71. *Henry v. Knight*, 74 Ind. App. 562, 122 N.E. 675 (1919); *Forsyth v. Ganson*, 5 Wend. 558 (N.Y. Sup. Ct. 1830); *Rundell v. Bentley*, 53 Hun 272, 6 N.Y. Supp. 609 (Sup. Ct. 1889). These cases involved contracts to support a relative, performed on defendant's failure by another relative.

72. See, e.g., *Moody v. Moody*, 14 Me. 307 (1837); *Wilson v. Combs*, 203 Miss. 286, 33 So. 2d 830 (1948). These also involve contracts for support.

be one in which there is a strong public interest.⁷³ Second, in the case of a statutory obligation, if there is some other adequate method of enforcing it, that method may need to be employed.⁷⁴ Courts often insist on an action which is brought for the direct purpose of determining whether an obligation exists instead of an action of restitution, which is for the purpose of preventing unjust enrichment and thus raises the question of the existence of the obligation only indirectly.⁷⁵ Thirdly, the language of the statute is very important. It may be construed as providing for a recovery only if its terms are explicitly followed, thus eliminating any common law remedy in restitution.⁷⁶ Finally, there is some indication that plaintiff must show that he was an appropriate person to perform the duty.⁷⁷

This matter of the appropriate person to perform the duty may also play a significant role in expanding the scope of the exception. Thus, one who is acting to protect his own property or his own interests may perform another's duty, even his contractual duty, such as payment of a debt, and be entitled to restitution, despite the latter's

73. In *Sommers v. Putnam County Bd. of Educ.*, *supra* note 68, the court stated that the obligation must be one of "grave public concern." This was taken from *WOODWARD, QUASI CONTRACTS* § 194 (1913). Keener's language, "interest which the public has in its performance," is criticized by Woodward as too broad. The English court has refused to distinguish between a contractual duty and a statutory duty, not granting relief in either case. *In re National Motor Mail-Coach Co.*, [1908] 2 Ch. 515 (C.A.).

74. Thus, if mandamus will provide adequate relief, resort to it may be required. See, e.g., *Noble v. Williams*, 150 Ky. 439, 150 S.W. 507 (1912), where teachers furnished school supplies and sued for their value. Even in Ohio where the *Sommers* case allowing restitutionary relief in the school-transportation situation was decided, it was later held that the plaintiff must first exhaust his administrative remedies before himself supplying the transportation. *Halliday v. Marchington*, 44 Ohio App. 132, 184 N.E. 698 (1932). The existence of an emergency requiring immediate action may be very pertinent in determining whether the other relief is adequate.

75. An early illustration is *Stokes v. Lewis*, *supra* note 58, where one parish hired a sexton for itself and a second parish, paid him his salary and then sought contribution. Lord Mansfield indicated that the real question was whether the sexton was properly selected, and that a suit by him against the second parish was the right way to try it rather than this suit in quasi contract.

76. See, e.g., *Bruggeman v. Independent School Dist. No. 4*, *supra* note 68 (school transportation); *Frontier County v. Lincoln County*, 121 Neb. 701, 238 N.W. 317 (1931) (care of pauper). Cf. *Stern v. Haas*, *supra* note 59 (plaintiff must show that he did no more than the statute requires); *Manhattan Fire-Alarm Co. v. Weber*, 22 Misc. 729, 50 N.Y. Supp. 42 (Sup. Ct. 1898) (no showing that defendant might not have complied with the statute in some other way).

77. There has been no real indication of this in the cases involving the supplying of necessities to members of the defendant's family, but it has arisen in the cases of a statutory duty. There it appears that the plaintiff must have some personal interest in the performance of the duty. Thus, when recovery was allowed, the plaintiff's own children were transported by him (though he might take others in addition), and it was the plaintiff's own land which was served by the road which he laid out. See discussion in *Sommers v. Putnam County Bd. of Educ.*, *supra* note 68; *WOODWARD, QUASI CONTRACT* § 196 (1913).

deliberate refusal to perform it himself.⁷⁸ There are also cases holding that if the plaintiff has a moral obligation, he may perform the defendant's duty, and recover.⁷⁹ All of these cases are more completely considered subsequently.⁸⁰

D. *No Recovery for Benefits Conferred Without Suitable Opportunity To Decline, in Absence of Reasonable Excuse for Failure To Afford Opportunity*

A person is ordinarily not required to pay for benefits which were thrust upon him with no opportunity to refuse them. The fact that he is enriched is not enough, if he cannot avoid the enrichment.⁸¹

On the other hand, if the plaintiff, before bestowing the benefit on the defendant, notifies him and thus gives an opportunity to decline, the defendant, if he accepts the benefit, will be held liable. This may be on the basis of an actual contract—one implied-in-fact from the conduct of the parties, to pay the reasonable value;⁸² or it may be in restitution on the basis of an obligation imposed by law to pay for the enrichment. A similar problem arises when the defendant did not have an opportunity to decline the benefit before the plaintiff acted, but on a later occasion had the opportunity to elect whether or not to take it. Here, too, it would appear that if he takes the benefit, he should be liable.⁸³ The real question is whether he has a suitable opportunity to accept or decline. Two boat cases illustrate. In *Chase v. Corcoran*,⁸⁴ plaintiff rescued a drifting boat and repaired it when he could not locate the owner. Later, defendant claimed it and brought replevin when plaintiff insisted on payment. The court

78. Cf. *Exall v. Partridge*, 8 T.R. 308, 101 Eng. Rep. 1405 (K.B. 1799).

79. See, e.g., *Boney v. Central Mut. Ins. Co.*, 213 N.C. 563, 197 S.E. 122 (1938); *Hult v. Ebinger*, 222 Ore. 169, 352 P.2d 583 (1960); *Application of Mach*, 71 S.D. 460, 25 N.W.2d 881 (1947).

80. See pp. 1200, 1203 *infra*.

81. Though the law does not impose a liability on him to pay, he should be able to bind himself by a promise to compensate for the enrichment. Thus, in *Drake v. Bell*, 26 Misc. 237, 55 N.Y. Supp. 945 (Sup. Ct. 1899), where defendant's house was replastered and painted by mistake, a promise to pay the reasonable value was enforced. See generally Note, *Promissory Obligations Based on Past Benefits or Other Moral Consideration*, 7 U. CHI. L. REV. 124 (1939).

82. Often, the courts will speak of an adoption or a ratification.

83. Compare the remarks of Brett, M.R., in *Leigh v. Dickerson*, 15 Q.B.D. 60, 64-65 (1884): "Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that he is bound to accept it: in this case he has no opportunity of exercising any option, and he will be under no liability."

84. 106 Mass. 286 (1871).

held that plaintiff might recover the cost of storage and repairs, since defendant could have chosen to let the finder keep the boat.⁸⁵ In *J. L. Carpenter Co. v. Richardson*,⁸⁶ a motorboat was left with plaintiff to be tuned, but plaintiff did additional work on it. Defendant was held not liable for the unordered work, since he "was entitled to the use of his motorboat, and in order to use it was obliged to avail himself of such work as the plaintiff had performed on it."⁸⁷ The distinction is hard to express, yet it clearly exists. One who had apparently abandoned property is not put to an unreasonable election when required either to pay for the expense of saving and preserving it or to leave it with the finder. It is unreasonable, however, to expect the owner of valuable property to give up that property if he is unable to reject additional and unrequested benefits. In the case of improvements made upon defendant's land, he has an election if they are removable, but not if they are incorporated into the land.⁸⁸

On this basis it would appear that when defendant's debt is paid by plaintiff, defendant always has an option to accept or reject it, since he could insist that he had not accepted the payment and intended to pay the debt himself, all of this without injuring himself in any way or giving up anything. Although some courts have taken this viewpoint,⁸⁹ the majority position disregards it. The position is less applicable to the performance of other contractual obligations.

1. *Excuse.*

Even in a case where defendant was afforded no opportunity to accept or decline the benefit, restitution may still be granted against him if there was a reasonable excuse for failure to make the opportunity available. When is it not necessary to provide the option to the defendant? There are several types of situations.

(a). *Defendant Under Legal Obligation.*—If the defendant is under obligation to perform a legal duty, such that if he refused to perform the plaintiff might perform for him and be entitled to restitution,

85. *Cf. Hunter v. Felton*, 61 Vt. 359, 17 Atl. 739 (1889).

86. 118 Conn. 322, 172 Atl. 226 (1934).

87. Compare the remarks of Pollock, C.J., in the argument in *Taylor v. Laird*, 25 L.J. Ex. 329, 332 (1856): "Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? . . . The benefit of the service could not be rejected without refusing the property itself."

88. *Cf. Bichler v. Ternes*, 63 N.D. 295, 248 N.W. 185 (1933); *Jensen v. Probert*, 174 Ore. 143, 148 P.2d 248 (1944).

89. See, e.g., *Monast v. Marchant*, 72 Atl. 820 (R.I. 1909); *Crumlish's Adm'r v. Central Improvement Co.*, 38 W. Va. 390, 18 S.E. 456 (1893); *cf. Kenan v. Holloway*, 16 Ala. 53 (1849). The position is fully sustained by the quotation from Brett, M.R., quoted in note 83 *supra*, and the Western Australian Court quoted it to reach that result in *Cheeseman v. Industries Assistance Bd.* 29 W. Austl. L.R. 1 (1926).

then it may be that plaintiff can proceed to perform for him without notifying him and giving him the opportunity. But ordinarily this can be done safely only in the situation where it is obvious that giving the opportunity would be useless. Defendant should be afforded the chance of performing the legal duty himself unless his conduct or other circumstances manifestly indicate that he would have refused to exercise that chance.⁹⁰ Of course, if he has already refused to perform or is clearly in default, there is no need to give him an additional opportunity.⁹¹

(b). *Plaintiff Under Legal Compulsion.*—If the plaintiff is under a legal duty so that in performing his own obligation he discharges a duty of the defendant, he is normally excused from the requirement that he give the defendant an opportunity to perform. Of course, if the plaintiff's liability does not arise until after the defendant is in default, plaintiff is not under legal compulsion until his liability arises. The cases usually involve sureties, and joint tortfeasors. They need not be treated in detail here.⁹²

(c). *Plaintiff Acts To Protect His Own Property or Interests.*—The leading case is the early one of *Exall v. Partridge*.⁹³ Plaintiff's coach, left with defendants to be repaired, was seized by defendants' landlord as distress for rent in arrears, and he was forced to pay the rent to repossess it. It was held that he was entitled to restitution. Similar cases involve the payment of a senior mortgage by a junior mortgagee to protect his interest,⁹⁴ or payment of taxes by a mortgagee.⁹⁵

In other situations, the plaintiff acts to protect an interest rather than property. Thus, in *Zurich General Accident & Liability Insurance Co. v. Klein*,⁹⁶ defendant sold property which had an unknown tax lien on it, and plaintiff, insurance company for the attorney who had searched the titles and failed to locate the lien, paid the lien. Plaintiff was held entitled to restitution.⁹⁷ An interesting case in this connection is *Rivers v. Roe*,⁹⁸ where a bank clerk, accepting payment

90. See, e.g., the language in *Bradshaw v. Beard*, 12 C.B. (N. S.) 344, 142 Eng. Rep. 1175 (C.P. 1862) (funeral expenses); *Manhattan Fire-Alarm Co. v. Weber*, *supra* note 76; WOODWARD, QUASI CONTRACTS § 195 (1913).

91. See p. 1198, *supra*.

92. See generally RESTATEMENT, RESTITUTION §§ 76-102 (1937).

93. *Supra* note 78.

94. Subrogation is normally granted. See, e.g., *Allyn v. Dreher*, 124 Neb. 342, 246 N.W. 731 (1933); *Marks v. Baum Bldg. Co.*, 73 Okla. 264, 175 Pac. 818 (1918); *cf.* *Stein v. Simpson*, 37 Cal. 2d 79, 230 P.2d 816 (1951).

95. See, e.g., *Wyoming Bldg. & Loan Ass'n v. Mills Constr. Co.*, 38 Wyo. 515, 269 Pac. 45 (1928). See generally 27 CORNELL L.Q. 97 (1941).

96. 181 Pa. Super. 48, 121 A.2d 893 (1956).

97. *Cf.* *Kamarata v. Hayes Freight Lines, Inc.*, 123 Ind. App. 222, 108 N.E.2d 723 (1952), where a freight line failed to collect from the consignee and paid the shipper; held, it was subrogated to the shipper's right against the consignee.

98. 4 U.C.C.P. 21 (1854).

on a note from defendant, later showed up twenty-five pounds short and was required by the bank to pay it. He was permitted to recover from the defendant on proof that the total amount had not been paid. Courts differ as to whether plaintiff must have been acting to prevent a legal liability on his part. Thus two early cases disagree as to whether a sheriff who failed to execute on property, paying the amount himself, can obtain reimbursement,⁹⁹ and two recent cases similarly disagree as to whether a party who claims he was not negligent but nevertheless pays the amount of the injured party's loss can recover against the person who he claims to have been negligent.¹⁰⁰

(d). *Plaintiff Confers Benefit Under Mistake.*—If plaintiff pays defendant's debt under the mistaken apprehension that he was himself under a duty to do it or that he was protecting his own property, there is less reason to treat him as being officious, and the courts will usually grant restitution.¹⁰¹ The mistake excuses plaintiff from the requirement of giving defendant an opportunity to decline, when he is not placed in a worse position by the creation of an obligation to reimburse the plaintiff. His duty to pay is merely transferred to another party. A similar result is usually reached when the plaintiff mistakenly performs defendant's legal obligation.¹⁰² Somewhat analogous are the cases where plaintiff gratuitously provides necessities for the defendant under the mistaken apprehension that the latter is financially unable to provide them himself. Again, recent cases allow recovery.¹⁰³

99. *Ott v. Chapline*, 3 Har. & McH. 323 (Gen. Ct. Md. 1793) (yes); *Jones v. Wilson*, 3 Johns. R. 434 (N.Y. Sup. Ct. 1808) (no).

100. *Crain Bros. v. Duquesne Slag Prod. Co.*, 273 F.2d 948 (3d Cir. 1959) (no); *Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co.*, 97 So. 2d 435 (La. App. 1957) (yes); *cf. Tugboat Indian Co. v. A/S Ivarans Rederi*, 334 Pa. 15, 5 A.2d 153 (1939). Compare also the split of authority as to whether an insurance agent who pays the premium on a policy can recover from the person who was benefited. *Boston Safe-Deposit & Trust Co. v. Thomas*, 59 An. 470, 53 Pac. 472 (1898) (yes); *Whitehead v. Wilson Knitting Mills*, 194 N.C. 281, 139 S.E. 456 (1927).

101. See, *e.g.*, *Sykes v. Sykes*, 262 Ala. 277, 78 So. 2d 273 (1954); *Brookfield v. Rock Island Improvement Co.*, 205 Ark. 573, 169 S.W.2d 662 (1943) (taxes); *Ragan v. Kelly*, 180 Md. 324, 24 A.2d 289 (1942); *Monast v. Marchant*, *supra* note 89; *Harrison v. Harrison*, 149 Tenn. 601, 259 S.W. 906 (1921); *cf. Schuetz v. Schuetz*, 237 Wis. 1, 296 N.W. 70 (1941). *Contra*, *Federal Land Bank v. Dorman*, 112 Ind. App. 111, 41 N.E.2d 661 (1942). Compare *Norton v. Haggett*, 117 Vt. 130, 85 A.2d 571 (1952), where the plaintiff's mistake was not in thinking he was paying his own debt, but in thinking that he was acquiring the debt to enforce against the defendant. The adjective epithet, officious, could still be appropriately applied, and no relief was granted.

102. *McClary v. Michigan Cent. R.R.*, 102 Mich. 312, 60 N.W. 695 (1894); *Blackwood v. Southern Ry.*, 178 N.C. 342, 100 S.E. 610 (1919); *Blowers v. Southern Ry.*, 74 S.C. 221, 54 S.E. 368 (1906). *Contra*, *Rohr v. Baker*, 13 Ore. 350, 10 Pac. 627 (1886) (contract duty); *Johnson v. Boston & Maine R.R.*, 69 Vt. 521, 38 Atl. 267 (1897).

103. See, *e.g.*, *Old Men's Home, Inc. v. Lee's Estate*, 191 Miss. 669, 4 So. 2d 235 (1941); *In re Agnew's Will*, 132 Misc. 466, 230 N.Y. Supp. 519 (Surr. Ct. 1928);

A somewhat different situation exists when plaintiff has by mistake added improvements to defendant's property. Plaintiff's situation is not materially different, since his mistake is still the reason for his failure to give defendant an opportunity to decline. But defendant's situation is quite different; now, unwanted and unneeded benefits may be forced upon him. For this reason, a majority of the courts have stated that restitution is not granted.¹⁰⁴ Even here, however, a good number of cases have granted restitution,¹⁰⁵ and if the "betterment statutes" are added to this group, restitution is granted in a substantial number of states.¹⁰⁶ There is a clear enrichment, and the balancing process of weighing the equities of the mistaken plaintiff and the unconsenting defendant is a delicate one, whether done by court or legislature. It is easy to see why the states are divided.

On principle there would be more reason to grant restitution when the plaintiff has made necessary repairs rather than unneeded improvements. Several cases, however, have refused recovery,¹⁰⁷ and it is not possible to say that this is the law.

(e). *Plaintiff Acts Under an Emergency.*—If an emergency exists so that plaintiff cannot give defendant an opportunity to decline the benefit before acting, this may excuse him from that requirement. If other requirements are met, restitution is normally granted, provided the plaintiff has acted reasonably.

Thus, in the saving of life, a physician, who is regarded as not intending to render his services gratuitously, and whose services can be properly reduced to terms of a measurable benefit, is granted restitution.¹⁰⁸ A similar result is reached where a person saves or preserves

Conkling's Estate v. Champlin, 193 Okla. 79, 141 P.2d 569 (1943); *cf.* Upton-on-Severn Rural Dist. Council v. Powell, [1942] 1 All E.R. 220 (C.A.) (fire services rendered under mistaken belief defendant was in plaintiff's district). See Comment, 41 MICH. L. REV. 149 (1942).

104. See RESTATEMENT, RESTITUTION § 42 (1937): Numerous cases are cited in the Reporters' Notes. And see Annots., 104 A.L.R. 577 (1936), 57 A.L.R.2d 350 (1958).

105. See, *e.g.*, Bright v. Boyd, 1 Story 478, 2 Fed. Cas. 127 (No. 1875) (C.C. Me. 1841), 2 Story 605, 2 Fed. Cas. 134 (No. 1876) (C.C. Me. 1843); Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200 (1930); *cf.* Jensen v. Probert, *supra* note 88.

106. See Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456 (1957); Note, 6 W. RES. L. REV. 397 (1955); see note 161 *infra*.

107. Darce v. One Ford Automobile, 2 La. App. 185 (1925); Winney v. Leuci, 189 Misc. 441, 74 N.Y.S.2d 585 (Sup. Ct. 1947). Perhaps these cases are explained by the fact that they dealt with chattels, since the courts have been less inclined to allow recovery in the case of personal property than in that of real property. See Isle Royale Mining Co. v. Hertin, 37 Mich. 332 (1877). Recovery for repairs made to real property through mistake was allowed in Karon v. Kellogg, 195 Minn. 134, 261 N.W. 861 (1935), 34 MICH. L. REV. 577 (1936). *But cf.* Lawson v. O'Kelley, 81 Ca. App. 883, 60 S.E.2d 380 (1950).

108. See, *e.g.*, Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907); Schoenberg v. Rose, 145 N.Y. Supp. 831 (Munic. Ct. N.Y.C. 1914); Matheson v. Smiley, 40 Man. 247, [1932] 1 West. Weekly R. 758, [1932] 2 D.L.R. 787. In England, there is statutory provision for recovery by a "medical practitioner" of a specific amount for

another's property, so long as his services are not treated as gratuitous and a properly measurable benefit is bestowed.¹⁰⁹ Cases involving funeral expenses also come within this principle. Obviously, there is no opportunity to present the matter to the decedent's estate, or its representative, for decision.¹¹⁰ And finally, restitutionary relief is also awarded in those cases where the plaintiff looks after animals of a decedent, pending the qualifying of a representative of the estate who can take over.¹¹¹

(f). *Plaintiff Acts Under a Moral Responsibility.*—In a number of cases a plaintiff has been granted restitution when he was not under a legal obligation to perform a duty for the defendant but where he had a moral obligation to act. In most of these cases the discussion is posed in terms of the plaintiff's classification as a volunteer or not, relief depending upon the classification.

Thus, in *Ford v. United States*,¹¹² plaintiff, an American soldier in England, had stolen money from an Englishman. The United States Government reimbursed the victim in accordance with an American statute, and later caught plaintiff and confiscated some of his money. In his action for the money, the Government was able to counterclaim for the amount it had paid, on the ground that it had "a moral obligation to respond for depredations committed by a member of our armed forces." In several cases, where the defendant had breached a contract to provide support to a third party, a close relative of that party who supplied the support was allowed to recover on the ground that he was acting under "moral compulsion."¹¹³ In a case where a wife paid her husband's obligation, the court spoke of a "moral duty or at least a moral privilege."¹¹⁴ In an interesting pair

"emergency treatment," against the "person who was using the motor vehicle at the time of the event out of which the bodily injury arose." Road Traffic Act, 1960, 8 & 9 ELIZ. 2, ch. 16, § 213.

109. See, e.g., *Chase v. Corcoran*, *supra* note 84 (finder); *Berry v. Barbour*, 279 P.2d 335 (Okla. 1955) (fire damage repaired when owner out of country); *Great Northern Ry. v. Swaffield*, *supra* note 60 (bailee of horse). Cases like *Bartholomew v. Jackson*, 20 Johns. R. 28 (N.Y. Sup. Ct. 1822) turn on the question of whether the services were intended to be gratuitous or not, rather than on the issue of whether defendant was given an opportunity to decline the services.

110. E.g., *Cape Girardeau Bell Tel. Co. v. Hamil*, 160 Mo. App. 521, 140 S.W. 951 (1911); *Rogers v. Price*, 3 Y. & J. 28, 148 Eng. Rep. 1080 (Ex. 1829); Annot., 35 A.L.R.2d 1399 (1954).

111. See, e.g., *Todd v. Martin*, 4 Cal. Unrep. 805 37 Pac. 872 (1894); *Wilder Grain Co. v. Felker*, 296 Mass. 177, 5 N.E.2d 207 (1936); cf. *In re Bryant's Estate*, 180 Pa. 192, 36 Atl. 738 (1897) (management of estate). But cf. *Mathie v. Hancock*, 78 Vt. 414, 63 Atl. 143 (1906).

112. 88 F. Supp. 263 (Ct. Cl. 1950).

113. E.g., *Henry v. Knight*, *supra* note 71; *Application of Mach*, *supra* note 79, 46 MICH. L. REV. 115 (1942), 32 MINN. L. REV. 183 (1948). *Contra*, *Wragg v. Wragg*, 208 Iowa 939, 226 N.W. 99 (1929).

114. *Hult v. Ebinger*, *supra* note 79.

of cases, an agent negotiated a contract for a principal, and, though not legally bound, paid the third party when the principal reneged on the contract. An early English case denied recovery against the principal,¹¹⁵ but the North Carolina case granted it.¹¹⁶ Mere courtesy or accommodation for a friend does not meet the requirement here.¹¹⁷

(g). *Interests of Third Parties Involved.*—There have been a few cases suggesting that when public funds are used to pay the obligation of someone else, recovery may be had, although an individual would have been treated as a volunteer.¹¹⁸ And in another case involving a corporation which had paid the debts of its predecessor, it was held that restitution might be granted to protect the creditors of the payor.¹¹⁹

E. No Recovery for Benefits Incidentally Conferred

Where a plaintiff in the performance of his own duty incidentally confers a benefit on the defendant, it is usually held that restitution is not available. Thus, where one in possession of land hires the plaintiff to put an improvement on it, the fact that this inures to the benefit of the owner does not create liability to make restitution.¹²⁰ Similarly, where one benefits another's property in improving his own property¹²¹ or promoting his own interest in some manner,¹²² restitu-

115. *Child v. Morley*, 8 T.R. 610, 101 Eng. 1574 (K.B. 1800) ("voluntary payment").

116. *Boney v. Central Mut. Ins. Co.*, *supra* note 79 ("moral obligation"; court also speaks of bona fide belief he had an interest to protect).

117. See, e.g., *Beach v. Vandenburg*, 10 Johns. R. 361 (N.Y. Sup. Ct. 1813) (payment of neighbor's tax); *Tappin v. Broster*, 1 Car. & P. 112, 171 Eng. Rep. 1124 (N.P. 1823) (mail carrier paid mail charges).

118. *Inhabitants of City of Biddeford v. Benoit*, 128 Me. 240, 147 Atl. 151 (1929) (municipal corporation); *Love v. Robinson*, 161 Miss. 585, 137 So. 499 (1931) (state superintendant of banks). Apparently the rule does not apply when the defendant is also a municipal corporation. See *Inhabitants of South Scituate v. Inhabitants of Hanover*, 75 Mass. 420 (1857).

119. *Slater v. Bright*, 248 S.W.2d 915 (Ky. 1952).

120. See, e.g., *Kennedy v. Nelson*, 37 Ala. 484 70 So. 2d 822 (1954); *Chatfield v. Fish*, 126 Conn. 712, 10 A.2d 754 (1940); *La Chance v. Rigoli*, 325 Mass. 425, 91 N.E.2d 204 (1950). In *Burgess v. Grooms*, 81 A.2d 338 (Munic. Ct. App. D.C. 1951), an electric subcontractor who installed certain fixtures in accordance with his agreement with the general contractor, was unable to obtain quasi-contractual relief from the owners. "Admittedly defendants have received a benefit by having the fixture installed in their house. Speaking loosely, they have been 'enriched.' But we cannot say as a matter of law that it amounted to an unjust enrichment." *Id.* at 339. See also *Meelian v. Cheltenham Township*, 410 Pa. 446, 189 A.2d 593 (1963).

121. In *Uhner v. Farnsworth*, 80 Me. 500, 15 Atl. 65 (1888), plaintiff drained his own lime quarry and thus also drained the adjacent quarry of the defendant. In *Loring v. Bacon*, 4 Mass. 575 (1808), plaintiff, owner in fee of an upper room, repaired the roof and this aided defendant, owner in fee of the room below. No recovery was allowed in either case.

122. In *United States v. Pacific R.R.*, 120 U.S. 227 (1887), the United States for military purposes during the Civil War rebuilt a bridge on defendant's land that had

tion is not granted.

A more difficult question has arisen when an attorney has rendered services which benefit not only the persons who employed him but also other claimants similarly placed. Thus, in *Felton v. Finley*,¹²³ the attorney was employed by two nephews to break the will of an uncle; three others, who had refused to join in the employment of plaintiff or the suit, then decided to benefit from the results. The Idaho court first held that the plaintiff might recover since the defendants had voluntarily accepted the benefits of the services, but then changed its mind and held for the defendants. On the other hand, in *Winton v. Amos*,¹²⁴ the United States Supreme Court held that attorneys who had, under employment with certain members of an Indian group, rendered lobbying services which allegedly made Federal funds available to all members of the group, would be entitled to an "equitable charge upon the funds and lands for a reasonable and proportionate contribution toward value of services rendered and expenses incurred." The Court found applicable the principle that one with a common interest in a trust fund who saves it from destruction is entitled to reimbursement from the fund or the other beneficiaries,¹²⁵ and also spoke of the "curious analogy to the salvage services of the maritime law."

The distinction between the incidental-benefit cases and the cases where the plaintiff confers a benefit on defendant in protection of his own property or interests is one only of degree, and the attorney cases are close to the uncertain borderline. The courts may be especially inclined to hold liability when the defendants consciously and voluntarily elect to accept the benefits.¹²⁶

III. SPECIAL PROBLEMS

A. *Law and Equity*

Because of the historical development in some areas of the law of restitution, relief has been more freely given in equity than at law,

been burned. In *Green Tree Estates, Inc. v. Furstenberg*, 21 Wis. 2d 193, 124 N.W.2d 90 (1963), plaintiff, a real estate developer, put in curb, gutter and street base improvements to facilitate obtaining a loan from the FHA. In neither case were the property owners held liable.

¹²³. 69 Idaho 381, 209 P.2d 899 (1959).

¹²⁴. 255 U.S. 373 (1921).

¹²⁵. *Relying on Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1881).

¹²⁶. With the *Winton* case, contrast *Coleman v. United States*, 152 U.S. 96 (1894), where attorneys rendered services for clients leading toward vacating of land titles. This inured incidentally to the benefit of the federal government but no compensation was granted.

and there have been differences in the form of the remedy. There is less of this in the area involving benefits conferred without request than in several other fields.

The equitable remedy of subrogation may of course, be available when relief is granted for paying the debt of another.¹²⁷ But because of the traditional maxim that equity will not aid a volunteer, though it involves a misapplication in connection with the type of volunteer involved here,¹²⁸ equity has not developed a more liberal set of rules regarding the person who pays the debt of another.¹²⁹ A series of lower court decisions during the early part of this century suggested that the English courts of equity were about to develop a position permitting recovery as a general rule.¹³⁰ The Court of Appeal in 1938 apparently repudiated them, however, and indicated that the common law rule of no-recovery would apply in equity too.¹³¹

One place where the rules of equity have been more liberal is in regard to the putting of improvements on land under mistake as to ownership. It is quite generally held that when the owner seeks equitable relief, the court of equity will require him to do equity and to compensate for the value of the improvements, as a condition of receiving assistance.¹³² In some jurisdictions a stronger position has been taken and it is held that a court of equity will grant affirmative restitutionary relief.¹³³

B. *Paying Another's Debt*

It is not clear why the courts have continued to hold with such rigidity that one who pays another's debt is not entitled to restitution from him. At early common law, a chose in action was not assignable for reasons of champerty and maintenance.¹³⁴ For a long time,

127. See, e.g., *Love v. Robinson*, *supra* note 118; *Boney v. Central Mut. Ins. Co.*, *supra* note 79; *Hult v. Ebinger*, 222 Ore. 169, 352 P.2d 583 (1960); SHELDON, SUBROGATION, ch. 8 (1893); Note, *Subrogation in Favor of a "Volunteer,"* 39 HARV. L. REV. 381 (1926).

128. See *supra* note 4.

129. In a few cases, a somewhat more liberal attitude has indicated that relief may be more fully given in situations involving mistake or fulfillment of a moral obligation. See, e.g., the cases cited in note 127 *supra*.

130. See, e.g., *Butler v. Rice*, [1910] 2 Ch. 277 (C.A.); *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins*, [1924] 1 K. B. 775 (C.A.); *B. Liggett (Liverpool), Ltd. v. Burclays Bank*, [1928] 1 K.B. 48.

131. *In re Cleadon Trust, Ltd.*, [1939] Ch. 286 (C.A. 1938) (strong dissenting opinion by Greene, M. R.).

132. E.g., *Hawkins v. Brown*, 80 Ky. 186 (1882); *Freichnecht v. Meyer*, 39 N.J. Eq. 551 (Ct. Err. & App. 1885); *Jensen v. Probert*, *supra* note 88.

133. See, e.g., *Bright v. Boyd*, *supra* note 105; *Hardy v. Burroughs*, *supra* note 105; *Hatcher v. Briggs*, 6 Ore. 31 (1876).

134. See 4 CORBIN, CONTRACTS § 856 (1951); 3 WILLISTON, CONTRACTS § 405 (rev. ed. 1938).

however, it has been held that a debt is freely assignable, without regard to the consent of the debtor.¹³⁵ Even officious motives on the part of the payor-purchaser make no difference so long as he obtains a valid assignment. Where there is no express assignment, the position of the debtor is not made worse than it was prior to the payment, if the payment is treated as the equivalent of an assignment. Indeed, some courts have spoken of an equitable assignment which puts the payor in the position to enforce the original obligation as his own.¹³⁶ One objection which has sometimes been raised to this suggestion is that the payment amounts to a discharge of the debt, which therefore no longer exists to be enforced. This argument is merely technical,¹³⁷ and any validity in it is met by adopting the approach of equity in utilizing the remedy of subrogation. There, equity retains or revives the lien for the benefit of the payor, who steps into the shoes of the original obligee.¹³⁸ This is also what happens when one pays an unsecured debt of another, and the only reason why subrogation has not been applied is the old maxim that equity will not aid a volunteer. With the free assignability of choses in action there is no longer any reason to look on the payor with more disfavor than an assignee.¹³⁹ Since the payor merely steps into the shoes of the original creditor, he cannot change the original obligation, and the debtor's burden is in no way increased.

135. See 4 CORBIN, CONTRACTS § 865 (1951); 3 WILLISTON, CONTRACTS 412 (rev. ed. 1938).

136. *Neely v. Jones*, 16 W. Va. 625 (1880); *Crumlish's Adm'r v. Central Improvement Co.*, *supra* note 89; see *Brown v. Inhabitants of Chesterville*, 63 Me. 241 (1874); *cf. Neer v. Neer*, 80 S.W.2d 240 (Mo. App. 1935).

137. See 6 CORBIN, CONTRACTS § 1285 (1951); 6 WILLISTON, CONTRACTS §§ 1857-61 (rev. ed. 1938); Gold, *Accord and Satisfaction by a Stranger*, 19 CAN. B. REV. 165 (1941). Compare *Walter v. James*, L.R. 6 Ex. 124 (1871), where a third party paid defendant's debt as defendant's agent, even though his authority had been countermanded. Subsequently, "and before any act of defendant assenting to or adopting the payment, he requested plaintiff to return him the money, which was accordingly done." Held, plaintiff can recover from defendant, and defendant's plea of payment fails.

138. See 5 POMEROY, EQUITY JURISPRUDENCE § 2349 (4th ed. 1919); SHELDON, SUBROGATION § 6 (2d ed. 1893).

139. Indeed, if the debt is in the form of a negotiable instrument an express assignment is no longer necessary. The Uniform Commercial Code, § 3-603(2), provides: "Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee." In this connection it may be relevant to recall that in the prior Negotiable Instruments Law, based on the common law, a third party might intervene to protect the credit of the drawer of a bill which had been protested for nonpayment, by paying it, and he would then be entitled to restitution. See NIL §§ 171-77; RESTATEMENT, RESTITUTION § 117(2) (1937). This provision was omitted from the UCC as having been rendered obsolete by modern methods of communication which make it possible to get in touch with the drawer almost immediately. See UCC § 3-603, comment 2.

Look at the situation now from the standpoint of the debtor. If he has his debt paid and has no further obligation, he has clearly been enriched. And he just as clearly has a full opportunity to accept or decline the benefit. If he wishes, he may elect to disregard the payment and to insist that he be permitted to pay his own debt to the creditor. On the other hand, if he accepts the payment of his debt, he accepts the enrichment and should be required to make restitution. A procedural device which would make this clear but which apparently has not been utilized, would be for the plaintiff to join the debtor and the creditor in a single action, suing in the alternative. If the debtor elects to regard the plaintiff's action as a payment of his debt, he should be liable on the ground of his unjust enrichment; if he elects to regard it as not being a payment, he is still under obligation to the creditor, and the creditor should be liable to the plaintiff on the ground of his unjust enrichment. This method of bringing suit, if used, might constitute a means of bringing the substantive law into accord with modern conditions.

Whatever validity the no-relief-for-the-volunteer rule has, it does not apply to the payment of another's debt. For the opposite rule could not increase the debtor's burden; and the true volunteer, the officious person who is consciously trying to interfere in the debtor's affairs, can do that anyway by taking an express assignment. The no-recovery rule damages only the altruistic individual who was trying to help, or the person who was acting under a mistake. Is any social policy promoted by this anomaly? No, not even logical consistency is promoted by it.¹⁴⁰

C. *Relationship to the Law of Salvage and the Civil Law*

The law of salvage, as applied by both British and American courts, affords a marked contrast to the restrictive attitude of the common law. One who saves property from impending danger at sea is held entitled to compensation.¹⁴¹ His compensation includes reimbursement of his expenses, the value of his services, a consideration of the benefit to the owner, involving the value of the property, and a reasonable reward in addition. To enforce it he is given a lien on the property.¹⁴²

140. See discussion generally in Hope, *Officiousness*, 15 CORNELL L.Q. 205, 205-21 (1929); Note, *Subrogation and the Volunteer Rule*, 24 VA. L. REV. 771 (1938). See also 5 POMEROY, EQUITY JURISPRUDENCE § 2348 n.91 (4th ed. 1919); STOLJAR, QUASI-CONTRACT 141-45 (1964).

141. See generally GOFF AND JONES, RESTITUTION, ch. 15 (1966); KENNEDY, CIVIL SALVAGE (4th ed. 1958); NORRIS, SALVAGE (1958); GILMORE & BLACK, ADMIRALTY, ch. 8 (1957); ROBINSON, ADMIRALTY, ch. 15 (1939); Knauth, *Aviation and Salvage: The Application of Salvage Principles to Aircraft*, 36 COLUM. L. REV. 224 (1936).

142. The fact that the relief has normally been in the form of a lien on the property has meant that the courts have proved less ready in giving remedy in cases

To be entitled to relief he must prove that he is a volunteer; a pre-existing duty disqualifies him.¹⁴³

No adequate explanation has been given for this remarkable contrast with the common law, other than the historical development. It was referred to by Chief Justice Marshall in *Mason v. Ship Blaireau*,¹⁴⁴ but without explanation. In *Falcke v. Scottish Imperial Insurance Co.*,¹⁴⁵ the English Court of Appeal expressly rejected an analogy to salvage and refused to allow recovery by one who paid the obligation of another in order to have an insurance policy.¹⁴⁶ The only discovered case where the salvage analogy was used to allow recovery is the United States Supreme Court case of *Winton v. Amos*,¹⁴⁷ where an attorney who obtained a fund for some claimants was given equitable charge on it to permit compensation against others; no reference was made there to the restrictive common law cases.

The practical explanation of the difference between the common law and the maritime law may be that they are two different systems of law, with entirely different backgrounds. Yet it may be pertinent to see the reasons given by the courts for the salvage rule. On several occasions, the assertion has been made that it is founded upon principles of equity.¹⁴⁸ Frequently, it is said that the rule is based on

involving the saving of life. See Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779 (1954).

143. KENNEDY, CIVIL SALVAGE, ch. 3 (4th ed. 1958); NORRIS, SALVAGE, ch. 6 (1958). It is also necessary that the services have been rendered under circumstances such that a reasonably prudent owner would have accepted them. *The Emilie Galline*, [1903] P. 106.

144. 6 U.S. (2 Cranch) 240 (1804). "If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard be rendered at sea, and a very ample reward will be bestowed in the courts of justice." *Id.* at 266.

145. 34 Cb. D. 234 (C.A. 1886).

146. Said Bowen, L.J.: "The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances." *Id.* at 248-49.

147. *Supra* note 124. *Cf.* Allison v. Jenkins, [1904] 1 Ir. R. 341, 348-49, where the maritime law of general average and jettison was used as an analogy to allow contribution.

148. For example: "This is a general principle of natural equity . . . Considering all salvage therefore to be founded on the equity of remunerating private and individual services, a Court of Justice should be cautious not to treat it on any other principle." Sir Christopher Robinson, in *The Calypso*, 2 Hagg. 209, 218, 166 Eng. Rep. 221, 224 (Adm. 1828). "But the maritime law of salvage is based on principles of equity." Lord Wright, in *The Beaverford v. The Kafirstan*, [1938] A.C. 136, 147 (1937). Significantly, the admiralty courts never sought to base the recovery on the fiction of an implied contract. See Sir Francis Jeune, P., in *The Cargo ex Port Victor*, [1901]

the policy of encouraging mariners to undertake the task of rescue by offering a reward. And it is sometimes added that there is the countervailing policy of withdrawing the "temptation to embezzlement and dishonesty" by allowing him "a liberal compensation."¹⁴⁹ The extent to which these reasons may apply to activities on land should be apparent after reflection. Do they not have a reasonable application to emergency rescues of property or land? The only real difference is that custom has now developed so that the salvor at sea always expects compensation and there is no presumption of gratuity.¹⁵⁰

The Roman law had a doctrine of *negotiorum gestio*, under which one might take charge of the affairs of his absent neighbor and manage them in the latter's interest; he was then allowed to recover for the value of his services if they were beneficial. The doctrine passed into the civil law of the continent and, while its career has been somewhat varied in several European countries, it is still found and used in their law.¹⁵¹

The attitude here is that of encouraging a man to act in an altruistic fashion in aiding another. No deprecating remarks are made about the volunteer or the intermeddler, and there is no refusal to grant him relief. The common law has steadfastly refused to adopt this attitude.¹⁵² Some have explained it on the basis of the difference in temperament of the Anglo-Saxon and the Latin, suggesting that the characteristic independence of the former is not to be found in the latter.¹⁵³ The difference in the law may perhaps have started on

P. 243, 249 (C.A.). *But cf.* the argument in STOLJAR, QUASI-CONTRACT, ch. 7, § 4, (1964).

149. For presentation of both views see Justice Clifford in *The Blackwall*, 77 U. S. (10 Wall.) 1, 14 (1869); *The Clarita*, 90 U.S. (23 Wall.) 1, 17 (1874).

150. Where there is a local custom that salvage services will be rendered without expectation of pay, the American court held it to be against public policy and unenforceable, *The Star*, 53 F.2d 890 (D.C. Wash. 1931); but the British Columbia court held it to be controlling, *The "Freiya" v. The "R.S."*, [1921] 2 West. Weekly R. 111, 59 D.L.R. 330 (Ex. 1921).

151. A thorough and penetrating treatment of the doctrine in modern European law is to be found in Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817 & 1073 (1961); see also DAWSON, UNJUST ENRICHMENT 55-61, 136-40 (1951). For other treatments, see Heilman, *The Rights of the Volunteer Agent Against His Principal in Roman Law and in Anglo-American Law*, 4 TENN. L. REV. 34 & 76 (1925); Lorenzen, *The Negotiorum Gestio in Roman Modern Civil Law*, 13 CORNELL L.Q. 190 (1928); Comment, *Management of the Affairs of Another*, 36 TUL. L. REV. 108 (1961).

152. The position of the law in Louisiana is hard to determine. Compare *Police Jury v. Hampton*, 5 Mart. (N.S.) 389 (La. Sup. Ct. 1827), with *Watson v. Ledoux*, 8 La. Ann. 68 (1853). Compare *Darce v. One Ford Automobile*, *supra* note 107, with *Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co.*, 97 So. 2d 435 (La. App. 1957). See Comments, 7 TUL. L. REV. 253 (1933); 36 TUL. L. REV. 108 (1961).

153. See Allen, *Legal Duties*, 40 YALE L.J. 331, 375 (1931); Hope, *Officiousness*, 15 CORNELL L.Q. 25, 29 (1929). This is characterized as "nonsense" in STOLJAR, QUASI-CONTRACT 161 n.4 (1964).

this basis, but it now seems more historic than anything else.

The prime significance of the law of salvage and that of the civil law is that they indicate that a fully developed system of law may operate effectively under a principle which seeks to encourage rather than discourage and deprecate the rendering of aid to another without his prior request. The law of salvage is administered by our own courts without difficulty.

D. *Liens*

When restitution is granted to the person who voluntarily confers a benefit on another, it is only rarely that he is given a lien. Thus, in the early case of *Nicholson v. Chapman*,¹⁵⁴ it was held to be a conversion when a defendant who had rescued some timber from the river, refused to turn it over to the owner without compensation. The court expressed some doubt as to whether he was entitled to any relief, but declared that "at any rate it is fitting that he who claims the reward in such case should take upon himself the burden of proving the nature of the service which he has performed, and the quantum of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover."¹⁵⁵

Since then numerous cases have held that a finder or a bailee is not entitled to a lien for his services in preserving property.¹⁵⁶ On the other hand, where relief is granted to one who makes improvements on land mistakenly believing it to be his own, there are indications that he will be protected by a lien on the land.¹⁵⁷ In a few other isolated cases, liens have also been decreed.¹⁵⁸

IV. CONCLUSION

The restrictions on recovery¹⁵⁸ which have been spelled out at considerable length have all been presented from a negative standpoint.

154. 2 H. Bl. 254, 126 Eng. Rep. 536 (C.P. 1793). See also *Binstead v. Buck*, 2 Wm. Bl. 1117, 96 Eng. Rep. 660 (K.B. 1773).

155. 2 H. Bl. at 259, 126 Eng. Rep. at 539.

156. See, e.g., *Preston v. Ncale*, 78 Mass. 222 (1858); *Moline, Milburn & Stoddard Co. v. Neville*, 52 Neb. 574, 72 N.W. 854 (1897); *Amory v. Flynn*, 10 Johns. R. 102 (N.Y. Sup. Ct. 1813); *De la O v. Pueblo of Acoma*, 1 N.M. 226 (1857); *Meekins v. Simpson*, 178 N.C. 130, 96 S.E. 894 (1918). Statutes may change this, particularly, in regard to finders, and the law of salvage is different.

157. See, e.g., *Lee v. Menefield*, 249 Ala. 407, 31 So. 2d 581 (1947); *Rowe v. Arnett*, 241 Ky. 768, 45 S.W.2d 12 (1931); *Jensen v. Probert*, 174 Ore. 143, 148 P.2d 248 (1944).

158. See, e.g., *Winton v. Amos*, *supra* note 124 (equitable charge on funds obtained by attorney's efforts); *Berry v. Barbour*, *supra* note 109 (contractor doing additional work to save property in an emergency).

It may now be possible to summarize them and present a general principle stated in a positive fashion.

Perhaps the following two sentences will prove helpful in this regard:

One who, without intent to act gratuitously, confers a measurable benefit upon another, is entitled to restitution, if he affords the other an opportunity to decline the benefit or else has a reasonable excuse for failing to do so. If the other refuses to receive the benefit, he is not required to make restitution unless the actor justifiably performs for the other a duty imposed upon him by law.

Note that this is a statement of a general principle. It does not purport to be a rule providing for results with precision. Such a rule, or even a set of such rules, does not appear to be possible, or even desirable. This statement contains numerous terms which obviously require considerable discretion in their application, and allow the court considerable leeway.¹⁵⁹ On the other hand, it does purport to give direction to the line of thought of the court, and it aids in putting meaning in the adjective "unjust," in the phrase, unjust enrichment.

Note also that the statement eschews any use of expressions like "volunteer" or "officious." Any study of the cases indicates that these words have been question-begging epithets which have had the effect of creating a personal disability in the plaintiff. The policy that benefits cannot be forced upon a person against his will is incorporated into the statement, but hopefully in a more meaningful and less emotional fashion.

No attempt will be made to show the application of this statement of general principle to the various types of fact situations involving the saving, preserving or improving of life or property, or the per-

159. There is little value in trying here to paraphrase or annotate the whole statement. Some of the expressions which require discretionary interpretation are the following:

"intent to act gratuitously." This permits consideration of custom and use of presumptions—of fact, not law. It could have been phrased in terms of "intent to charge" as the *Restatement* does, the difference, of course, being one of burden of proof. In *Blackwood v. Southern Ry.*, 178 N.C. 343, 100 S.E. 610 (1910) it is put, "not intended to be gratuitous."

"measurable benefit." The discussion, pp. 1186-90 *supra* is relevant here.

"opportunity to decline the benefit." There can be difference of viewpoint as to whether there is an opportunity or not. See p. 1199 *supra*. Like "refuses to receive the benefit," this does not apply to refusal to pay for it.

"reasonable excuse." This is one of the broadest terms in the statement, covering several factors and affording considerable discretion. See pp. 1199-1204 *supra*. But it makes the exercise of discretion manifest rather than disguised.

"justifiably performs . . . a duty." This is the most indefinite expression in the statement. Yet it offers an approach which avoids an emotional epithet and promotes frank consideration of the factors involved.

formance of another's duties. A careful tracing of the application to these situations indicates that the statement may be interpreted to explain the existing holdings and to aid in reaching decisions.

In two types of situations it may have a liberalizing effect. One involves the payment of the debt of another. Here the language on which the decision would turn is that of the "opportunity to decline the benefit." Courts holding for the defendant may explain by saying that the opportunity must exist before the payment is made (unless there is a reasonable excuse). It is quite appropriate to say, however, that the opportunity may exist later; and that the defendant has a true opportunity to decline by insisting that he pay the debt himself. This would produce a different result, but one which should be encouraged.

The other situation involves the placing of improvement on land under mistake as to ownership. Here the language on which the decision will turn is "reasonable excuse for failure" to afford an opportunity to decline. The majority rule has been stated that restitution is not granted.¹⁶⁰ But a number of courts have consistently allowed it, and a number of states have changed the rule by statute. The existence of a statutory change and the procedural device of permitting recovery when the owner brings an action have undoubtedly taken care of many cases where the courts would more forthrightly have permitted recovery by judicial decision if it had been necessary. The phrase "reasonable excuse" does not compel either result, but would seem to be more persuasive toward allowing recovery.

The existence of the "betterment statutes,"¹⁶¹ the "finder statutes,"¹⁶² the "Good Samaritan statutes"¹⁶³ and others¹⁶⁴ is an indication of

160. RESTATEMENT, RESTITUTION § 42 (1937).

161. See, e.g., ILL. STAT. ANN. ch. 45, §§ 56-61 (Smith-Hurd, 1944); N.C. GEN. STAT. § 1-340 (1953); TEX. CIV. STAT. art. 7393 (Vernon, 1960); VA. CODE § 8-842 (1950); WIS. STAT. ANN. § 275.24 (1958). See Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456 (1957); Note, 6 W. RES. L. REV. 397 (1955). These are sometimes called "occupying claimants acts."

162. See, e.g., ILL. STAT. ANN. ch. 50, § 32 (Smith-Hurd, 1966); MO. STAT. ANN. § 447.050 (Vernon 1949). On estrays, see CALIF. AGR. CODE § 391 (Deering, 1962); MINN. STAT. ANN. § 346.04 (1957); N.C. GEN. STAT. § 79-2 (1953).

163. The statutes referred to here are those providing for reimbursement by the government to the Good Samaritan who is injured or damaged in trying to prevent the commission of a crime against another. See note 26 *supra*. Similar is the British statute providing that a doctor who provides emergency treatment to the victim of a traffic accident will receive specified compensation from the driver of the automobile. See note 108 *supra*. See generally the abstracts of the talk at a conference held at the University of Chicago School of Law, April 9, 1965, in *THE GOOD SAMARITAN AND THE BAD* (Sentry Ins. 1966), especially the comments of Norval Morris at p. 12.

The term, Good Samaritan statutes, is often applied to the acts passed in many states providing that a doctor who renders emergency aid will not be liable to the recipient for ordinary negligence. See Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301 (1964); Legis. Note, *Good Samaritan Pro-*

dissatisfaction with the traditional rule of no-recovery. It may well be argued that our law as a whole has become much more cognizant of social needs and less insistent upon the attitude of rugged individualism. Courts today would probably be less likely to take a doctrinaire approach, but ready instead to attempt carefully to balance the interests and claims of the parties. They would be less likely to do this, that is, if they were not frequently led astray from the real problems by the question-begging epithet, volunteer.

The effort here has been to pose a statement of the general principle which utilizes the valid idea behind the term but does not permit it automatically to impose a disability upon the plaintiff, barring him at the threshold of the court.

tection, 18 VAND. L. REV. 323 (1964). Like the indemnification statutes, these acts have as a major purpose the encouragement of the rendering of such aid. In this respect they appear to be somewhat unsuccessful. See Editorial, *The Good Samaritan and the Law*, 273 N. ENG. J. MED. 934 (1965). Another purpose is to prevent "ingratitude suits" on the part of the person aided. In this respect the acts are similar to automobile guest statutes, but both, of course, are special interest legislation.

On the general question of whether a legal duty should be imposed to rescue a person in danger, see THE GOOD SAMARITAN AND THE BAD, *supra*; Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1951); Note, *The Bad Samaritan: Rescue Reexamined*, 54 GEO. L.J. 629 (1966).

The subject of restitution by the state to the victims of crime has been much discussed in recent times. See especially, Symposium, *Compensation to Victims of Crimes of Personal Violence*, 50 MINN. L. REV. 211-310 (1965); Legis. Note, *Compensation for Victims of Crime*, 19 VAND. L. REV. 220 (1965).

[Since this paper has been put in print, the conference at the University of Chicago described in the first paragraph of this note has been published as a 300-page Doubleday Anchor Original Paperback. See THE GOOD SAMARITAN AND THE LAW (Ratchliffe ed. 1966). Besides the conference proceedings it contains a good number of other articles (such as Dean Ames' classic discussion of Law and Morals and Professor Dawson's article cited note 20 *supra*) and a proposed model Good Samaritan Act. Most of the emphasis is on the question of whether there should be a duty imposed by law to aid a person jeopardized by criminal acts, and there is no strong concentration on restitutionary recovery by the Good Samaritan. See, however, pp. 63-89 (Dawson article), 115-17 (rescuer's claims under civil law), 135-39 (Norval Morris remarks), 237 (rescuer's recovery of expenses and rewards), and 283-84 (model act provision for compensation).]

164. Another statute indicative of the legislative attitude is that in Maine providing that when logs become mixed in the river so that they cannot be conveniently separated one person may drive them all to the market and obtain reasonable compensation on demand, and if the owner cannot be ascertained he may libel the property and dispose of enough to defray the expense. 38 ME. REV. STAT. ANN. § 975 (1964); see *Wadleigh v. Katahdin Pulp & Paper Co.*, 116 Me. 107, 100 Atl. 150 (1917).