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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

CONTRACTS—AN ELEMENT OF NEGOTIABILITY BY CONTRACT

There is a difference of opinion among the courts as to the effect and interpretation of a provision in a non-negotiable contract designed by the parties to secure for the assignee of the creditor the claim free of defenses which exist between the original parties. This type of provision has appeared in some conditional sales contracts. It allows the purchaser the benefit of financial assistance

in the way of deferred payments, and at the same time permits the seller to assign the purchase agreement with ease. Such a result could be obtained by the use of a negotiable instrument if the terms of the agreement made by the parties are consonant with such an instrument. Where the terms of the contract are such that they will not fit the required form for a negotiable instrument, the parties rely upon this type of provision to achieve this one characteristic of negotiability. The provision which is relied upon to cut off the obligor's defenses may be phrased in different ways. Usually it is to the effect that the purchaser understands that the contract is to be assigned, and agrees that the payments will be made to such assignee without regard to any defenses, set-offs or counterclaims which the purchaser may have against the seller. It is the object of the parties to secure for such a non-negotiable contract right one, but only one, of the advantages or attributes of negotiable paper, and not an attempt to make the agreement a negotiable instrument. This is to be distinguished from an attempt to achieve full negotiability by methods other than those prescribed by the Negotiable Instruments Law.[1]

The divergence of opinion amony the courts with regard to the validity and interpretation of such provisions appears to arise primarily from differences as to the public policy involved in such a contractual agreement. However, some courts appear to have been influenced by a confusion concerning questions of estoppel[2] and attempted abrogation of the Negotiable Instruments Law.[3]

It has been said that the rule that an assignee of a non-negotiable chose in action takes subject to any defenses, set-offs or counterclaims which exist at the time of the assignment is so well established as a part of the common law that it may not be changed by agreement of the parties. This view seems to be based upon the theory that the common law rule is not merely a general statement of relationship between the parties but is a statement of public policy. Any attempt to change the rule by an agreement in advance to waive any defense would be void as against public policy.

The Missouri Court of Appeals seems to take this view in *Industrial Loan Company v. Grisham*[4] where the court allowed the obligor to set up a defense of breach of implied warranty of fitness and failure of consideration in spite of such a provision. The agreement, says the court, is void as against public policy. It is

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1. Beutel, *Negotiability by Contract* (1933) 28 ILL. L. REV. 205; Francis, *Do Some of the Major Postulates of the Law of Bills and Notes Need Re-examination?* (1929) 14 CORN. L. Q. 41; Note (1924) 24 COL. L. REV. 756; Comment (1933) 8 WIS. L. REV. 272. President and Directors of Manhattan Co. v. Morgan, 242 N. Y. 38, 150 N. E. 594 (1926); Enoch v. Brandon, 249 N. Y. 263, 164 N. E. 45 (1928).

2. Howie v. Lewis, 14 Pa. Super. Ct. 239 (1900); National City Bank of N. Y. v. Prospect Syndicate, Inc., 170 Misc. 611, 10 N. Y. S. (2d) 759 (1939).

3. Industrial Loan Company v. Grisham, 115 S. W. (2d) 214 (Mo. App. 1938); American National Bank of San Francisco v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923).

4. 115 S. W. (2d) 214 (Mo. App. 1938) *supra* note 3.

an attempt to "settle in advance the substantive rights of the parties under the contract and oust the courts of their jurisdiction to determine such rights." It is evidently the opinion of the court that these defenses are so firmly established within the substantive rights of the obligor by the common law assignment rule that they may not be removed by agreement. To sustain this position, *San Francisco Securities Corporation v. Phoenix Motor Co.*[5] was cited, in which an assignment statute was relied upon. However, the Missouri Supreme Court had previously said concerning this case that a statute would seem to be unnecessary since it merely stated a rule of common law.[6] The court also said that to give effect to such a provision would be a violation of public policy declared by the Usury statute. Although there was no attempt to establish usury, the provision was in terms broad enough to cut off this defense, as well as all other defenses.[7] In view of this fact, the court may have considered the provision too comprehensive and all inclusive. That, however, is to overlook the possibility of interpreting the provision as severable. If, in a particular case, the defense which the obligor attempted to set up were one, such as usury, which is given on the basis of some strong public policy, the provision could be held to be ineffective to waive it. If, on the other hand, the defense were one not so strongly protected by public policy, as warranty of fitness or failure of consideration, the provision could be given effect.[8]

Where there is a statute stating in substance that, "in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment,"[9]

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5. 25 Ariz. 531, 220 Pac. 229 (1923). See discussion in Note (1931) 19 CALIF. L. REV. 544.

6. Brucker v. Georgia Casualty Co., 326 Mo. 856, 32 S. W. (2d) 1088, 1092 (1938). But see WILLISTON, CONTRACTS (rev. ed. 1936) § 432, in which he states the general common law rule to be, "But the assignee of a non-negotiable chose-in-action, or of a negotiable note payable to order, assigned otherwise than by endorsement though for value, and in good faith, takes it subject to all defenses which the obligor may have had against the assignor, *unless the debtor by the form of the instrument intrusted to the assignor* or otherwise has estopped himself to set up a defense, or *has given an absolute promise to pay the assignee in substitution for the assigned obligation.*" (Italics mine).

7. "It is understood and agreed that this instrument and the Seller's interest therein may be offered by the seller for discount to . . . Industrial Loan . . . Co., and to induce said Corporation to accept such assignment, the purchaser hereby agrees and represents to said Corporation that such assignment shall be free of any and all defenses which the purchaser may or might have against the seller." The court also mentioned that it would make the instrument negotiable in defiance of the N. I. L., but it appears to be merely an attempt to secure this one characteristic of negotiability. *Cf.* Motor Contracts Division v. Van Der Volgen, 162 Wash. 449, 298 Pac. 705 (1931).

8. United States v. Troy-Parisian, Inc., 115 F. (2d) 224 (1940); Anglo-California Trust Company v. Hall, 61 Utah 223, 211 Pac. 991 (1922).

9. ARIZ. REV. STAT. (1913) § 402 (ARIZ. R. C. A. (1939), § 21-515). Corresponding statutes are, *Calif.*, CAL. CIV. CODE (Deering, 1937) § 368; *Idaho*, CODE 1932, § 5-302; *Ind.*, IND. ANN. STAT. (Burns, 1933) § 2-226; *Oregon*, ORE. CODE ANN. (1930) § 1-302; *Utah*, REV. STAT. 1933, § 104-3-2.

some courts have relied upon it as a legislative statement of public policy to hold such a waiver provision void. In view of the statute, these courts have held the provisions to be ineffective to waive any defense. Cases from California[10] and Idaho[11] have so held where similar statutes were involved.[12] In *San Francisco Securities Corporation v. Phoenix Motor Co.*,[13] the Arizona court followed the California case in relying upon the statute for a statement of public policy. However, there is language to the effect that although such a statute may be needed to protect certain defenses, it is not needed to protect others. "The aid of no statute declaring agreements that grant immunity from the results of forcible and fraudulent acts is necessary in order to declare such agreements against public policy; but as to the relinquishment by contract of the right to assert the defenses of failure of consideration, breach of warranty, and other similar pleas, the statute itself must stand guard over the rights of the defendant, on the ground of public policy."

On the other hand, some courts hold that although there is an assignment statute, it is not a statement of public policy, and its benefits may be waived by the obligor. This does not mean that the provision may be used to negate the real defenses, or those which may be specifically provided by the legislature on the grounds of public policy. The supreme court of Utah in *Anglo-California Trust Company v. Hall*[14] clearly sets forth this position by saying, "For a purchaser to sign a contract containing such a stipulation may not be a wise thing to do, but courts cannot rewrite contracts into which parties have seen fit to enter, and unless *fraud* or *duress*, or *something against public policy*, enters into the transaction, a purchaser who waives defenses, as the defendant has done, cannot obtain relief from an improvident contract, into which he enters without care and foresight."[15] The court allowed the provision to preclude the obligor from setting up a defense of breach of warranty of fitness. Instead of grouping all defenses to-

10. American National Bank of San Francisco v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923), *supra* note 3. This court also speaks of an attempt to attain negotiability, but the provision seeks only a waiver of defenses. It provides that in case of an assignment, "the second party shall be precluded from in any manner attacking the validity of this contract on the ground of fraud, duress, mistake, want of consideration, or failure of consideration, or upon any other ground." *Cf.*, President and Directors of Manhattan Co. v. Morgan, 242 N. Y. 38, 150 N. E. 594 (1926), *supra* note 1; Enoch v. Brandon, 249 N. Y. 263, 164 N. E. 45 (1928) *supra* note 1 (bond provision stating, "they are to be treated as negotiable, and all persons are invited by the company to act accordingly.")

11. Pacific Acceptance Corporation v. Whalen, 43 Idaho 15, 248 Pac. 444 (1926).

12. *Supra* note 9.

13. 25 Ariz. 531, 220 Pac. 229 (1933), *supra* note 5.

14. 61 Utah 223, 211 Pac. 991 (1922), *supra* note 8.

15. (Italics mine) 211 Pac. 991, 994 (1922). Contract provision, "It is agreed that in the event the seller shall assign and transfer this agreement and his rights and moneys payable thereunder to a third party, then the purchaser shall be precluded from in any manner attacking the validity of the agreement on the ground of fraud, duress, mistake, want of consideration, or failure of considera-

gether, this court seems to differentiate between those defenses which are provided merely for the benefit of the individual and those which are provided for the protection of the public welfare. This same reasoning was applied by the United States Circuit Court of Appeals sitting in Idaho in the case of *United States v. Troy-Parisian, Inc.*,[16] to allow the assignee of a conditional sales contract to recover in spite of an attempted defense of breach of warranty of fitness. The court recognizes on the basis of precedent[17] that the defense of fraud or total want of consideration might not be waived, but finds no public policy which would be offended by the waiver in favor of an assignee of warranty of fitness and failure of consideration. These defenses are provided for the benefit of the individual. If he wishes to forego their protection, there is no public policy which would be abrogated by his so doing. It is pointed out that the obligor still retains his right of action for damages against the obligee for breach of contract.[18]

Finally, a few courts have taken an entirely different view of the public policy involved in giving effect to such a contract provision. These opinions are based upon the proposition that the primary public policy is the freedom of contract with which the courts should not lightly interfere. They consider the waiver of these defenses by the obligor against the assignee to be only the waiver of a right of action, which, to deprive the obligor of the right to waive, would be more against public policy than to enforce the clause.

An early case recognizing this view was *Howie v. Lewis*.[19] A non-negotiable note contained the provision, "this note shall be subject to the same rules governing commercial paper as to equities." The court held the provision effective to preclude the setting up of a defense of fraud by the obligor. It was a valid contractual agreement to give the note one attribute of commercial paper, and "was a waiver by the defendant of the right to inquire into the adequacy of the original transaction," so far as the assignee was concerned.[20] In *Elzey v. Ajax Heating*

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tion, or upon any other ground, and the moneys payable hereunder by the purchaser shall be paid to such assignee or holder without recoupment, set-off, or counterclaim of any sort whatsoever."

16. United States *ex rel.* and for Benefit of Administrator of Federal Housing Administration v. Troy-Parisian, Inc., 115 F. (2d) 224 (1940), (*certiorari denied*, 312 U. S. 699), cited *supra* note 8.

17. Pacific Acceptance Corporation v. Whalen, 43 Idaho 15, 248 Pac. 444 (1926), *supra* note 11.

18. Beutel, *Negotiability by Contract* (1933) 28 ILL. L. REV. 205, *supra* note 1. National City Bank v. Prospect Syndicate, Inc., 170 Misc. 611, 10 N. Y. S. (2d) 759 (1939), *supra* note 2, where the court gave effect to such a provision which provided that any claims which might arise would be made by the buyer upon the seller, and not set up as a defense to a suit by an assignee.

19. 14 Pa. Super. Ct. 232 (1900).

20. Cited in NORTON, BILLS AND NOTES (4th ed., 1914) p. 36, n. 14, where the author says, "a debtor in the instrument creating a non-transferable common law obligation may effectually stipulate that the creditor's assignee may enforce the obligation notwithstanding equities between the debtor and creditor."

Company,[21] the Supreme Court of New Jersey held such a provision valid and effective in a conditional sales contract. There is language in the case strong enough to indicate that the court would allow even real defenses to be waived by the agreement. The court also recognizes that the waiver does not leave the obligor without remedy, since he still has his cause of action against the vendor.

JACKSON A. WRIGHT

TORTS—DUTY TO RESCUE OR AID THIRD PERSONS PLACED IN A POSITION OF PERIL THROUGH NO FAULT OF THE DEFENDANT

The recent Indiana case of *L. S. Ayres & Co. v. Hicks*[1] suggests the possibility of an extension of legal duty into a field heretofore governed by moral duty only. In that case the plaintiff, a six year old boy, accompanied his mother on a shopping tour of the defendant's department store. The boy, while riding on the escalator, fell and caught his hands in the moving parts of the machine and was unable to remove them. Although there were clerks and agents of the defendant within a few feet of the boy, and although there was a switch on each floor that would stop the machine instantly, it was not turned off for from three to five minutes; the injury was, of course, greatly aggravated by the continued running of the machine. The plaintiff alleged negligence on the part of the defendant, first, in that the machine was improperly constructed, maintained and operated, and, second, in not going to his assistance immediately. In answer to interrogatories, the jury found that the defendant was not negligent in the selection, construction, or operation of the machine. On the basis of these findings, the defendant moved for a directed verdict in its favor, contending that it had no legal duty to go to the aid or rescue of the plaintiff who was responsible for his own peril. The court overruled defendant's motion and entered judgment for the plaintiff. Recovery was limited to damages suffered through the aggravation of the injury resulting from the delay in stopping the machine. This decision was affirmed by the Indiana Supreme Court. In its affirming opinion the court said, "There may be a legal duty to take positive or affirmative steps to effect the rescue of a person who is helpless and in a situation of peril when the one proceeded against is a master or invitor, *or when the injury resulted from the use of an instrumentality under the control of the defendant.* Such an obligation may exist although the accident or original injury was caused by the negligence of the plaintiff or a third party and without any fault on the part of the defendant. Other relationships may impose a like obligation, but it is not necessary to pursue that inquiry further at this time."[2] The court continued, "The relationship here of invitee was sufficient relationship to impose a duty upon the

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21. 10 N. J. M. 281, 158 Atl. 851 (1932).

1. 40 N. E. (2d) 334 (1942).
2. Italics mine.

appellant. Appellant's duty arose after the injury. He can be charged only with the failure to exercise reasonable care to avoid aggravation. The measure of that duty is not unlike that imposed by the last clear chance doctrine of discovered peril."

The defendant in support of its position relied on the general rule that there is no legal duty—only a moral obligation—to go to the aid or rescue of a person who has through his own negligent conduct placed himself in a dangerous position from which he cannot recover without help, unless there is a relationship between the parties that placed such a duty on the defendant. Defendant contends that the relationship of invitor and invitee does not create such a duty. Previous cases both in England and America seem to be unanimous in support of the defendant's position. The rescue cases all point out that although the Levite and the Priest had a strong moral obligation to go to the aid of the injured man by the wayside, they could not be punished for their failure to do so. Their only punishment could be from the voice of their own conscience and the stigma which society places upon inhumane acts.

This general rule as to the duty to rescue is not to be confused with the situation where the defendant through his own negligence caused the initial injury and then upon becoming aware of it does nothing to prevent further aggravation of the injury. In that case the defendant in addition to being liable for the initial injury is also liable for the aggravation on the grounds of causation. Neither is the general rule to be confused with the cases where the defendant voluntarily undertakes to go to the rescue of an injured person and then negligently leaves him in a worse position. This point is probably best illustrated by the case of *Northern Central R. R. v. Maryland, Use of Price.*[3] In that case the defendant's train crew removed the supposedly dead man from the tender of the engine after he had been struck through no negligence on the part of the railroad company. He was then thoughtlessly placed in a locked warehouse for the night without examination by a doctor. During the night he regained consciousness but was unable to get out of the warehouse and died. The court in that case held the railroad company liable. The case is often cited for the proposition that there is a duty to rescue a person in danger where an instrumentality within the control of the defendant caused the danger or injury even though the accident occurred through no fault of the defendant. However, it is submitted that the case does not stand for that proposition, but rather for the principle that once the defendant undertakes to give aid, he is under a legal duty to leave the injured person in no worse position.

Certain exceptions have been recognized to the rule that there is no duty to go to the aid of an injured person or a person in danger of injury where the negligence of the defendant is not responsible for the danger or the injury. In these exceptions the prior relationship of the defendant and the plaintiff places a duty on the defendant to use reasonably humane care in aiding after injury or going to

3. 29 Md. 420 (1868).

the rescue of the plaintiff. The relationships which give rise to this duty are:

1. *Some master-servant relationships.*

(a) Where the servant engaged in carrying on the master's business is placed in an isolated spot, dependent upon the master for the necessities of life and unable to provide for himself, the master has a duty to give aid when he is injured, or go to his rescue if he is in danger. The best example of this is the case of the sailor at sea dependent upon the master for food, shelter, clothing and medical attention. Should the sailor fall over-board, for instance, in the performance of his duties, the captain of the ship has a clear legal duty to go to the aid of the sailor where that would not prejudice the safety of the ship or other members of the crew or passengers.[4] If the sailor should receive an injury or become sick, he has a right to the best medical attention available on the ship at the ship's expense.[5] The maritime law is sensitive to the rights of seamen and sedulous for their protection. In the case of *Hyatt v. Hannibal & St. Joseph R. R.*[6] the plaintiff was hired to shovel snow off the defendant's tracks at an isolated spot during the night. The plaintiff took the job in reliance on the defendant's promise to provide the workers with a heated car to warm themselves during the night. The defendant failed to provide the warm car and the court held the railroad liable in tort for injuries sustained by the plaintiff from the cold.[7] It will be seen that the duty imposed on the master in this situation arises from the relationship of master and servant—that is, the isolation of the servant, his dependence on the master for the necessities of life, and the dangers inherent in the employment.

(b) Where the servant is not isolated or dependent upon the master, some courts have held that when he is injured through no negligence on the part of the master, the master nevertheless has a duty to use reasonable care and diligence in alleviating the suffering occasioned by the accident. The Indiana court in the principal case cites *Raasch v. Elite Laundry Co.*[8] in support of this proposition. In that case, the plaintiff caught her hand in a mangle iron through no fault of the defendant. The foreman, however, in attempting to extricate her negligently started the motor and pulled her hand farther into the machine thus greatly aggravating the injury. The defendant was held liable for the aggravation. It is submitted however, that this case, like the case of *Northern Central R. R. v. Maryland, Use of Price*[9] stands for the proposition that once a rescue is attempted, the defendant owes a duty to leave the plaintiff in no worse position. Dicta in the

4. See United States v. Knowles, 26 Fed. Cases 801 (1864) and Harris v. Pennsylvania R. R. Co., 50 F. (2d) 866 (1931).
5. See Scarff v. Metcalf, 107 N. Y. 211 (1887).
6. 19 Mo. App. 287 (1885).
7. See also Schumaker v. St. Paul & Duluth R. R. Co., 46 Minn. 39 (1891) and Clifford v. The Denver, South Park & Pacific R. R. Co., 9 Col. 333 (1886) holding in accord with the *Hyatt* case. But *cf.* King v. Interstate Consolidated R. R., 23 R. I. 583 (1902).
8. 98 Minn. 375 (1906).
9. *Loc. cit.*

Raasch case, however, are very strong to the effect that the master has a duty to aid. The court said, "Those who employ methods or instrumentalities which are naturally dangerous and are liable to be the means of causing injuries to the ignorant and unfortunate should be required to take reasonable means to alleviate the suffering occasioned by the accident, although up to that time, the master is under no legal duty to respond in damages."[10] The court recognizes, however, authority contra."[11] Section 512 of the Restatement of the Law of Agency recognizes a duty on the part of the master to take the first steps in giving relief and to continue in the care of the servant until he is able to care for himself or until he can be cared for by others in those situations where the master is engaged in a dangerous occupation where severe harm may be expected, or where the business is conducted in an isolated place in which the employees reasonably believe that they will be taken care of if they are hurt or become ill while acting within the scope of employment. No opinion, however, is expressed as to whether a duty is owed by a master who is engaged in a non-hazardous activity in a place which is not isolated.

The court in the principal case relies rather heavily on the case of *Tippecanoe Loan & Trust Co. v. Cleveland, C. C. & St. L. R. R.*[12] In that case the plaintiff was employed by the defendant as a section hand. He was injured in a collision and members of the crew took charge of him. He was taken to a doctor and then to a hospital. During the trip he was placed in a cold car and was not covered. Blood poisoning set in as a result and he died. His administrator sued, basing his claim on the negligence of the crew members in taking care of the injured decedent. The jury found that the exposure to the cold was responsible for the death of the decedent. The court granted a new trial, saying that if an employee injured as a result of hazards in his job subjects himself to injury, the company has a duty to use due care in taking necessary and proper steps to avoid aggravation of the injury. If they take him into their care, they must exercise reasonable care in the treatment given him. It is submitted that here again the case relied on by the Indiana court is not exactly in point, since it did not hold directly that the defendant was negligent in not going to the aid of the injured man. The real holding of the case on the exact facts is that the defendants after going to the aid of the injured man were negligent in taking care of him, and are therefore liable; whereas in the principal case the defendants are held liable for their failure to go to the rescue of the injured plaintiff.

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10. See Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 S. W. 43 (1914). This is a strong decision holding the master liable for failure to secure prompt medical assistance for an injured employee who was employed to perform dangerous work and was injured while performing that work so badly as to be incapacitated from caring for himself. The Missouri court cites and discusses many of the cases relied on by the Indiana court in the principal case. See (1915) 8 U. OF MO. BULL. L. SER. 41 for a discussion of the Hunicke decision.

11. Allen v. Hixson, 111 Ga. 460, 36 S. E. 810 (1900); Stager v. Troy Laundry Co., 38 Ore. 480, 63 Pac. 645 (1901).

12. 104 N. E. 866 (1914).

2. *Carrier-passenger relationship.*

The cases are in conflict as to whether the railroad has a duty to aid a passenger who becomes sick en route or who places himself in a position of danger on the train through no fault of the railroad. The rule in Missouri seems to be that the carrier owes a duty to use reasonable care under the circumstances at least to infirm passengers where notice is had of the infirmity.[13] The majority of the cases, however, seem to hold that there is no duty.[14]

3. *Injury caused by defendant but without negligence.*

It has been suggested that where the defendant through some act or the use of a dangerous instrumentality causes injury to the plaintiff, there is a duty to use reasonable care in aiding the injured person, even though the defendant is not liable for the initial injury or danger. Section 314 of the Restatement of Torts lays down the following principle as governing the duty to aid or rescue others where there is no liability up to that point: "Duty to Act for Protection of Others. The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Comment c qualifies the above by saying, "The rule stated in this Section applies only where the peril, in which the actor knows the other is placed, is not due to any active force which is under the actor's control. If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance." However, the Restatement cites no authority in support of this qualification to the general rule as stated.[15] Many cases which seem at first glance to support this proposition upon further analysis reveal that the defendant had undertaken the care of the injured person and then negligently left him in a worse position. The line of demarcation between these two principles is often rather shadowy, and many

13. Layne v. Chicago and Alton R. R., 175 Mo. App. 34, 157 S. W. 850 (1913). (By dictum the duty was said to extend to the sick and other physically and mentally disabled passengers.)

14. See Brown's Adm'r. v. Louisville & Nashville R. R., 44 S. W. 648 (1898); Prospert v. Rhode Island Suburban Ry. Co., 67 Atl. 522 (R. I. 1907); Fagg's Adm'r. v. L. & N. R. R., 63 S. W. 580 (1901); New Orleans, Jackson, and Great Northern R. R. v. Statham, 42 Miss. 607 (1869); Cincinnati, N. O. & T. P. Ry. v. Marr's Adm'x., 85 S. W. 188 (1905); Atchison, Topeka & Sante Fe R. R. v. Weber, Adm'r., 33 Kan. 543 (1885); Wheeler v. Grand Trunk Ry., 70 N. H. 607 (1900); Union Pacific Ry. v. Beatty, 35 Kan. 265 (1886).

15. The Restatement § 314 gives the following hypothetical cases illustrating the qualification in Comment c: "2. A, a factory owner, sees B, a young child or blind man who has wandered into his factory about to approach a piece of moving machinery. A is guilty of negligence if he permits the machinery to continue in motion when by the exercise of reasonable care he could stop it before B comes in contact with it. 3. A, a trespasser in the freight yards of the B Railroad Co. falls beneath a slowly moving train. The conductor of the train sees A and by signalling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander might not be liable to A for deliberately refusing to help him from under the train, the B Railroad is liable for permitting the train to continue in motion with knowledge of A's peril."

courts do not clearly distinguish. The cases generally do not fall in line with this suggestion. Without some prior relationship creating a duty, it would seem that the mere act of causing the injury or danger without fault on the defendant's part does not give rise to the duty to rescue or aid.[16] It is submitted, however, that there is a growing tendency to place some responsibility on those who injure others although without fault. This tendency is evidenced in one instance by the "hit-and-run" statutes enacted by most states making it a crime for the driver of an automobile to leave the scene of an accident without first giving aid or at least revealing his identity.[17]

4. *Invitor-invitee relationship.*

In general, the relatonship of invitor and invitee does not impose a duty on the invitor to go to the rescue of the invitee who through no fault of the invitor places himself in a dangerous position. The case of *Depue v. Flateau*[18] is cited in the principal case as authority to the contrary. In that case the plaintiff, a buyer, spent the day at the defendant's farm buying furs. He was invited to dinner and after dinner complained of feeling sick and weak. He was refused permission to spend the night and was assisted by the defendant and the defendant's son to his carriage. The plaintiff was in a very weak and practically helpless condition. The reins were thrown over his shoulders and his horse started on the road toward the plaintiff's home. It was a cold night. The next morning the plaintiff was discovered lying

16. See Weymire v. Wolfe, 52 Iowa 533 (1879). Deceased got drunk at the defendant's saloon. At closing time he was unconscious and helpless, but was put out in the cold and died of exposure. The trial court instructed the jury that if deceased had by voluntarily purchasing and drinking the liquor contributed to his own death, the verdict should be for the defendant. The Supreme Court of Iowa reversed the trial court saying, "If defendant negligently subjected Dunn (deceased) to exposure to his injury, knowing he was unconscious, even helpless, the defendant cannot escape liability on account of Dunn's negligence prior to the wrongful acts whereby Dunn was subjected to exposure, however great Dunn's negligence may have been."

17. IND. REV. STAT. (1934) § 11171 provides: "Any person who while driving or operating a motor vehicle or motor bicycle on any highway in this state, although he may not be at fault, shall strike, wound or injure any human being, or shall meet with an accident whereby any other person receives an injury or the property of other persons is damaged, shall immediately stop, render or offer to render assistance, and give to the injured person or to some person who is with such person or to the owner or person in charge and control of the damaged property, his name, . . . address, . . . and license number. . . ." Violation of this statute is a felony. MO. REV. STAT. (1939) § 8401 (f) provides: "Leaving scene of accident: No person operating or driving a vehicle on the highway knowing that an injury has been caused to a person or damage has been caused to property, due to culpability of said operator or driver, or to accident, shall leave the place of said injury, damage or accident without stopping and giving name, residence, including . . . motor vehicle number . . . to the injured person or . . . the nearest police officer." See State v. Hudson, 285 S. W. 733, 314 Mo. 599 (1926), "Whether injury to property was accidental or culpable act is immaterial to offense of feloniously leaving scene of accident."

18. 111 N. W. 1 (Minn. 1907).

nearly frozen by the roadside some distance from the defendant's house. The Minnesota court held the defendant liable, saying, "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense, who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such injury or danger. The obligation is imposed as a matter of law and not sentiment." It is conceded that the language of the court is clearly to the effect that there is a duty to aid an injured person although the defendant is not responsible for the injury or sickness. However, under the exact facts of the case, the defendant and his son had undertaken to aid the plaintiff by assisting him into his carriage, and in so doing had left him in a much worse position. It may be possible, therefore, to distinguish this case from the principal case on the facts, although the language used by the Minnesota court indicates the same viewpoint in regard to the duty to aid.

Professor Ames some time ago urged that legal duty be substituted for moral duty in this type of case.[19] He presented this question for discussion: Should a person be liable for wilful inaction where there is no relation creating a recognized legal duty—where the only relation is that of one human to another?" For instance, should a man go unpunished at law for standing idly by watching another drown when he could easily have thrown him a life preserver and thus saved his life? Or, suppose that a careful hunter fires at a flying bird and the shot glances from a tree limb and strikes the heretofore unseen plaintiff in the eye knocking him stunned into a shallow pool of water. Should the hunter, although without fault or liability up to that point be allowed to stand by and watch the plaintiff drown when he could easily pull him out? Mr. Ames thought not. It will be seen that the moral culpability if not the legal liability of the hunter is greater than that of the innocent bystander, because it was the act of the hunter (even though it was not negligent) which placed the plaintiff in his perilous position. Mr. Ames admitted that it would be difficult to draft legislation which would fairly draw the line between the cases where it is reasonable to require a person to rescue and cases where it would be unreasonable. But he pointed out that "drawing the line" is difficult if not impossible in many legal situations, and yet it is done. Mr. Ames suggested this as a working rule: "One who fails to interfere to save another from impending death or great bodily harm when he might do so with little or no inconvenience to himself and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or his widow and children in case of death." There is little doubt but that Professor Ames would approve of the result and the principle announced in the principal case.

19. Ames, *Law and Morals* (1908) 22 HARV. L. REV. 97.

Professor Bohlen in his article, *"Moral Duty to Aid Others,"*[20] made a thorough analysis of the subject. He said, "On the whole it may be said that duties to take positive action for the benefit and protection of others attach only to certain relationships; and are imposed only when absolutely necessary for the protection of others and only to the extent generally necessary to afford them protection." He states further that, "Cases which seem to go farthest in imposing a duty on the defendant based upon moral or ethical standards—in all but one case there will be some other ground for plaintiff's recovery: (1) Defendant has not merely failed to assist but by some act done with knowledge or means of knowledge of his peril has turned it into actual injury or has increased the injury already sustained. (2) Defendant stood in some antecedent relationship which imposed duty. (3) Defendant by voluntarily taking charge of the situation after knowing of the peril has, as it were, assumed a position of voluntarily though gratuitous bailee of his safety."

In conclusion, it would seem that the Indiana court has taken a new step in imposing legal liability for failure to go to the rescue of a person in danger; or, in other words, the Indiana court has added another exception to the general rule. In Indiana, at least, it would seem that the relationship of invitor and invitee imposes a duty to use reasonable care and diligence in aiding those who through their own negligence place themselves in a dangerous position.

It is submitted that this case is in line with the more modern view or philosophy as indicated by various legislative enactments. It does not seem to the writer that this duty imposes too great a burden upon defendants—at least it does not seem too great a burden where there is some prior relationship between the parties. Is it too much to require that people act humanely to save life or prevent injury to a fellow human where that can be done reasonably and without great danger or inconvenience to the rescuer?

MAX POWELL

20. (1908) 56 U. OF PA. L. REV. 217, 317.