who should be expected to stop and render needful assistance, and that the defendant's claim that he owed himself no duty was without merit.[14]

In the instant case the court expressly refused to follow the *Saylor* case,[15] and without the equivocal language of the *Brugh* case regarding the duty of drivers on a public highway, adopted the reasoning of Professor Bohlen when he said:

> The rescuer's right of action, therefore, must rest upon the view that one who imperils another, at a place where there may be bystanders, must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue. If this is so, the right of action depends not upon the wrongfulness of the defendant's conduct in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue.[16]

The court concluded that a lack of self-protective care may be negligence towards any person in whose vicinity one exposes one's self to undue risk of injury. This holding suggests a strong analogy to the cases where the plaintiff receives injuries from shock as a result of discovering the body of a suicide,[17] in which it is arguable that the suicide has behaved negligently if his manner and place of self-destruction is such that shock to persons making the discovery would foreseeably arise.[18] The rescue cases may appear more difficult since the conduct may not be characterized as "willful," as it can be in the suicide cases.

There remains the possibility that a court may feel that avoiding danger is so strong and natural an instinct that one who has endangered himself could not be said to have reasonably foreseen the hazard.[19] Although this may be a proper consideration for a jury, it does not seem to be a strong enough basis for directed verdicts of no cause of action as a matter of law.

Workmen's Compensation Acts—Security Funds—Security Fund Subrogated to Employee's Rights against Employer—[Illinois].—An employee of the defendant Illinois corporation was injured in Wisconsin in the course of his em-

[14] Ibid.

[15] Carney v. Buyea, 271 App. Div. 338, 344, 65 N.Y.S. 2d 902, 909 (1946). "We think there was a legal duty owing by the defendant to the plaintiff not to create an undue risk of injury to him and not merely a moral duty as was held in Saylor v. Parsons. . . . ."

[16] Bohlen, Studies in the Law of Torts 569, n. 33 (1926).

[17] Blakely v. Shortal's Estate, 236 Iowa 787, 20 N.W. 2d 28 (1945), noted in 13 Univ. Chi. L. Rev. 215 (1946), where recovery from the estate of the suicide was allowed.

[18] "It would seem that a person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act toward them in that it exposes them to a recognizable risk of injury." Bohlen, Studies in the Law of Torts 569, n. 33 (1926).

[19] The court in the Saylor case may have had this in mind when it said, after settling the case on the duty issue, "In the first place there is nothing in the record to indicate that Parsons, in the exercise of ordinary care, could not have undermined the wall with safety to himself. That he so intended must be presumed, for the presumption in favor of prudence is always to be indulged in until the contrary appears. If, then, he might have performed the work with safety to himself, neither he nor the company is chargeable with negligence for not anticipating that he would do it otherwise, and that, if he so did, somebody would attempt to rescue him." Saylor v. Parsons, 122 Iowa 679, 684, 98 N.W. 500, 502 (1904).

ployment. The defendant was insured against workmen's compensation liability with a mutual carrier which had contributed to the Wisconsin mutual workmen's compensation security fund. This fund, established by the state[1] to assure compensation benefits to workers whose employers had insured themselves in carriers which thereafter became insolvent, was maintained by mandatory annual contributions from each mutual carrier licensed to insure workmen's compensation liability in Wisconsin. After the employee's injury, the defendant's insurer was taken over by a stock company which became insolvent without having paid the employee's compensation awards. Thereupon the plaintiff, custodian of the Wisconsin's workmen's compensation security funds, paid the awards as required by the statute establishing the funds, and brought this action in Illinois to recover that amount from the defendant, claiming a common-law right to be subrogated to the injured employee, and a statutory right to proceed to recover sums paid from the security funds as awards. On appeal, *held*, the plaintiff was entitled to both common-law and statutory subrogation. Judgment dismissing the action reversed. *Smith v. Clavey Ravinia Nurseries.*[2]

In permitting statutory recovery by the fund custodian against the employer, the Illinois court, in the first case of its kind under the Wisconsin statute, has set a precedent for a new interpretation of the function of a workmen's compensation security fund. By basing its decision also upon the ground of common-law subrogation, the court has evidently intended to effect an extension of that doctrine.

Workmen's compensation security funds were established in five states[3] as a depression measure because insolvencies of compensation insurers had rendered many compensation awards worthless.[4] The section of the Wisconsin act relied on by the plaintiff provides that "the state treasurer as custodian of the funds shall proceed to recover the sums of all liabilities of such [insolvent] carrier assumed by such funds from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy, employers, and all other liable, and may prosecute an action or other proceedings therefor."[5] In permitting the plaintiff to recover under this section, the court interpreted the insertion of "employers" to mean that employers were directly liable to the security fund for awards paid by it to their own employees, for otherwise, it was said, the funds would be depleted and their purpose frustrated.[6]

[1] Wis. Stat. (Brossard, 1943) § 102.65.

[2] 329 Ill. App. 548, 69 N.E. 2d 921 (1946).

[3] New Jersey, 1935, N.J. Rev. Stat. (1937) tit. 34, c. 15, §§ 103–120; New York, 1935, N.Y. Workmen's Compensation Law (McKinney, 1946) c. 67, § 106; North Carolina, 1935, N.C. Gen. Stat. (Michie, 1943) c. 97, §§ 105–122; Pennsylvania, 1937, Pa. Stat. Ann. (Purdon, 1937) tit. 77, §§ 1052–1066; Wisconsin, 1935, Wis. Stat. (Brossard, 1943) § 102.65.

[4] Dodd, Administration of Workmen's Compensation 578 (1936).

[5] Wis. Stat. (Brossard, 1943) § 102.65(11).

[6] Smith v. Clavey Ravinia Nurseries, 329 Ill. App. 548, 557, 69 N.E. 2d 921, 925 (1946).

This interpretation of the court seems open to question in the light of a comparison of the Wisconsin statute with those of the other states. The New Jersey[7] and North Carolina[8] statutes contain no provisions for recovery of awards paid by their funds, from insolvent insurers or from employers. The New York statute requires proceedings for recovery against insolvent insurers, but expressly prohibits any proceedings against employers.[9] The Pennsylvania statute as originally enacted[10] contained a provision for recovery identical with that of the Wisconsin statute, but was later amended to delete "employers."[11] In all states, contributions by carriers to security funds bear the same proportion to the earned premiums of the contributors. Nevertheless, it seems that the legislatures of the states other than Wisconsin did not anticipate depletion of the funds, although their fund custodians were not authorized to recover awards paid from employers. It is possible, therefore, that by "employers" the Wisconsin statute refers to all the employer members of insolvent mutual or reciprocal carriers, rather than to the individual employers to whose employees awards have been paid. As policyholders, employers may have been intended to become liable along with "its [the insolvent carrier's] receiver, liquidator, rehabilitator or trustee in bankruptcy . . . . " to discharge the obligations of the carriers.[12]

In placing ultimate liability on the defendant, the court seems to have viewed the security fund as an emergency fund rather than as a reinsurance measure. However, an opposite conclusion seems better founded. The Wisconsin act merely states that the funds are created "for the purpose of assuring . . . . the benefits . . . . provided for employments insured in insolvent . . . . carriers."[13] Such language is entirely consistent with a description of a reinsurance scheme. Writers in the field of workmen's compensation insurance consider these funds clearly reinsurance measures.[14] The funds of each state, including the states that do not authorize recovery by the fund custodian against employers, are maintained by required contributions of one percent per year of premiums earned within the state on workmen's compensation insurance, and accumulate

[7] N.J. Rev. Stat. (1937) tit. 34, c. 15, §§ 103–120.

[8] N.C. Gen. Stat. (Michie, 1943) c. 97, §§ 105–122.

[9] N.Y. Workmen's Compensation Law (McKinney, 1946) c. 67, §§ 109-c(3), 109-g.

[10] Pa. Stat. Ann. (Purdon, 1937) tit. 77, § 1061.

[11] Pa. Stat. Ann. (Purdon, Supp. 1946), tit. 77, § 1061.

[12] Cf. In re Builders' Mutual Casualty Co., 229 Wis. 365, 282 N.W. 44 (1938). This decision upheld the right of the Wisconsin insurance commissioner to levy against the policy holders of insolvent mutual workmen's compensation insurers. The assessments in this case were in the amount of twenty per cent of the premiums earned in the years in which the losses leading to insolvency occurred. The levy was held to be authorized by statute. Wis. Stat. (Brossard, 1943) §§ 200.08–200.09. This provision is applicable to an "insurance company or fraternal or mutual benefit society," and hence also covers reciprocal carriers.

[13] Wis. Stat. (Brossard, 1943) §§ 102.65(2), (4), (6).

[14] Hobbs, Workmen's Compensation Insurance 433 (1939); Kreech, Workmen's Compensation in North Carolina 1929–1940, 71, 123–25 (1942).

until they equal, less liabilities, five per cent of the total loss reserves of the contributing carriers.[15] One writer, in adducing typical instances of reinsurance rates in various fields of liability insurance, offers as example two unnamed large carriers; the percentages of their reinsurance premiums to earned premiums average one per cent.[16] The Workmen's Compensation Reinsurance Bureau, established in 1914, composed of twenty-eight stock carriers, reinsures members against losses not arising in extra-hazardous industries. Members contribute one per cent of premiums earned on coverage outside New York. Because interest on funds so established has often been sufficient to meet liabilities the Bureau has frequently been able to return premiums to members.[17] Reinsurance rates in the field of workmen's compensation underwriting seem, therefore, to approximate the rate of contribution to the state security funds. If the fund in the instant case is viewed as having reinsured employers against compensation liability, recovery by the fund custodian from the individual employer on any theory of subrogation seems anomalous.

Nevertheless, the court's views on common-law subrogation are worth attention. Although the court argued that by its reference to "employers" the statute expressly provided for subrogation in a case like the present, the decision is also based on common-law subrogation. This holding raises the other interesting question in the case.

Subrogation is said to be an equitable right, existing independently of contract;[18] the lack of contractual relationship in the present case between plaintiff and defendant or defendant's employee is therefore unimportant. The common law has nevertheless been hesitant to permit recovery for benefits conferred and retained in absence of a request or agreement to pay for them.[19] A line of Illinois and Wisconsin cases has held that one who pays the debt of another, with no express or implied agreement for subrogation, is not entitled to succeed to the rights of the satisfied creditor, unless there is some obligation, interest, or right distinguishing his status from that of a "mere volunteer."[20] Thus, subroga-

[15] N.J. Rev. Stat. (1937) tit. 34, c. 15, §§ 107, 108, 114, 115; N.Y. Workmen's Compensation Law (McKinney, 1946) c. 67, §§ 108(2), 109, 109-e(2), 109-f; N.C. Gen. Stat. (Michie, 1943) §§ 109, 110, 116, 117; Pa. Stat. Ann. (Purdon, 1937) tit. 77, §§ 1055, 1058; Wis. Stat. (Brossard, 1943) §§ 102.65(3)(b), 5(b), 7(b).

[16] Hobbs, Workmen's Compensation Insurance 440 (1939).

[17] Ibid., at 443–44.

[18] Maryland Trust Co. v. Poffenberger, 156 Md. 200, 144 Atl. 249 (1928); In re Freeman & Brooks, 1 F. 2d 430 (C.C.A. 7th, 1924); Ricker v. Ricker, 248 Mass. 549, 143 N.E. 539 (1924); 4 Williston, Contracts § 1265 (rev. ed., 1936); Sheldon, Subrogation § 1 (1893); Mullen, Equitable Doctrine of Subrogation, 3 Md. L. Rev. 201 (1939).

[19] Wragg v. Wragg, 208 Iowa 939, 226 N.W. 99 (1929); McCabe v. Montgomery, 131 Ark. 523, 199 S.W. 548 (1917); Title Guaranty & Trust Co. v. Haven, 196 N.Y. 487, 89 N.E. 1082 (1909); 1 Williston, Contracts § 36A (rev. ed., 1936); 5 ibid., at § 1479; 3 Page, Contracts § 1520 (1920); Keener, Quasi-Contracts 315 (1893); Sheldon, Subrogation § 241 (1893); Hope, Officiousness, 15 Corn. L. Q. 25 and 205, at 26 (1929).

[20] Marshall & Ilsley Bank v. Hackett, Hoff & Thiermann, 213 Wis. 426, 250 N.W. 866 (1933); Harris Trust & Savings Bank v. Lennox, 263 Ill. App. 629 (1931); Pearce v. Bryant

tion "is confined to the relation of principal and surety, and guarantors, or to cases where a person, to protect his own junior lien is compelled to remove one which is superior, and in cases of insurers paying losses."[21] Under this rule as applied to the principal case, it can be argued that the plaintiff was not entitled to common-law subrogation, since the State of Wisconsin was not obligated to the defendant's employee to establish the security fund and to pay his compensation awards. The plaintiff, if considered the agent of the state, appears, therefore, to have been in the position of a volunteer.

However, unqualified statements such as that quoted, excluding the volunteer from subrogation, seem too broad. Many Illinois and Wisconsin cases adopting that rule have relied in part on dicta in early cases.[22] Some well-defined exceptions are recognized. Subrogation or reimbursement is generally allowed in cases of money paid by mistake, where the payor was under the misapprehension that he was obligated to pay or that payment was necessary to protect his own interest.[23] Persons rendering services in emergencies, or where the public interest is involved, may frequently recover the value of their services.[24]

Coal Co., 121 Ill. 590, 13 N.E. 561 (1887); Hough v. Aetna Life Ins. Co., 57 Ill. 318 (1870); Downer v. Miller, 15 Wis. 612 (1862). In Bank of Baraboo v. Prothero, 215 Wis. 552, 255 N.W. 126 (1934), the earlier Wisconsin cases were construed as indicating that subrogation to a creditor's rights will be allowed to one paying a debtor only (1) if the person paying is secondarily liable to the creditor, or (2) if he acted under compulsion, or necessity to protect his own interests, or (3) if there was an agreement that he have security.

[21] Bishop v. O'Connor, 69 Ill. 431, 437 (1873).

[22] The Illinois case most frequently cited as authority for the rule restricting subrogation is Hough v. Aetna Life Ins. Co., 57 Ill. 318 (1870), where the rule was laid down as dictum without citation of authority in its support. In this case subrogation to the rights of the defendant company against sureties on its subagent's bond was allowed to its agent, Hough, who, upon the subagent's defalcations, had remitted out of his own pocket premiums due the defendant. The court held that Hough had made the payments to the defendant not as a volunteer, but under compulsion, since the terms of his agency made him responsible to the defendant for premiums. The early Wisconsin case frequently cited for the same rule is Downer v. Miller, 15 Wis. 612 (1862), where the restrictive rule is again stated as dictum; subrogation was there allowed to a lender who had advanced money to satisfy a foreclosure judgment upon agreement with the borrower that the judgment was to be kept alive for the lender's benefit. It was held that this agreement justified the court in keeping the judgment alive and in subrogating the lender to it. The earlier cases in both jurisdictions denying subrogation rely on Sanford v. McLean, 3 Paige (N.Y.) 117 (1832), where the restrictive rule again seems to be announced as dictum, inasmuch as the funds advanced by the parties seeking subrogation to the rights of judgment creditors had not been applied to the payment of the judgments.

[23] N.Y. Telephone Co. v. Board of Ed., 270 N.Y. 111, 200 N.E. 663 (1936); Gold Brand Confectionery Co. v. Dimick, 276 Mass. 386, 177 N.E. 547 (1931); Mosser & Co. v. Cherry River Boom & Lumber Co., 290 Pa. 67, 138 Atl. 85 (1927); McClary v. Mich. Cent. R. Co., 102 Mich. 312, 60 N.W. 695 (1894); Blodgett v. Hitt, 29 Wis. 169 (1871); 5 Williston, Contracts § 1574 (rev. ed., 1936); Woodward, Quasi Contracts c. 2 (2d ed., 1913); Keener, Quasi-Contracts c. 2, § 2, c. 6, § 2, c. 8, § 2 (1893).

[24] Fisher v. Drew, 247 Mass. 178, 141 N.E. 875 (1924); Barnes v. Starr, 144 Md. 218, 124 Atl. 922 (1923); Tryon v. Dornfeld, 130 Minn. 198, 153 N.W. 307 (1915); Perry County v. Du Quoin, 99 Ill. 479 (1881); Keener, Quasi-Contracts c. 7 (1893); Hope, Officiousness, 15 Corn. L. Q. 25 and 205, at 238 (1929).

In the mistake cases subrogation or reimbursement has been justified by saying that the payment was not really voluntary, since made under mistake.[25] In the public interest cases, however, the person paying money or rendering services seems able to force himself on the defaulting debtor as a creditor, if the former has been in blameworthy default of a legal obligation affected with a public interest. These cases have involved voluntary payment of burial expenses,[26] necessities furnished to families neglected by husbands,[27] and support of paupers[28] or slaves.[29] The nature of the recovery, as in the mistake cases, is quasi-contractual, since performance of the legal obligation of another is said to be a "benefit" to him whether or not he desired the "benefit."[30]

The principal case can be regarded as fitting into and extending the public interest exception, since the public welfare requires prompt, certain payment of workmen's compensation awards.[31] It marks a desirable change from the heretofore narrow application of subrogation in Illinois,[32] and points toward a sug-

[25] Gold Brand Confectionery Co. v. Dimick, 276 Mass. 386, 177 N.E. 547 (1931); Hope, op. cit. supra note 24, at 218.

[26] Phillips v. Tribbey, 82 Ind. App. 68, 141 N.E. 262 (1923); Foley v. Brocksmit, 119 Iowa 457, 93 N.W. 344 (1903); Marple v. Morse, 180 Mass. 508, 62 N.E. 966 (1902).

[27] Frank v. Carter, 219 N.Y. 35, 113 N.E. 549 (1916); Martin v. Beuter, 79 W.Va. 604, 91 S.E. 452 (1917); St. Vincent's Institute v. Davis, 129 Cal. 20, 61 Pac. 477 (1900); Prescott v. Webster, 175 Mass. 316, 56 N.E. 577 (1900).

[28] Eckman v. Brady, 81 Mich. 70, 45 N.W. 502 (1890); Perry County v. Du Quoin, 99 Ill. 479 (1881).

[29] Kellar v. Bate, 3 Metc. (Ky.) 130 (1860); Fairchild v. Bell, 2 Brevard's Law Rep. (S.C.) 129 (1807).

[30] Carr v. Anderson, 154 Minn. 162, 191 N.W. 407 (1923); Ott v. Hentall, 70 N.H. 231, 47 Atl. 80 (1899); Hope, op. cit. supra note 24, at 49.

[31] Another extension of the public interest exception is illustrated by a case in which subrogation was allowed for the benefit of the plaintiff, who had under protest performed services that the defendant's employees should have performed. The plaintiff had a contract to carry mail from the defendant's cars to the post office. It was the defendant's duty, under federal law, to move the mail from its cars across the station platform to plaintiff's truck, but the defendant refused either to do this, or to pay the plaintiff for doing it. In allowing the plaintiff to recover for the value of his services, the court said that though the plaintiff "would have performed his full duty by leaving the mail bags on the station platform," the plaintiff "was not a volunteer, nor was he acting officiously"; he was performing duties in which the public was interested." Grossbier v. Chicago, St.P., Minn. & O. R. Co., 173 Wis. 503, 509, 181 N.W. 746, 748 (1921).

[32] In the principal case the court said that subrogation is a much-favored doctrine, 329 Ill. App. 548, 552, 69 N.E. 2d 921, 923 (1946). The following two cases cited by the court are not convincing as authority for this proposition. The results of both cases can be upheld under a restricted doctrine of subrogation. In Cherry v. Aetna Casualty & Surety Co., 372 Ill. 534, 25 N.E. 2d 11 (1940), bondholders of a bankrupt builder who had been compelled by order of the bankruptcy court to satisfy the subcontractors' liens were held entitled to subrogation to the rights of the subcontractors against the defendant, the surety of the general contractor. In People ex. rel. Nelson v. Phillip State Bank & Trust Co., 307 Ill. App. 464, 30 N.E. 2d 771 (1940), a county treasurer had deposited county funds in the bank, which became insolvent. The plaintiff, the treasurer's surety, sought to obtain priority among the bank's creditors by claiming subrogation to the rights of the state to preference. Subrogation

gested development in the volunteer rule. One writer has advocated a distinction between a "volunteer" and an "officious volunteer," and would deny subrogation only to the latter.[33] Application of this rule would prevent the unwelcome interference in private affairs, connoted by "officious," which the common law has been so solicitious to prevent. Yet it would permit a more equitable solution of those cases where the volunteer has acted in good faith, but is denied recovery under the present rules restricting subrogation.[34]

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was denied, the court saying that the plaintiff had only fulfilled its contract and must be treated as a general creditor; since the state had been paid, it was not directly concerned. In both these cases it was said that subrogation is a favored equitable doctrine, but no Illinois cases were cited as authority. In the second case, moreover, the weight of authority would allow subrogation. Richeson v. Crawford, 94 Ill. 165 (1879); 4 Williston, Contracts § 1267 (rev. ed. 1936).

[33] Hope, op. cit. supra note 24; see Neely v. Jones, 16 W.Va. 625 (1880). Similarly, the common law rule denying subrogation to the volunteer is not found in the Roman law. Under that system, when the affairs of an absent friend seemed to be suffering, one might manage them voluntarily as the friend's agent to prevent loss, and recover for reasonably incurred expenses. It was quite possible that at times the principal would have preferred that the assistance should not be rendered. In that case, the test was whether the volunteered help had really been to the principal's advantage, or would have been so, if it had succeeded. Radin, Handbook of Roman Law § 112 (1927).

[34] For example, in Chenango County Humane Society v. Polmatier, 188 App. Div. 419, 177 N.Y. Supp. 101 (1919), the caretaker of defendant's farm had disappeared, unknown to the defendant, leaving cattle without food or water. After learning of the situation, the plaintiff entered and cared for the cattle. It was held that the plaintiff was a volunteer and could not recover his expenses, although a statute made it a misdemeanor to mistreat animals. In Macclesfield Corp. v. Great Central Ry., [1911] 2 K.B. 528, the defendant railway was required by statute to maintain a certain roadway, and had been notified by the plaintiffs, a local highway authority, that the roadway needed repairs. The defendant having failed to act, the plaintiffs made the necessary repairs, although not obligated by law to do so. It was held the plaintiffs acted as volunteers and could not recover expenses from the defendant.