

NEGOTIORUM GESTIO AND THE COMMON LAW: A JURISDICTIONAL APPROACH

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Even this less than pietistic age looks with favour upon the charitable act. Yet the common law has not been astute to reimburse or reward those who gratuitously interfere in the affairs of others.¹ This indifference to the volunteer is deep-rooted and, apparently, so unremarkable that one of the leading theoretical writers on Restitution in the common law, Professor Birks, recently discussed *negotiorum gestio* only twice, and peripherally, in his entire work. He was content to echo earlier writers in observing that "the Justinianic category, as opposed to its name in an adopted form, has never been borrowed by the common law."^{1A}

The thesis of this article is that this frigidity may be explained historically, and in particular, by examining the jurisdiction of those courts in which the volunteer is still accorded some courtesy. Specifically, it will be suggested that the Admiralty and Ecclesiastical Courts, because of their provenance, nurtured *negotiorum gestio* and allowed it to survive. The argument will be largely historical but it has an important modern consequence: it is that there is no room for expansion of the recovery allowed to a volunteer, and consequently, agency of necessity as a doctrine is incapable of further growth.

The modern relevance of the arguments is starkly revealed in the recent disagreement in the English Court of Appeal in *The Goring*.² The case considered whether salvage was payable to rescuers for services performed in non-tidal waters, beyond the Admiralty jurisdiction. On the jurisdictional ground alone, a divided court held that salvage was not payable.

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¹ "The temperamental aversion to voluntary intervention in one's private affairs has resulted in a frigidly individualistic attitude towards any suggested adoption of the principle of '*negotiorum gestio*'." R. P. Roulston, "A Plea for Restitution" (1958) 1 *Tasmanian University Law Review* 80, 94. "It is well known that in the treatment they accord altruists there is a major difference between the Anglo-American common law and most legal systems of Western Europe." J. P. Dawson, "*Negotiorum Gestio: The Altruistic Intermeddler*" (1961) 74 *Harvard Law Review* Pt. 2, 817. R. M. Jackson, *The History of Quasi-Contract* (1936) 24 states simply: "the principle of *negotiorum gestio* does not exist in our law." See generally J. Munkman, *The Law of Quasi-Contract* (1949) 69.

^{1A} B. P. H. Birks, *Introduction to Restitution* (1986) 31.

² [1987] 2 W.L.R. 1151 reversing the decision of Sheen, J. reported at [1986] 2 W.L.R. 219; [1986] 1 All E.R. 475. Since affirmed in the House of Lords [1988] 2 W.L.R. 460.

In systems derived from the civil law, beneficent intervention by a volunteer may be recompensed under the doctrine of *negotiorum gestio*.^{2A} De Vos has described the doctrine with his customary lucidity:

When a person had undertaken the management of the affairs of another without mandate from that person, he acquired against that other the *actio negotiorum gestorum contraria* for the reimbursement of all his expenses, whether the affair turned out well or ill, provided that the act of management was *utiliter coeptum*.³

It has been suggested that the doctrine of *negotiorum gestio*, in the isolated and putative instances of it at common law, has nothing to do with implied contract.⁴ Recent writing,⁵ however, suggests that the assumed incompatibility between the common law and the civil is not as great as formerly appeared. Authors have attempted to discern some unifying element in the possible examples of *negotiorum gestio* which exist in our law,⁶ in order to demonstrate that it is not as "remedially" poor as an initial inspection suggests.

Why is altruism so little encouraged by our legal system? The reason that no coherent doctrine, comparable to the civilian, has developed in our law, is because the only extant examples of it are relics which have an historical unity derived from their jurisdictional antecedents alone. Two consequences follow. First, any attempt to rationalize the cases in the area, on a doctrinal basis, will fail. Secondly, the categories of act for which a volunteer may be recompensed are now and forever closed.

THE BASIC POSITION

*Anson's Law of Contract*⁷ states categorically:

^{2A} "... an act done for the benefit of another may create mutual duties. The ... source of obligations came to be known in Roman law as *negotiorum gestio* and is known in the modern positive civil law as *Geschäftsführung Ohne Auftrag, gestione d'affari d'altrui, gestion de negocios ajenos* or management of the affair of another": J. M. Solis, "Management of the Affairs of Another" (1961) 36 *Tulane Law Review* 108. See generally W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd ed. 1963) 537; A. Watson, *The Law of Obligations in the Later Roman Republic* (1964) 206.

³ W. de Vos, "Liability arising from unjustified enrichment in the law of the Union of South Africa" [1960] *Juridical Review* 125, at 132. For a discussion of the German law Dawson, *supra* n. 1 at 824-836. Louisiana law is comprehensively discussed in A. de Castro, "*Negotiorum Gestio* in Louisiana" (1932) 7 *Tulane Law Review* 253; B. Nicholas, "Unjustified Enrichment in Civil Law and Louisiana Law Pt. II" (1962) 37 *Tulane Law Review* 49.

⁴ The putative examples of *negotiorum gestio* are collected by R. Goff and G. Jones, *Law of Restitution* (1978) 271-279. B. P. H. Birks, "*Negotiorum Gestio* and the Common Law" (1971) 24 *Current Legal Problems* 110 at 132 concludes that "... quasi-contractual obligation is nonetheless involuntary, and it has no more vicious temptation that a renewal of its unnatural English liaison with implied contract". Compare the well-known views of Sir William Holdsworth "Unjustifiable Enrichment" (1938) 37 *Law Quarterly Review*, 37 at 42.

⁵ S. Stoljar, *The Law of Quasi-Contract* (1964) 191-194; Birks, *supra* n. 4; M. L. Marasinghe, "The Place of *Negotiorum Gestio* in English Law" (1976) 8 *Ottawa Law Review* 573. As early as 1929 E. W. Hope could write, "the fact is ... that the Anglo-American law, while it has not incorporated into itself the rule of *negotiorum gestio* in its entirety, is not hostile to it in principle". E. W. Hope, "Officiousness" (1929) 15 *Cornell Law Review* 25 at 27.

⁶ See generally, Stoljar *op. cit. supra* n. 5 at 191-194, Marasinghe *supra* n. 5 at 586; R. Powell, *Law of Agency* (2nd ed., 1961) at 416: "A thorough investigation of English case law would reveal a large number of cases in which the basic principle of *negotiorum gestio* has in fact been followed."

⁷ A. G. Guest (ed.) *Anson's Principles of the English Law of Contract* (26th ed. 1985) at 600.

. . . the general rule that work done without his approval or consent or services performed by one person for another creates no obligation to pay where the work or services are purely voluntary . . . Exceptions . . . exist in the case of an agency of necessity, bills of exchange, and maritime salvage, but these are peculiar to those particular branches of the law.

Recovery from an executor for reasonable burial expenses incurred by a stranger also falls within this amorphous class.⁸ At first sight a more heterogeneous category could scarcely be imagined.⁹

It will, however, be perceived that their unifying element is the history of the various actions. The common historical element, in bills of exchange, ship-masters,¹⁰ salvage and burial is the court in which these questions were first considered. The first three were connected with the Court of Admiralty¹¹ while the fourth fell under the aegis of the Ecclesiastical courts.¹²

This jurisdictional rapport is important. For much of their history, those courts were under the control of judges whose training and outlook was pre-eminently civilian.¹³ It is no surprise if examples of *negotiorum gestio* should survive in such an environment, away from the encroachment of the common law.

An Historical Approach

An historical explanation of the rarity of *negotiorum gestio* in English law has not commended itself previously to any writer.¹⁴ It is likely that

⁸ Cf. Anson *Law of Contract* (23rd ed. 1969) at 593 who prefers to place it (none too certainly) under the rubric of Money paid by the Plaintiff to the Defendant's Use as a compulsory discharge of the Defendant's liability to a third party thus subsuming it to a recognised money count. The author states "that the presence of some moral or social duty in the plaintiff to expend the money will amount to compulsion, or at any rate, prevent him from being a volunteer." (emphasis supplied) The two are not coterminous and if the second statement as a matter of fact is unexceptionable, its initial premise is tendentious.

⁹ They have "no connecting link except their possible inclusion under the heading of quasi-contract" according to Jackson *op. cit. supra* n. 1 at 127.

¹⁰ This is at once the earliest and clearest example of agency of necessity; F. M. B. Reynolds and B. J. Davenport (eds.) *Bowstead on Agency* (14th ed. 1976) 64 (Art. 21). Of "cases of necessity whereby a person not previously an agent is constituted agent for another . . . almost the only clear case . . . is that of the ship-master acting for the cargo-owner (he is already an agent of the ship-owner)."

¹¹ Beawes, *Lex Mercatoria* (1813) at 401. "The Admiralty is said to be no court of record, on account of its proceeding by the civil law. But the Admiralty has jurisdiction where the common law can give no remedy; and all maritime causes or causes arising wholly upon the sea, it hath cognizance of."

¹² Rolle, *Abridgement* (1668) Administration at 217; "Administration L'antiquite de Ecclesiastical Jurisdiction de ceo. 1. Le graunt de Administration auncientment est al common ley, ne appartient al Ecclesiastical Courts mes al temporal Courts. 2. Mes le graunt de Administration fuit done al Ecclesiastical Courts per Parlement . . .". Hargraves, *Collection of Tracts* (1787) Vol. 1, at 457.

¹³ Ferriere and Duck, *Treatise of the Use and Authority of Civil Law in England* (1724) at XXX: "The Courts, in which by the Custom of England, they proceed by the Civil Law only, are reducible to Three Heads, viz the Court of Chivalry . . ., the Court of Admiralty and the Ecclesiastical Courts . . ."; G. R. Y. Radcliffe and R. Cross, *The English Legal System* (5th ed. 1971) at 234.

¹⁴ I am not entirely alone, however. The possibility of a jurisdictional nexus has clearly occurred to Professor G. H. Treitel, "Agency of Necessity" (1953) 3 *University of Western Australia Law Review* 2, who, in speaking of salvage, ship-masters and bills of exchange says: "it will be observed that . . . the . . . three are based on the law merchant and maritime; as these branches of the law were strongly influenced by Roman law, it is not unreasonable to detect something of the influence of *negotiorum gestio* (sic) behind these three cases." Unfortunately the Professor does not develop this theme.

different legal systems would evolve similar answers to the same problems. It is too easy to assume that what is merely a Roman parallelism is, in fact, a Roman progenitor. Moreover, there is a problem of sources. As Oliver¹⁵ noted long ago,

. . . the difficulty of ascertaining the original foundation of any particular doctrine in English courts may be said generally to be in direct ratio to the antiquity of the series of authoritative reports.

While it is not intellectually satisfying to explain the development of legal remedies purely on the basis of historical accident the development of the common law supports such an explanation. An examination of the authorities suggests that, here too, jurisdiction is the basis of the law.

The Court of Admiralty: Bills of Exchange, Salvage, Ship-Masters

At the time of the Tudors, the Court of Admiralty dealt mainly with maritime matters.¹⁶ The *Liber niger admiralitatis*¹⁷ states, "any contract made between merchant and merchant, or merchant or mariner beyond the sea, or within the flood mark, shall be tried before the admiral and noe where else."

There is no need to rehearse the internecine strife that eventually resulted in the demise of the Court of Admiralty and the usurpation of its jurisdiction by the courts of common law.¹⁸ It is sufficient to say that at any early period, bills of exchange were within the Admiralty Court's cognisance.¹⁹ "By the middle of the sixteenth century . . . English merchants were accustomed to the use of the continental bill of exchange as it then existed, and if litigation arose there was the court of Admiralty in which to sue."²⁰ So, too, in Scotland,²¹ ". . . nothing (was) more ordinary than to pursue for bills of exchange before the Admiral . . ."²² Jurisdictionally, a contract on a bill of exchange arose over the sea²³ and

¹⁵ D. T. Oliver, "Roman Law in Modern Cases in English Court" in *Cambridge Legal Essays* (1926) 243 at 245.

¹⁶ See generally A. L. Goodhart and H. G. Hanbury (eds.), *Holdsworth's History of the English Law* (7th ed. 1956) Vol. 1, at 552-559. "It [the jurisdiction] practically comprised all mercantile and shipping cases". As to its criminal jurisdiction *id.*, Vol. 1, at 550-552; Vol. IX at 523; as to prize Vol. I at 561-568.

¹⁷ H. Twiss (ed.) *Black Book of the Admiralty* (1871). See generally J. Mathiasen, "Some Problems of Admiralty Jurisdiction in the 17th Century" (1958) 2 *American Journal of Legal History*, 215.

¹⁸ Holdsworth *supra op. cit.* n. 16 *loc. cit.*; B. P. Levack, *The Civil Lawyers of England 1603-1641* (1973) at 122-150, 196-202; E. S. Roscoe, *Studies in the History of the Admiralty and Prize* (1932) at 2.

¹⁹ Holdsworth *op. cit. supra* n. 16 Vol. VIII at 152 but "by the end of the seventeenth century the law as to bills of exchange was administered by the common law courts, and had become part of the common law" *Id.* 169. (This development was an end result of the victory of the common law.) See J. M. Holden, *History of Negotiable Instruments in English Law* (1955) at 3, 16-20.

²⁰ T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956) at 668.

²¹ See generally M. C. Meston, "Some Aspects of Scottish Admiralty Practice" [1964] *Juridical Review* 1.

²² *Anderson v. Turnbull* (1706) M.7509. The Scottish Admiral had "a cumulative jurisdiction in matters mercantile": (*A v. B* (1752) M.7513) "acquired by inevitable usage": *Gordon v. Bogle* (1784) M.7532.

²³ Blackstone, *Commentaries* (1800) IV at 67 ". . . in mercantile questions, such as bills of exchange and the like . . . the law merchant which is a branch of the law of nations is regularly and constantly adhered to." J. M. Holden, "Bills of Exchange During the Seventeenth Century" (1951) 67 *Law Quarterly Review* 230 at 234: "until the seventeenth century . . . [bills] were used exclusively for the settlement of foreign accounts."

so fell within the Admiralty's jurisdiction. Moreover, the civilian lawyers administering the court were the best fitted to resolve issues of a mercantile character.²⁴

The international nature²⁵ of the *lex mercatoria* in general and bills of exchange in particular led to an infusion of unacknowledged continental concepts into the area.²⁶ The aspect of interest to the importing of *negotiorum gestio* into the common law is the origin of the acceptance of honour on a bill *supra* protest.^{26A} An explanation given by Pothier,²⁷ for example, is of value to this inquiry because of the carrying over of continental doctrine.

Contracts of salvage and those which involved ship-masters also fell within the jurisdiction of the Admiralty Court.²⁸ That contracts made by ship masters in foreign ports for necessitous repair of their vessels fell within the purview of the Admiralty court is demonstrated in a "negative" fashion²⁹ by the absence of writs of prohibition going to the Admiralty from Kings Bench to prevent it from adjudicating upon such matters.

This is in contrast to the prohibitions which issued at the slightest hint of Admiralty jurisdiction in relation to a contract which was in some way connected with the land. The distinction is most clearly made in the contrast between contracts made by a shipmaster *before* and *during* a voyage.

For example, in *Johnson v. Shippen*³⁰ Lord Holt said that hypothecation made before a voyage began "is not a matter within the jurisdiction of the court of Admiralty, for it is a contract made here, and the owners can give security to perform the contract".³¹ *Benoir v. Jeffrys*³²

²⁴ Roscoe, *op. cit. supra* n. 18 at 2; Mathiasen *op. cit. supra* n. 17 at 216.

²⁵ Azumi, *The Maritime Law of Europe* (1806) at 397, "... law merchant is grounded on the usages and customs of merchants, and those general rules which prevail among commercial men in all countries." Blackstone *supra* n. 23 *loc. cit.*; Zouch, *The Jurisdiction of the Admiralty of England against Sir Edward Coke's Articuli Admiraltatis* (1663) Ch. 22 as quoted in Mathiasen *op. cit. supra* n. 17 at 220.

²⁶ W. S. Holdsworth, "The Origins and Early History of Negotiable Instruments IV" (1916) 32 *Law Quarterly Review* 20 at 22, "Under cover of these convenient phrases about the custom of merchants it was easy to introduce into the common law both the legal principles familiar to continental lawyers, and the commercial practices familiar both to English and to foreign merchants."

^{26A} W. S. Holdsworth, "The Origins and Early History of Negotiable Instruments III" (1915) 31 *Law Quarterly Review* 376 at 386: "On many other points Marius follows closely the rules of law observed on the Continent. Thus rules as to acceptance for honour . . . follow clearly continental rules of law" (emphasis supplied).

²⁷ T. A. Street, *Foundations of Legal Liability* (1906) Vol. III at 397, "English and French law were substantially the same when Beaves wrote (circ. 1750)".

²⁸ L. K. Wroth, "The Massachusetts Vice-Admiralty Court and the Federal Admiralty Jurisdiction" (1962) 6 *American Journal of Legal History* 250, 347; at 351. Holdsworth *op. cit. supra* n. 16 Vol. I at 692.

²⁹ The concept is that of Sir W. Scott (as Lord Stowell then was) in *The "Gratitude"* (1801) 3 C. Rob. 240; 166 E.R. 450 at 269, 460, "... it is no slight negative argument of the understanding of the common law . . . that during a long series of years, no instance has happened, in which a prohibition of the enforcement of such a contract has issued."

³⁰ (1967) 2 Ld. Raym. 982; 92 E.R. 154.

³¹ *Id.* 983, 155 and see *Justin v. Ballam* (1697) 2 Ld. Raym. 805; 92 E.R. 38 at 806, 38 where the court said "... it does not appear in this case that *the ship was in her voyage*, when she became in distress for want of an anchor, and *at the time of the contract*". (emphasis supplied)

³² (1696) 1 Ld. Raym. 152; 91 E.R. 999 (prohibition granted purely due to *stare decisis*) cf. Holt, C. J.: "since the cause of the pledging arises upon the sea, the suit may well be in the Admiralty Court."

and *Costard v. Lewstie* suggest that contracts "*super altum mare*"³³ were cognizable only by the Admiralty Court.

Admiralty law was international.³⁴ The perspectives of the Admiralty judges were continental³⁵—indeed, so important was an understanding of Roman law that it was a *sine qua non* of practice.³⁶

Executors and Burial of the Dead

The Canon law also had an unbroken Romanist tradition. Selden, writing in 1647,³⁷ adverts to the long and close connection between the Canon law³⁸ and that administered by the Kings Bench. The development of the law relating to burial demonstrates its close nexus with the *actio funeraria* which may in turn be traced directly to *negotiorum gestio*.

Sir James Fitzjames Stephen once remarked:

the subject of burial was formerly and for many centuries exclusively a branch of the ecclesiastical or canon law. Amongst the English writers on this subject little is to be found relating to burial. The subject was much more elaborately and systematically studied in Roman Catholic countries than in England because the law itself prevailed much more extensively.³⁹

³³ See *Palmer v. Pope* (1612) Hob. 213, 80 E.R. 359: "Note that every libel in the Admiralty doth, and must lay the cause of the suit *super altum mare*, which argues that this is a necessary point; for the jurisdiction there groweth not from the cause of tythes and testaments in the Spiritual Court, but from the place."

³⁴ J. Macmillan, *The Sources and Literature of Scots Law* (1936) Stair Society Vol. 1 at 329. In the sixteenth century maritime law continued to be largely international, and the laws of Oleron and of Wisby continued to the authoritative, but with the general expansion of trade which then took place, and the edictal supersession of local by national mercantile courts, the need for more definite legal principles came to be felt, and everywhere in Europe recourse was had to the Roman law.

³⁵ T. E. Scrutton, "Roman Influence in Chancery, Church Courts, Admiralty and Law Merchant" in *Select Essays in Anglo-American Legal History* (1907) Vol. 1, 233. Macmillan *supra* n. 34 at 329, "... in England the study of Roman law was confined to the small body of Civilians, centred at Doctor's Common, who practised in the Court of Admiralty."

³⁶ Radcliffe and Cross, *op. cit. supra* n. 13 at 234: "... the degree of Doctor of Civil Law ... became a condition precedent to admission by the Archbishop of Canterbury to practise as an advocate in the ecclesiastical and admiralty courts . . ."

³⁷ D. Ogg, *Johannis Seldeni ad Fletam Dissertatio* (1925) at 154 (author's translation) notes the connection between Canon Law and that administered by the Kings Bench "which is clearly entwined with the Canon, just like the serpents of mercury's wand, and is modified by it so that as long as the Canons are not inconsistent with it, it has strength in those courts, a fact which has persisted to our own times. This is true especially of testamentary matters and succession to intestate estates . . ."

³⁸ The main authority on early Canon Law was William Lyndwood. F. W. Maitland, "Canon Law in England I. William Lyndwood. II Church, State and Decretals" (1896) *English Historical Review* 446, 641; at 448-449: "... the principal witness whom we have to examine, if we would discover the theory of law which prevailed in our English ecclesiastical courts about a hundred years before the breach with Rome, is indubitably William Lyndwood." The early commentaries of John of Ayton on William of Lyndwood were the first to discuss the law relating to succession and it is there (*mirabile dictu*) that the question of intervening to attend to a burial is first raised. The development of the claim for burial and its nexus with the *actio funeraria* is discussed below in detail. It suffices to say that the canon law contained the civilian element which has survived to the present day.

³⁹ *R. v. Price* (1884) 12 Q.B.D. 247 at 249.

Of course, all societies need to encourage the expeditious disposal of dead bodies.⁴⁰

In Roman law, the *actio funeraria*⁴¹ provided recovery for expense involved in burying the dead. At common law, a stranger is able to recover reasonable expenses from a deceased's executor for disposal of the deceased's corpse.⁴²

While "modern" cases on the subject of reimbursement for burial are of comparatively recent origin (beginning with *Tugwell v. Heyman*),⁴³ the issue, as one would expect, exercised judicial minds from the earliest times.⁴⁴ This is demonstrated by the interest manifested in the early reports on what acts will constitute an intermeddler an *executor de son tort*.⁴⁵ It is not as *Doctor and Student* contends that "in all contreys and in all landes they make executors".⁴⁶ The executor is an English institution and on the Continent the heir is in the ascendancy.⁴⁷

The early Constitution, *De Executione Testamentorum*,⁴⁸ in which the glossator, John of Athona,⁴⁹ comments on the necessity of the executor's compiling a complete inventory, points up the problems of arranging the burial:⁵⁰

*Immo etiam universalis Executor ante huiusmodi confectionem Inventarii, vel approbationem Testamenti, aliqua attingere potest, quae citiorem celeritatem requirunt; puta circa funus et huiusmodi.*⁵¹

Thus even at this time, although as a general rule certain formal steps had to be taken before any action could be taken over a will, there were

⁴⁰ W. W. Buckland and A. D. McNair, *Roman Law and Common Law* (2nd ed. 1952) at 148: "Owing to the absence of adequate records of the doings of the ecclesiastical courts it is often difficult, if not impossible, to say whether, when our rule and the Roman agree, we have borrowed the principle or developed it independently." (emphasis supplied) Polson, Brittain and Marshall, *The Disposal of the Dead* (1953) at 3: "The need to dispose of his dead was one of man's first problems and his choice of method was influenced by the facilities available."

⁴¹ *Digest* 11.7.14; W. W. Buckland, *A Text-book of Roman Law* (2nd ed. 1950) 544; "The *actio funeraria* is an *actio in factum perpetua*, akin to *negotiorum gestorum*, by which one who had undertaken funeral arrangements without legal liability could recover the cost from the person actually liable."

⁴² See generally Marasinghe *op. cit. supra* n. 5.

⁴³ (1812) 3 Camp. 298 (N.P.); 170 E.R. 1389.

⁴⁴ See Year Book authorities collected by W. S. Holdsworth, *History of English Law* (4th ed. 1935) Vol. III at 572 n. 5.

⁴⁵ *Ibid.*

⁴⁶ T. F. T. Plucknett and J. Barton (eds.), *Doctor and Student* (1974) Selden Society Vol. 91 at 197.

⁴⁷ Plucknett, *op. cit. supra* n. 20 at 738: "In England the victory of the executor over the heir proved to be permanent, but on the continent of a new wave of Romanism in the sixteenth and following centuries gradually reduced his importance."

⁴⁸ Lyndwood, *Provinciale (seu Constitutiones Angliae)* (1679) Tit. 14, 107.

⁴⁹ J. Reeves *History of English Law* Vol. 4 Ch. XXV at 74: "Many points of law concerning the duty and character of executors are agitated by John de Athona, in his famous gloss on a treatise of Cardinal Ottoboni". Lyndwood *op. cit. supra* n. 48 at Introduction: "Authores in hoc opere citati; Johannes de Athona Author comment in Constitutiones Legatinas, claruit A.D. 1290". See F. W. Maitland, *Canon Law in the Church of England* (1898) 6-7.

⁵⁰ As Reeves *op. cit. supra* n. 49 at 75 points out: "and the legacy left to the executor ought not to deprive him of his *actio funeraria*".

⁵¹ "Indeed the universal executor is able to carry out some things which necessitate speedy action before the compilation of an inventory or approval of the will; one thinks of the funeral and the like." (author's translation).

affairs which required expedition. The chief of these was burial, "Quae citiorem celeritatem requirunt". The sentiment, compendiously expressed, is at the heart of the gratuitous intervention of a stranger and his subsequent desire for repayment. "The honour generally due unto all men maketh a decent interring of them to be convenient even for very humanity's sake."⁵²

Birks has suggested⁵³ that "burial" cases are explicable on the basis of contract, and an appeal to public decency to which is allied "a secondary enquiry to ensure that the plaintiff was an appropriate person to respond".⁵⁴ However, while this may be an adequate *description* of the action as it ultimately developed, it is submitted that it does not satisfactorily explain the origin of the doctrine.

Modern cases normally involve the gratuitous intervention of someone who enjoyed an antecedent relationship with the deceased.⁵⁵ That such a prior connection is not a *sine qua non* of recovery, however, is demonstrated by a strong line of authority, beginning in recent times with *Ambrose v. Kerrisson*.⁵⁶

There, the point that the plaintiff was stranger/volunteer was specifically taken by counsel for the defendant in that case. "The question is whether a total stranger, volunteering to pay the expense of the funeral . . . can recover the amount from the husband upon a count for money paid to his use."⁵⁷

One of the executor's functions was to compile an inventory of assets.⁵⁸ As the Constitution itself states, this was a vital task and a condition precedent to any other action since "*si quis autem Inventario non confecto administrare praesumpserit ad sua Episcopi arbitrium puniatur*",⁵⁹ intervening to bury a corpse did not attract any punishment, as Swinburne points out.⁶⁰ Much the same situation existed in Scotland,⁶¹

⁵² A. Walton, *Hooker's Works* (1841) Vol. 2, 153.

⁵³ Birks *supra* n. 4 at 123.

⁵⁴ *Id.* 122. P. Hrilmsn, "The Rights of the Voluntary Agent against his Principal in Roman Law and in Anglo-American Law" (1926) 4 *Tennessee Law Review* 34, 76 at 94-95 is equally vociferous and incorrect viz: ". . . in cases where one has stepped in and assumed the management and expenses of a funeral in behalf of another . . . there can be no recovery of such expenses if that person did not occupy such a position that the circumstances pointed to him as one who might appropriately interpose."

⁵⁵ E.g. *In re Townsend* (1852) 21 L.J. Ch. 747 *per* Cranworth, L.J.: "*Prima facie* the nephew and his wife, with whom the lunatic has lived, are the most proper persons to be engaged in such a matter. Let them proceed with the funeral . . ."; *Robinson v. Shaw* (1952) 8 M.C.D. 192 (sister); *Routtu v. Routtu* [1955] 1 D.L.R. 627.

⁵⁶ (1851) 10 C.B. 776; 138 E.R. 307. Action for debt for money paid by plaintiff to use of defendant. *Plea nunquam indebitatus*.

⁵⁷ Montagu Chambers *arguendo*, *id.* 777-778, 307-308.

⁵⁸ As indeed he must still do today. See s. 28(i) Administration and Probate Act 1958 (Vic.), Hewitt and Bongiono, *Administration and Probate* (2nd ed. 1971) at 28, Keeton (ed.), *Williams on Executors and Administrators* (14th ed. 1960) at 440-446.

⁵⁹ Lyndwood, *op. cit. supra* n. 48 tit. 14, 107.

⁶⁰ Swinburne, *Testaments and Last Wills* (4th ed. 1743) at 33.9. See 1 Comyns *Digest* (4th ed. 1800) at 365, c.2 where a man is said not to be an executor "if he pays the funerals, or debts of the intestate, with his own money".

⁶¹ A. E. McCrae, *Currie on Confirmation of Executors* (6th ed. 1964) at 1: ". . . there is no doubt that for a considerable time anterior to the Reformation in 1560 the canon law furnished the rule of distribution and judicial and practical administration of . . . estates was undertaken by the prelates of the Roman Catholic Church . . ." Thus, to all intents and purposes, the situation was closely aligned with that south of the Tweed.

where one did not become a *vicious intromitter* merely by intervening to preserve property of conduct obsequies.⁶² The usual view, which accords once again with the English, was that "ane executour may not intromet with the guidis and gier of the deid, nor zit persew as executour until the testament be first confirmit".⁶³

The glossator to Ottoboni,⁶⁴ who is almost the earliest commentator that we have available on the ecclesiastical control over executors,⁶⁵ had the action *negotiorum gestorum*⁶⁶ specifically in mind when considering the recovery of funeral expenses. "*Idem dico per Legatum Executor relictum non consume actionem funerariam*".⁶⁷ The clerical courts were clearly familiar with the classical action⁶⁸ — Vacarius,⁶⁹ for instance, mentions the funerary action in his *Liber Pauperum*.⁷⁰

The right of the stranger to recover continued as a matter of course in subsequent times. To support such an assertion only negative evidence is available. For the Year Books references⁷¹ make it clear that strangers were still intervening to bury the dead, the only question was whether they became liable as executors for such action.⁷² Whether they could sue for expenses so incurred is never mentioned. The most plausible explanation for the omission is that their expenses were being paid without recourse to litigation.⁷³

As the law developed such a right to reimbursement easily fitted into a category of implied promise. Thus in *Besfich v. Coggill*,⁷⁴ where a

⁶² D. M. Walker, *Principles of Scottish Private Law* (1970) Vol. 2, at 1875-1876; *Greig v. Christie* (1908) 15 S.L.R. 667 at 669 per Lord Low: "I am unable to see how by carrying on the farm and thereby necessarily intrmitting with the stock the defender could be regarded as a vicious intromitter".

⁶³ J. Balfour, *Practicks* Vol. 1 McNeil (ed.) Stair Society Vol. 21 (1962) at 219-220. Accord *Formulare* Vol. 1 224 Stair Society Vol. 7 (1942) at 261.

⁶⁴ See n. 49 *supra*.

⁶⁵ Cf. Plucknett *op. cit. supra* n. 20 at 377: "even as early as Glanvill, . . . the heir is liable for *his ancestor's debts* . . .". Glanvill was c. 1187 A.D.; Caillemer makes the executor the active and passive representative of the testator. "*Claims and debts of the deceased devolve on him, as they did on the heir in Rome* — a resemblance noted by English writers" (emphasis supplied). See n. 3 *supra* for this parallel with Roman law.

⁶⁶ Lyndwood *op. cit. supra* n. 48 at 108: "Consequenter quaero numquid hodie actio quam Executor habuit contra defunctum sit extincta? Videtur quod sic . . . Dic contra; cum hic reperiat alius, sc. haeres quem possit convenire. Quod non est in l. contraria. de haere acti. vendi facit C. de neg. ges. si ab es."

⁶⁷ *Ibid.*: "In the same way I say that the *actio funeraria* is not removed by a legacy left to the Executor." (author's translation) *i.e.* the Executor may still recover for funeral expenses over and above his gift.

⁶⁸ Cf. Justinian, *Codex* 4, 44, 3.

⁶⁹ See generally W. Senior, "Roman Law in England before Vacarius" (1930) 46 *Law Quarterly Review* 191.

⁷⁰ F. de Zulueta (ed.), *Vacarius' Liber Pauperum* (1927) Selden Society Vol. 44, 3, 54 P. 107.

⁷¹ Y.B.B. (1443) 21 H. 6.11, 28; (1454) 32 H. 6.5; (1481) 21 E.1.4.

⁷² E.g. (1454) 32 H.6.5 Brief de Debe fuit port en vers une feme come executor d'un J. Birb ite jadis son baron. As Ashton said in that case: "car ceo que vous parles n'est nul maner colour de administration, mes si ascun administre circa expenses funerels et nien t plus, et apres ascun brief est port envers luy, il poit bien pledger en cett cas comment il administre divers biens le testator pur tiel maner et cause, le quel est un administration tiel quel puit estre entend y ley: car it ne serra charg des auts biens . . . Quod fuit concessum per totam Curiam."

⁷³ Cf. Y.B. 21 E.1.4 Index 71: "Executor de son tort ne serra per tor cious prender des biens le mort, sans ascun chose fait come executor: *Quaere de choses circa funeraria*". (emphasis supplied)

⁷⁴ (1628) 1 Palm 559; 81 E.R. 1219.

father promised to pay the plaintiff,⁷⁵ after the latter had buried his son, Serjeant Finch's plea that "*pur ceo le pier nr est lya payer, et nul promise de payer eux avant l'account, ergo . . . ceo est male*"⁷⁶ availed the defendant naught. So, too, in *Church v. Church*,⁷⁷ Montague, L.C.B. held:

That whereas the plaintiff had at his own charges buried the defendant's child, the defendant promised to pay him his charges; and though there was no request laid, yet judgment was given for the plaintiff.⁷⁸

That such action was thought of in terms of the executor *de son tort* is demonstrated by the mention of *Church* in *Stokes v. Porter*.⁷⁹ There intermeddling is canvassed extensively. In all likelihood the origin of the right to recover for undertaking burial had been forgotten by the time of the Year Books cited.⁸⁰ As Sir William Holdsworth says:

The general principles which they [the writers and judges] have taken from Roman law, and adapted more or less to English uses were brought to light; and in the course of the sixteenth and the following century they were gradually made integral parts of the fabric of English law.

As Robson, J.A. stated in *Davey v. Cornwallis*:⁸¹ "The extraordinary nature of such cases gives rise to exceptional rules . . . an executor is liable for costs of burial of the testator without any specific contract."

As his Honour went on to say, quoting *Ambrose v. Kerrison*, this liability accrues "whether the party incurring the expense was an undertaker or a mere volunteer".⁸²

Although at common law a husband was liable for his wife's funeral expenses⁸³ and *vice versa*,⁸⁴ it is still by no means settled who is primarily

⁷⁵ *Ibid.*: "pur queux . . . le defendant ad avant sur bon consideration promise a payer, nec non pur charges expend pur le burial del fitz le defendant."

⁷⁶ *Id.* 559, 1220.

⁷⁷ (1656) T. Taym. 260; 83 E.R. 133. Action in *Assumpsit*.

⁷⁸ *Ibid.*

⁷⁹ In *Stokes v. Porter* (1559) 1 Dy. 166(b); 73 E.R. 364 it pointed out with regard to executors *de son tort* that "some possession is colourable, and still none in law to charge . . . as expenses about the funeral", Viner, *Abridgment* (1753) Exec. B.a.24; "spending of the Goods about a Funeral of the Testator is no Administration as Executor, for every Stranger may do it". (emphasis supplied) And see (1569) 3 Dy. 272(b)n.

⁸⁰ For a discussion of the growth of precedent in the Year Books see T. E. Lewis, "The History of Judicial Precedent" (1930) 46 *Law Quarterly Review* 207, 341.

⁸¹ [1931] 2 D.L.R. 80.

⁸² *Id.* 83.

⁸³ *Cf. Rees v. Hughes* [1946] K.B. 517 at 523 where Scott, L.J. speaks of "this ancient duty of the common law . . .". See *Re Montgomery; Lumbers v. Montgomery* (1911) 20 Man. R. 447 *per* Mathers, C.J.; "by a long series of authorities it is established that at common law the husband is bound to pay the funeral expenses of his wife"; *Re McMyn* (1886) 33 Ch.D. 575; *Re Spencer* [1955] 4 D.L.R. 221.

⁸⁴ *Chapple v. Cooper* (1884) 13 L.J. Ex. 286 but note that the widow had apparently actually contracted and the real issue was whether her infancy was a defence to suit on the contract. In *Re Montgomery id.* 448-449 Mathers, C.J. pointed out that the common law "imposes a corresponding duty upon the widow to bury her husband."

liable to defray the cost of those not so encumbered.⁸⁵ Time out of mind it would seem that the funeral expenses were to be paid out of the deceased's estate before any other costs and that the executor so doing would not be liable on a *devastavit*.⁸⁶ From the frequent reiteration of what would or would not constitute the acts of an executor de son tort, intervention by a stranger to see to a funeral must have occurred fairly often. As noted in 21 Henry II, "chescun estranger poit dispendre les biens le mort enter son sepult, et n'e st aucun administr".⁸⁷ Note that it is a stranger given this potential to intervene—the reason for such acts is that which bottoms the right from the earliest times to our own⁸⁸ viz "car ce est bon et charitablement fait."⁸⁹

At common law the executor "must bury the deceased in a manner suitable to the estate he leaves behind him".⁹⁰ The estate is liable for reasonable expenses but no more.⁹¹ Such a situation is analogous to that prevailing in the classical civil law with its *actio funeraria*.⁹² As Professor Powell reminds us, the *actio funeraria* was "closely allied to, and may even have existed before, the action for indemnity upon a *negotiorum gestio*".⁹³ That the two are clearly related in those systems which have more exactly followed the civilians is demonstrated by the Scottish decision in *Lady Ormiston v. Hamilton of Bangour*⁹⁴ where their Lordships found "that *actio funeraria* is only competent for expenses that were necessary and decent with regard to the defunct's quality and free estate . . .".⁹⁵

At both civil and common law the expenses had to be reasonable,⁹⁶ the debt was payable out of the estate before all others⁹⁷ and humanity was expressed to be "the foundation of this funerary action".⁹⁸ From the

⁸⁵ Halsbury, *Laws of England* (3rd ed. 1953) Vol. 4 at 4. "The law as to the persons upon whom the duty of burying a dead body falls, and as to the nature of the duty is imperfectly developed."

⁸⁶ E.g. Rolle, *op. cit. supra* n. 12 at 926: "quel detts doit estre primerment satisfie per eux et quel nemy sans devastavit. Tant des biens testator que est sufficient pur son funerall poient estre imploie a tiel use devant dett ou legacies paie." See F. D. Baker, *Widdifield on Executors' Accounts* (5th ed. 1967) at 1-2.

⁸⁷ Per Newton and Ascue: "A stranger is able to utilize the goods of the deceased for his burial, and this is no administration."

⁸⁸ *Croskery v. Gee* [1957] N.Z.L.R. 586 at 589 per McGregor, J.

⁸⁹ 21 E.I. 12: "Because this is well and charitably done". (author's translation) See Holdsworth, *op. cit. supra* n. 16 Vol. III at 572.

⁹⁰ *Williams v. Williams* (1882) 20 Ch.D. 659 at 664 per Kay, J.; see 2 Bl. Comm. 508.

⁹¹ *Green v. Salmon* (1838) 8 Ad. te. 348; 112 E.R. 869 per Denman, C.J. at 351, 871.

⁹² See *Digest* 11.7. De Religiosis et Sumptibus Funerum et ut funus ducere liceat.

⁹³ Powell, *op. cit. supra* n. 6 at 418. Cf. F. H. Lawson, *Roman Law and Common Law* (2nd ed. 1952) where the possibility of a genuine connection is deprecated: "there was in Rome an *actio funeraria* for funeral expenses long before the *actio negotiorum gestorum* reached its wide development". But this fails to account for the specific language of D.11.7, 14.6-7. And see A. Watson, *A Textbook of Roman Law* (1976) at 321, n. 5.

⁹⁴ (1709) M.4981.

⁹⁵ *Id.* 4988.

⁹⁶ *Rees v. Hughes* [1946] K.B. 517, 523 per Scott, L.J.; *Green v. Salmon supra* n. 91 " . . . the estate must at all events pay the reasonable expenses of the funeral, and can in no event be liable beyond them."

⁹⁷ *Lady Ormiston v. Hamilton of Bangour* (1709) M.4981 at 4983 " . . . being funeral charges, it is the defunct's debt, and preferable to the debts of the heir . . .". See *Digest* 14.7.1: "qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum herede" (emphasis supplied). Could this be the basis of the common law priority?

⁹⁸ Cf. *Croskery v. Gee* [1957] N.Z.L.R. 586 at 588 per McGregor, J.: "It seems to me, from common humanity or common decency, that the respondent was an agent of necessity for disposal of the body."

beginning, the duty of burial was laid upon the executor and control of executors in general fell to the ecclesiastical courts.

Acceptor of a Bill of Exchange for honour supra protest

The acceptor for honour of a bill of exchange⁹⁹ is another "volunteer" whose juristic antecedents can be traced¹⁰⁰ to the doctrine of *negotiorum gestio*. Munkman's truism¹⁰¹ states the common law:

A quasi-contractual obligation cannot be established . . . merely by paying another person's debt or by making some other payment which operates for his benefit. A common law claim for reimbursement did not lie unless money had been paid at the defendant's request . . .¹⁰²

In the light of this rule, the acceptor's position is distinctly anomalous. Yet, as Riley states,¹⁰³ "a stranger is allowed to intervene and accept in the place of the drawer".¹⁰⁴ By virtue of the Bills of Exchange Act¹⁰⁵ (which merely codified the existing law) the acceptor for honour stands in the shoes of him on behalf of whose honour he has intervened, both as regards rights and liabilities.

The early relationship between bills of exchange and the Court of Admiralty administering the mercantile law has already been noted.¹⁰⁶ That such a relationship involved reliance upon much of the learning of civilian jurists is inferentially demonstrated by the arguments of Serjeant Byles in *Geralopulo v. Wieler*¹⁰⁷ where in speaking of protest for dishonour he specifically states that "the doctrine . . . is in strict accordance with the laws of Scotland and of France, and, indeed of the whole of continental Europe".¹⁰⁸

⁹⁹ See Bills of Exchange Act 1909-1973 (Cth.) ss. 70-73.

¹⁰⁰ The quasi-contractual action for money paid to another's use is beyond the scope of this essay which aims to examine only the reception of the civilian doctrine in modern law. For the money count see G. Jones, "Restitutory Claims for Services Rendered" (1977) 93 *Law Quarterly Review* 273.

¹⁰¹ Munkman *op. cit. supra* n. 1.

¹⁰² *Id.* 69 and see Goff and Jones *op. cit. supra* n. 4 at 240-241; *Exall v. Partridge* (1799) 8 T.R. 308; 101 E.R. 1405 *per* Lawrence, J. at 311, 1406, "one person cannot, by a voluntary payment raise an assumption against another."

¹⁰³ B. B. Riley, *Bills of Exchange* (2nd ed. 1964). A third edition is available but the author prefers to use the second which is in many ways superior.

¹⁰⁴ *Id.* 223.

¹⁰⁵ S.71(v): "the acceptor for honour is liable to the holder, and to all parties subsequent to the party for whose honour he has accepted." See Riley *op. cit. supra* n. 103 at 225; M. D. Chalmers, *Bills of Exchange* (23rd ed. Megrah and Ryder) (1972) at 99; J. M. Holden, *History of Negotiable Instruments in English Law* (1955) at 49.

¹⁰⁶ *Supra* n. 19. W. S. Holdsworth, "Reception of Roman Law in the Sixteenth Century" IV (1912) 28 *Law Quarterly Review* 236 at 253; "It is true that we may trace continental influences in the maritime commercial law administered by the court of Admiralty . . .".

¹⁰⁷ (1851) 10 C.B. 690; 138 E.R. 272 at 697-701, 275-277.

¹⁰⁸ *Ibid.* He goes on to quote extensively from those authorities. See generally, *per* Lord Mansfield in *Luke v. Lyde* (175) 2 Bur 882, 97 E.R. 614 at 887, 617, "the maritime law is not the law of a particular country, but the general law of nations: 'non erit alia lex Romae, alia Athenae; alis nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit'."

Street¹⁰⁹ has remarked the correlation between English and French law on this topic, and it is important to examine continental explanations of the doctrine of acceptance for honour *supra* protest.

Pothier, in his seminal work on bills of exchange¹¹⁰ clearly explains the basis of such an acceptance. ". . . il est¹¹¹ vrai qu'il (c'est a dire l'accepteur pour honneur)¹¹² n'a pas l'action *mandati contraria*¹¹³ puisqu'il a refuse d'accepter le mandat aux conditions qui y etoient portees; mais on ne peut lui refuser l'action *negotiorum gestororum contraria*¹¹⁴ . . ." ¹¹⁵

Acceptance for honour and payment for honour were firmly established customs.¹¹⁶ In *Fairley v. Roch*¹¹⁷ acceptance for honour is described as being "in existence for such a period that no contrary recollection of men exists; (it is) a certain ancient and praiseworthy custom familiar amongst merchants and other people¹¹⁸ . . ." ¹¹⁹ Thus, although the common law assimilated the doctrine of acceptance for honour *supra* protest, the custom of the *lex mercatoria*¹²⁰ was the basis of the action,¹²¹ and for this the common law neither had, nor sought, a satisfying explanation, it being enough that the matter could be proven and hence pass into practice.¹²² It is significant that the first cases of acceptance for honour did not have to conform to the pleadings of an earlier time for it is not easily reconcilable with normal principle.

Lord Campbell, L.C. in *Ex parte Wyld*¹²³ stated that "proof as holder of the bill and proof for money paid to the use of the (defendant)

¹⁰⁹ *Supra* n. 27.

¹¹⁰ Pothier, *Traite du Contrat de Change* (1773): He was ". . . a most learned and eminent writer upon every subject connected with the law of contracts and intimately acquainted with the law merchant in particular" *per* Ellenborough, C.J. in *Hoare v. Cazenove* (1812) 16 East 39; 104 E.R. 1137 at 397, 1139.

¹¹¹ All lettering has been altered to accord with modern standards.

¹¹² Author's interpolation.

¹¹³ Heineccius, *Elementa Iuris Natural Gentium* (3rd ed. 1749) I.285 gives the following etymological explanation of *mandatum*: ". . . eius antem fidei symbolum fuisse manus dationem, qua alter alteri rem committere solebat. Unde et ipsum contractum MANDATI, nomen accepisse, probabile est." For a discussion of the classical *actio mandati*, see F. Schulz, *Classical Roman Law* (1950) at 554.

¹¹⁴ Heineccius, *op. cit. supra* n. 113 at I. 346; I.348; I.349 discusses possible bases for the *actio negotiorum gestororum contraria*.

¹¹⁵ Pothier *op. cit. supra* n. 110 at 104 ". . . it is true that he (that is to say the acceptor for honour) does not have the action *mandati contraria* since he has refused to accept the bill on the conditions on which it is brought; but he cannot be refused the action *negotiorum gestororum contraria* . . ." (author's translation). See generally Beawes *op. cit. supra* n. 11 at 568-572, ss. 42-51.

¹¹⁶ Holden, *supra* n. 23.

¹¹⁷ (1686) 1 Lutw. 891; 125 E.R. 489.

¹¹⁸ *Ibid.* "(le Custom) . . . est fair d'extender al tous manner de Persons per tout le mond."

¹¹⁹ ". . . et a toto tempore cuius contrar", memoria hominis non existit fuit quaedam antiqua et laudabilis consuetudo inter mercatores et al' personas usitat' . . .".

¹²⁰ ". . . the *lex mercatoria* or law-merchant, as it is called, is adopted by the English common law, and forms part of the law of the land . . ." Blackstone *op. cit. supra* n. 23 at I. 273. "This law merchant is grounded on the usages and customs of merchants, and these general rules which prevail among commercial men in all countries." Azumi *op. cit. supra* n. 25 at 397. See generally W. A. Bewes, *The Romance of the Law Merchant* (1923).

¹²¹ *Lewin v. Brunetti* (1688) 1 Lutw.896; 125 E.R. 494 at 899, 497 "le Declaration doit strictement persuer le Custome, que est le Foundation del Action . . ." See *English and Empire Digest* Vol. 6 at 390.

¹²² Apparently at an earlier stage the custom of merchants was not pleaded: Street *op. cit. supra* n. 27 at 343-347. At a later time the law merchant was regarded as part of the common law and "when a custom hitherto unrecognized is alleged to exist, the judges consult with the merchants or allow them to be produced as witnesses to prove its existence. Holt and Mansfield followed this course." *Id.* 353.

¹²³ (1860) 2 De G.F. and J. 642; 45 E.R. 770.

were only variations of the form of procedure for the same right"¹²⁴ But so to contend is seriously to misunderstand the nature of the acceptor for honour's right which is *sui generis* and bears only a superficial resemblance to the count for money paid to the use of the defendant. The acceptor *supra* protest does not satisfy the customary prerequisites for recovery under the rubric of money paid.¹²⁵ Thus, although the defendant was under a legal liability to pay the money and the acceptor for honour relieves him of that liability, the plaintiff is never at any stage under a legal liability himself to pay the sum.¹²⁶ His intervention is purely gratuitous.

Indeed, as Mr. Bayly Q.C. said *arguendo* in *Ex parte Wyld*,¹²⁷

. . . apart from the law merchant the case is nothing more than that one man voluntarily pays another man's debt without having been requested to do so, which, whatever moral claim it may raise, certainly gives no right at law or equity.

Such a proposition as a general statement of the law is indisputable.¹²⁸ It is based on the high regard of the common law for the principles of contract¹²⁹ and the desire to prevent people being in debt to those whom they have not themselves chosen.¹³⁰

Moreover, no equity attaches "upon the holder in favour of the person by whom he was paid".¹³¹ To support such an equity would change the effect of the payment since the acceptor for honour "has no right or remedy against subsequent indorsers, but if the holder was to be held to be a trustee for him he would have remedy against the subsequent indorsers."¹³²

Viner's *Abridgement*¹³³ expressly states that no antecedent connection between the acceptor and person for whom he accepted is necessary

¹²⁴ *Id.* 648, 772.

¹²⁵ See Anson, *op. cit. supra* n. 8 at 590-595.

¹²⁶ For the claim of money paid to the defendant's use as an example of a gratuitous service see Jones, *supra* n. 100 at 273. The situation is, of course, different if paid by the *indorser* of the bill for the acceptor. He can recover on a money paid count since he is initially obliged to pay, ". . . if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay to reimburse me." *per* Bayley, J. in *Pownall, Gent v. Ferrand* (1827) 6 Br.C. 439; 103 E.R. 513 at 443-444, 515.

¹²⁷ *Supra* n. 123.

¹²⁸ See Goff and Jones, *op. cit. supra* n. 4 at 241; "the mere payment of another's debt will not, of itself, discharge the debt or give a right to compensation"; and cases cited in Goff and Jones, *ibid.* n. 88. *Cf.* Jones, *supra* n. 100 at 275; "there may be circumstances where it is just to impose liability on a defendant even though he has neither requested nor freely accepted the services rendered."

¹²⁹ Birks, *supra* n. 4 at 114; G. H. L. Fridman, "The Quasi-Contractual Aspects of Unjust Enrichment" (1956) 34 *Canadian Bar Review* 393 at 414 ". . . a man must be entitled to reject benefits if he does not want them, or to reject benefits coming from a particular person." See S. Stoljar, "Contract, Gift and Quasi-Contract" (1959) 3 *Sydney Law Review* 33 at 39.

¹³⁰ *Exall v. Partridge* (1799) 8 T.R. 308, 101 E.R. 1405 provides the *locus classicus per* Lord Kenyon, C.J. at 310, 1406 in words so well known that they do not bear repetition.

¹³¹ *Ex parte Wyld supra* n. 123 at 652, 744 *per* Turner, L.J. See *Re Overend, Gurney, ex parte Swan* (1868) L.R. 344 at 365 *per* Malins, V.-C.

¹³² *Ibid.*

¹³³ Viner, *Abridgment Supplement* (1799) Bills of Exchange L.4.

whatsoever. He may act "without the orders or knowledge of the person" yet the latter is obligated to him as if "he acted entirely by his directions".¹³⁴

Thus, Munkman is perfectly correct so far as he goes when he says that "the right to indemnity on payment *supra* protest . . . (is) on any view purely quasi-contractual . . ." ¹³⁵ since the essence of such acceptance, as has been adumbrated, depends on no antecedent relationship or "implied request".

Moreover, when Scrutton says the law of Bills of Exchange "appears entirely free from Roman influence, the usages of Merchants which it embodies being of much later origin",¹³⁶ it is important to realise that he can only be referring to questions of direct historical linking. The origins of the bill of exchange are lost in the mists of antiquity;¹³⁷ it is highly unlikely that the acceptance *supra* protest is an exemplar of the praetorian edict as it was administered in the time of Justinian. Such concession in no way detracts from the strong authority which demonstrates that, no matter how the right derived,¹³⁸ it was explained from the earliest writing on the subject¹³⁹ in terms of the *negotiorum gestio*.

Thus, the "French edict of Versailles in 1673 defines . . . the bill may be honoured, paid or acquitted by any other besides the person on whom it is drawn and he will have all the rights of the person to whom the bill was paid without either assignment, substitution or explicit order; and so the law says, tit. de neg. gestis, quisque solvendo pro alio invito et ignorante liberat eum, et negotium eius gessit".¹⁴⁰

The bill of exchange, whatever its origin, is considered as a mercantile voucher.¹⁴¹ A basic prerequisite of its continued utility is its negotiability. Although Goff and Jones¹⁴² characterise acceptance *supra* protest as merely "another manifestation of necessitous intervention",¹⁴³ it is submitted that such a nebulous description reveals very little and that, in fact, only the doctrinal explanation given by continental jurists as received into English law in the Admiralty suffices to explain an anomaly which stands in stark contrast to the common law position on payment of another's debt.

¹³⁴ *Ibid.*

¹³⁵ Munkman, *op. cit. supra* n. 1 at 74.

¹³⁶ T. E. Scrutton, "Roman Law Influence in Chancery, Church Courts, Admiralty and Law Merchant" in *Select Essays in Anglo-American Legal History* (1907) Vol. 1 at 211, 244.

¹³⁷ See generally Beawes, *op. cit. supra* n. 11.

¹³⁸ The doctrine has a definite affinity with the *aval* which "is an element in the Italian, French Spanish commercial codes, and means the guaranty for the payment of a bill, apart from indorsement, and is either on the bill itself or in a separate document. It is obviously the Arabic *hawala* . . ." Beawes *op. cit. supra* n. 11 at 46. See s. 61 Bills of Exchange Act 1909-1973 (Cth.); *McDonald v. Union Bank of Scotland* Court of Session, 3rd series (1863-1864) II.999; Pothier *op. cit. supra* n. 110 at IV vii.

¹³⁹ Pothier, *op. cit. supra* n. 110 at IV, 114 quoting Heineccius, *Elementa Juris Cambii* 6, 9.

¹⁴⁰ *Carstairs v. Paton* (1703) P. 1528 at 1530 Fountainhall's Report.

¹⁴¹ *Gordon v. Bogle* (1782) M.7532.

¹⁴² Goff and Jones, *op. cit. supra* n. 4.

¹⁴³ *Id.* 241.

Salvage

"That those who rescued persons¹⁴⁴ or property from the perils of the sea should be rewarded, is a principle recognised from the earliest times."¹⁴⁵ From the earliest times, jurisdiction over wrecks and salvage was exercised by the court of Admiralty.¹⁴⁶ Its basis is variously attributed to a desire to encourage intervention in times of danger,¹⁴⁷ or more broadly as an example of an "equity of rewarding spontaneous services, rendered in the protection of the lives and property of others"¹⁴⁸ which is part of *ius gentium*.¹⁴⁹ The doctrinal basis of recompense for salvage and the reason for its circumscribed application—for it is a commonplace that salvage has no terrene counterpart.¹⁵⁰

The origin of salvage is generally ascribed to a maritime permutation of *negotiorum gestio*.¹⁵¹ "Remuneration to those who have saved property from destruction at sea is said to be taken from the Roman law of *negotiorum gestio* . . ."¹⁵² Such a view finds its strongest curial support in the comments of Sir Christopher Robinson in *The Calypso*,¹⁵³ where the judge extensively canvassed possible rationales of the doctrine and adopted the explanation of Sir William Wiseman¹⁵⁴ that it was, indeed, an example of *Digest lib. 3 tit. 5*¹⁵⁵—"Upon the equity hereof is that proceeding in the Admiralty Court clearly justified . . ."¹⁵⁶ But it

¹⁴⁴ Cr. G. Gilmore and C. L. Black, *Law of Admiralty* (2nd ed. 1975) at 532; "Historically, the saving of life was regarded as fulfilling a moral duty but not as entitling the salvor to a reward . . . Life salvage, unaccompanied by property salvage, still goes unrewarded." G. Robinson, "The Admiralty Law of Salvage" (1938) 23 *Cornell Law Quarterly* 229; "Reward for saving life has also come up . . . but historically, salvage has to do with the saving of property." See generally J. Bockrath, "The American Law of Life Salvage" (1976) 7 *Journal of Maritime Law* 207.

¹⁴⁵ Holdsworth *op. cit. supra* n. 16 Vol. VIII at 269.

¹⁴⁶ See generally R. G. Marsden, *Select Pleas of the Court of the Admiralty* (1892) Vol. 1 at xii-xiii, lxv; "the early statutes relating to wreck provide for the remuneration of salvors, and the question of remuneration for work and labour in bringing in wreck and derelict is frequently mentioned in derelict cases."

¹⁴⁷ Beawes, *op. cit. supra* n. 11 at 241.

¹⁴⁸ *Per* Sir Christopher Robinson in *The 'Calypso'* (1828) 2 Hagg. Adm. 209; 166 E.R. 221 at 217, 224.

¹⁴⁹ Beawes, *op. cit. supra* n. 11 at 241, "salvage is allowed by all nations . . ."; Mathiasen, *supra* n. 17 at 227 suggests that the Law Merchant and Law Maritime were part of the one jurisdiction and international law. See *Hartford v. Jones* (1698) 1 Ld. Raym. 393; 91 E.R. 1161 *per* Holt, C.J.

¹⁵⁰ See generally W. R. Kennedy, *Law of Civil Salvage* (4th ed. 1958) *passim*. Z. Cowen, "Notes on the Law of Civil Salvage" (1944) 18 *Australian Law Journal* 96; W. H. Tredinnick, "Some Aspects of Salvage" (1946) 20 *Australian Law Journal* 241; Z. Cowan, "Aspects of the Law of Civil Salvage" (1947) 3 *Res Judicatae* 19. E.g. *per* Marshall, C.J. in *Mason v. Ship Balireau* (1804) 2 Cranch 240 at 260 *obiter*; Gilmore and Black *op. cit. supra* n. 144 at 532, "on land the person who rushes in to save another's property from danger is an officious intermeddler, the volunteer whom even equity will not aid."

¹⁵¹ E.g. Anon, "The Nature of Salvage Service" (1920) 33 *Harvard Law Review* 33; Ryan, "Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective" (1968) 7 *Western Ontario Law Review* 173 at 194, n. 131: "Price says that salvage can be 'traced to the Roman law of *negotiorum gestio*' G. Price, *The Law of Maritime Liens* 44."

¹⁵² Anon, *supra* n. 151.

¹⁵³ See n. 50 *supra*.

¹⁵⁴ Wiseman, *Law of Laws* 90 as quoted in *The 'Calypso'* (1828) 2 Hagg. Adm. 209; 166 E.R. 221 at 218, 224.

¹⁵⁵ Justinian, *Corpus Iuris Civilis* lib.3 tit. 5. *De negotiis gestis*.

¹⁵⁶ Wiseman *loc. cit. supra* n. 154.

is one thing to justify a remedy by recourse to a hallowed civilian principle and another to trace its origin to it with certainty.¹⁵⁷

Grotius,¹⁵⁸ in dealing with *negotiorum gestio*, places salvage directly within the concept:

Under the name of administration of affairs is included trouble taken at sea for the salvage of other people's property. Since this is accompanied by great danger, and without it much property might be lost the institution of salvage money has with much reason been introduced amongst us.¹⁵⁹

Surprisingly for what *ex facie* appears to be an equitable¹⁶⁰ right of great utility *viz* to reward those who intervene to preserve property,¹⁶¹ there is, as noted, no terrene counterpart to maritime salvage.¹⁶² On land, the rescuer's plea for recompense goes unheeded.¹⁶³ It is submitted that the cause of this abjuration is jurisdictional. The general principle of maritime salvage, embodying a derivation of *negotiorum gestio* is fundamentally inimical to the common law's methods for regularising the contractual relations between citizens.¹⁶⁴

Salvage is permissible in Admiralty because it is confined to a maritime sphere.¹⁶⁵ It has been nurtured by men who have perceived its practical mercantile importance. At common law, the concept is forced willy-nilly into a category of "implied request",¹⁶⁶ artificial as that request may be in fact.¹⁶⁷

¹⁵⁷ Note, however, P. G. Vinogradoff, *The Legacy of the Middle Ages* (1909) 316 who supports an historical approach stating: "if we wish to trace the development of doctrines as to risks, . . . jettison, shipwreck . . . we may well start from the laws of obtaining nowadays, but we should have to look back for the reason of their information and conditions of their application not only to the customs of the Dutch, the Spaniards, the Portuguese, but to the compilations of Mediterranean usage called the consulate of the sea, the laws of Gotland, the usages of Oleron in Gascony, the Statutes of Ragusa, the practice of Venice, of Genoa, of Pisa, of Amalfi, the Byzantine legislation of the Basilica, and of Justinian's *Corpus Iuris*, the Rhodian law, the speeches of Demosthenes . . ." The passage is worth quoting *in extenso* as it traverses all known sources and shows the necessary ambit of historical researches in Admiralty.

¹⁵⁸ Lee (trans. Grotius', *Jurisprudence of Holland* 1926) Vol. 1 at 3, 27, 435-6. "Administration of affairs is the burden of managing the affairs of an absent person which another takes upon himself without mandate."

¹⁵⁹ *Ibid.*

¹⁶⁰ "The jurisdiction which the Court [of Admiralty] exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not necessarily do so." *per* Hannen, P. *The Five Steel Barges* (1890) 15 P.D. 142 at 146. See generally Bruce, J. in *The "Hestia"* [1895] 193 at 199.

¹⁶¹ ". . . the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save." *per* Bruce, J. *ibid.* See generally Kennedy, *op. cit. supra* n. 150 *passim*.

¹⁶² "No similar doctrine [to maritime salvage] applies to things lost upon land, nor to anything except ships or goods in peril at sea." *per* Bowen, L.J. in *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234 at 248.

¹⁶³ Jackson, *op. cit. supra* n. 1 at 124: "The whole topic of maritime salvage stands outside the realm of common law, both in its history and in its present form. *I have found nothing to show that the rules of maritime salvage law have exercised any influence on matters dealt with at common law.*"

¹⁶⁴ Stoljar, *op. cit. supra* n. 5 at 191; Birks, *supra* n. 4 at 114; Roulston, *supra* n. 1 at 95.

¹⁶⁵ ". . . salvage is not governed merely by regard to benefit received, but also on grounds of public policy by due regard to the interests of commerce and humanity" *per* Gorell Barnes, P. in *The "Veritas"* [1901] 304 at 313.

¹⁶⁶ Thus Jones, *supra* n. 100 at 274 points out that "it is not enough to show that the defendant had gained a material benefit from services rendered at the expense of another. The plaintiff must normally go further and show that the defendant had requested him to perform those services."

¹⁶⁷ See Munkman, *op. cit. supra* n. 1 at 69.

One of the earliest cases in the area faced the problem squarely. In *Nicholson v. Chapman*¹⁶⁸ Eyre, C. J. had to decide whether the rescuer of a quantity of timber found near a tow path had any lien upon it for his expense in retrieving it. At the very outset Eyre, C.J. stated that the only difficulty "was upon the question whether this transaction could be assimilated to salvage".¹⁶⁹ In coming to the conclusion that it could not, the Chief Justice clearly preferred the idea that on land at least "these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude".¹⁷⁰

Yet exactly the same platitudes could be used to bar relief for rescue carried out at sea. Certainly, there are difficulties peculiar to sea rescue which distinguish it from that on land.¹⁷¹ But the practical differences are not so fundamental as to prevent an extension to the land had the courts so wished.

But they did not so wish. "If the salvage service were performed on land the common law courts prevented the court of Admiralty from assuming jurisdiction".¹⁷² Moreover, they were unwilling to fill the vacuum thus created, lacking the singularly efficacious remedy of a procedure *in rem*¹⁷³ to allow themselves to more easily resolve the issues which might arise.

Recently, in *The Goring*,^{173A} the Court of Appeal divided on whether salvage was payable to "salvors" who had rescued a boat adrift in non-tidal waters of the Thames. The place of rescue is, of course, vital. Perhaps not surprisingly, the Court failed to explore the jurisdictional point in detail although, as we have seen above, it is of paramount importance.

The facts are picaresque. The salvors, members of the Island Bohemian Club, rescued "The Goring" while it was unmanned and adrift in the Thames above Reading Bridge. They claimed salvage and, when it was denied, commenced an Admiralty action by a writ *in rem*.

At first instance, Sheen, J. held they had a good cause of action.^{173B} On appeal, Donaldson, M.R. dissenting, this decision was reversed. The Master of the Rolls canvassed this history of the Admiralty Court's jurisdiction. As he pointed out,^{173C} "A claim for salvage

¹⁶⁸ (1793) 2 H.Bl.254, 126 E.R. 536 and see *Binstead v. Buck* (1777) 2 Wm. Bl. 1117, 96 E.R. 660.

¹⁶⁹ *Id.* 257, 538.

¹⁷⁰ *Id.* 259, 539.

¹⁷¹ The distinctions are admirably explained in A. S. Pelaez, "Salvage—A New Look at an Old Concept" (1975) 7 *Journal of Maritime Law and Commerce* 505 at 506-509.

¹⁷² Holdsworth, *op. cit. supra* n. 16 Vol. VIII at 270.

¹⁷³ Kennedy *op. cit. supra* n. 150 at 372-375: "Just as their procedure was unsuited to the enforcement of salvors' rights, so the substantive law of these courts was of a limited nature . . . the rights of an unpaid salvor was recognised in the courts of common law, but only by way of defence."

^{173A} [1987] 2 W.L.R. 1151.

^{173B} [1986] 2 W.L.R. 219; [1986] 1 All E.R. 475.

^{173C} [1987] 2 W.L.R. 1151 at 1159. As his Lordship puckishly noted, "The Lord High Admiral not only spurned juries—an unforgivable offence in the eyes of any true blooded Englishman as readers of newspapers of today will know—but he administered a law of his own derived in part from such outlandish sources, as the common law courts saw it, as Roman law, the Rolls of Oleron of general average fame and what seemed appropriate to Mediterranean trading nations."

remuneration, otherwise than by contract, is a cause of action unknown to the common law". After discussing both the relevant statutory provisions, and the earlier decisions, Donaldson, M.R. held that he could find no "rational basis of confining the cause of action to tidal waters . . .".^{173D}

Gibson and Bingham, L.J.J. disagreed. Gibson, L.J. held that it was neither desirable nor justifiable to extend the right to claim salvage to non-tidal waters.

The common law has never recognised any general doctrine of necessitous intervention by a stranger: see per Bowen, L.J. in *Falcke v. Scottish Imperial Insurance* and *Sorrell v. Paget*; and see also the discussion in Goff and Jones, *The Law of Restitution*, 3rd Ed. (1986) c. 15.^{173E}

His Lordship felt that this was a reasonable decision because to extend the right to recover for necessitous services would lead to great potential difficulties along the lines of those adverted to by Eyre, C.J. in *Nicholson v. Chapman*. Bingham, L.J., after a lengthy examination of the relevant statutes and history, reached the same conclusion.

This decision supports the argument advanced above. The jealousy of the common law courts deliberately sought to restrain any extension of the Admiralty Court's jurisdiction; "despite intense pressure from the common law courts the jurisdiction of the Admiralty Court over succeeding centuries broadly remained where it had been fixed in 1391."^{173F} It follows that the jurisdiction to reward the gratuitous intervener is confined to claims arising from action on the high seas. Anything occurring below the high tide mark is beyond the jurisdiction of the only court which recognises and rewards such action.

Story in his *Law of Bailments*¹⁷⁴ makes the frequently reiterated condemnation of the common law whose attitude "seem(s) scarcely capable of any solid vindication."¹⁷⁵ The learned author has adverted to the real grounds, albeit unwittingly, at a much earlier part of his work where he says of *negotiorum gestio* that "it is so remote from the jurisprudence of the common law that it does not seem important to review it . . . with its various descriptions".¹⁷⁶ As Marshall, C.J. stated in *The Blaireau*¹⁷⁷ when discussing the difference between intervention on sea as opposed to land, "neither will a fair calculation of the real hazard or labour be a foundation for (it); nor will the benefit received always account for it".

In truth, the only valid ground for distinction is the one that is so obvious as to be constantly overlooked; that the civilian concept of *gestio*

^{173D} *Id.* 1161.

^{173E} *Id.* 1162.

^{173F} Per Bingham, L.J. at 1173.

¹⁷⁴ Story, *Law of Bailments* (1843).

¹⁷⁵ *Id.* 614; s. 621.

¹⁷⁶ *Id.* 208; s. 189.

¹⁷⁷ (1804) 2 Cranch 239 at 264.

could only exist in Admiralty. Yet, even in Admiralty the scope of salvage is limited. As the House of Lords in *Gas Float Whitton No. 2*¹⁷⁸ showed, the doctrine of salvage is not applicable to every item found lost on the sea. In that case, which involved the salvage of a gas-float, Pylce, Q.C. *arguendo* in the House reaffirmed the popular, and it is submitted, correct view that "the origin of salvage was derived from the civil law".¹⁷⁹

The development of salvage on land has been prevented by the famous dictum of Bowen, L.J. in *Falcke v. Scottish Imperial Insurance Co*¹⁸⁰ where his Lordship pointed out that "liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will". Various writers have carped at this discouragement of gratuitous intervention.¹⁸¹ It is essential to remember the quiddity of salvage. It is, historically, a maritime right. As Willes, J. stated in *Notara v. Henderson*,¹⁸² salvage and another maritime right, that of a ship-master to dispose of a cargo and ship in cases of urgent necessity, are analogous in that both derive from the civil law and both have no parallel on dry land.

Thus the unquestioning acceptance of *negotiorum gestio* by Sir Christopher Robinson as the basis of maritime salvage is doctrinally satisfactory, even if its historical validity is, in the nature of things, impossible to establish. It is natural that a civilian should characterise salvage in such terms as it is *gestio* par excellence (although the question of reward takes the action beyond the bounds of the classical model).

The Ship-Master and Agency of necessity

John Selden,¹⁸³ writing in the middle of the seventeenth century on the influence of the civil law in England, states¹⁸⁴ emphatically that its influence may be seen in the Court of Admiralty where, "while certain matters are directly dealt with from the Corpus of Justinian, nevertheless this is done in such a manner that the maritime customs, styled the laws of Oleron, are mingled therewith and have chief place, as we find in other nations".¹⁸⁵

One of the "matters" derived directly from the Digest¹⁸⁶ is

¹⁷⁸ [1897] A.C. 337. See, too, [1895] P. 301; [1896] P. 42.

¹⁷⁹ *Id.* 340. And see J. Kent, *Commentaries on American Law* (7th ed. 1851) Vol. 3 at 308.

¹⁸⁰ (1886) 34 Ch.D. 234 at 248-9.

¹⁸¹ *E.g.* Dawson, *supra* n. 1 at 1127: "Does our law sufficiently recognise the ideal of mutual aid? Our mutual interdependence increases as the horizons of our world expand and its complexities multiply."

¹⁸² (1872) L.R. 7 Q.B. 225 at 233: "This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional and not obligatory."

¹⁸³ See M. A. Ziskind, "John Selden: Criticism and Affirmation of the Common Law Tradition" (1975) 19 *American Journal of Legal History* 22.

¹⁸⁴ Ogg, *op. cit. supra* n. 37.

¹⁸⁵ *Id.* 157 (Ogg's translation).

¹⁸⁶ Mommsen, *Corpus Iuris Civilis* (1877) 14.2.

allegedly¹⁸⁷ the *actio exercitoria*¹⁸⁸ whereby the owner of a vessel became liable for contracts entered by her master.¹⁸⁹ As Rolle's *Abridgement*¹⁹⁰ puts it:

si le Maister dun neife pawne le neife super altummare (scilicet hypothecando) pur tackling et victualls sans l'assent del Owner, uncore ceo liera l'owner per le Amirall ley, *car ceo est allowe pur necessite, et notre ley doit prendre notice de ceo . . .*" (emphasis supplied).¹⁹¹

The last words suggest an affinity with *negotiorum gestio*, a connection more easily discernible in the Scots and Dutch treatment of the subject. ". . . it is true, as to the tackling, furniture, and provisions to a ship, the master's contract binds the proprietors as *negotium utiliter gestum*, such as the repairing it with new anchors, cables, or sales . . .".¹⁹² Grotius notes the same power in the master.¹⁹³

ENGLISH DEVELOPMENT

The influence of continental doctrine on the maritime law of England has not evoked as much comment as it should.¹⁹⁴ "A probable cause is that England's insularity and supposed shielding from the Continental influence of Roman law deflected historical interest away from other possible 'imported' legal influences and particularly such a subtle one as the law practiced (sic) at sea."¹⁹⁵ The importance of the Laws of Oleron has already been noted.¹⁹⁶ Article 1 expressly recognises the master's power to pledge the cargo for necessities.¹⁹⁷ This Article is the basis of the Scottish law on pledging for necessities¹⁹⁸ and undoubtedly inspired

¹⁸⁷ Ogg, *op. cit. supra* n. 37 at 154; "In Admiratatis Curia, quae in titulis . . . de exercitoria occur (it), alia ad rem nauticam attinentia e Jure Justiniana adhiberi solent atque ex corpore atque interpretibus eius expressim deprimi".

¹⁸⁸ See J. A. C. Thomas, *Institutes of Justinian* (1975) at 246, ". . . a person contracting with one put in charge of a business or a ship could proceed against that person's principal".

¹⁸⁹ J. C. Ledlie (trans.), *Sohm's Institutes of Roman Law* (3rd ed. 1935) at 430, "any third party contracting with the slave in his capacity of captain . . . may sue the master . . . by the *actio exercitoria* for the whole amount of his claim."

¹⁹⁰ Rolle, *op. cit. supra* n. 12.

¹⁹¹ *Id.* 530 C.2. Admirall ley.

¹⁹² *Coltrain v. Mathie* (1707) M. 3951 at 3952; *Rogers v. Cathcart and Kerr* (1732) M. 3954 where the constituents were found liable to pay money "borrowed by their supercargo, though neither did his commission bear any express power to borrow money, now was it applied to their behoof." And see *Scrimg-Cour v. Alexander* (1769) M. 3955; *Richardson & Co. v. Stoner, Hunter and Kerr* (1783) M. 3956.

¹⁹³ Grotius, *Jurisprudence of Holland* (trans. Lee 1926) Vol. 1, 3, 20, 9: "If a master being in foreign parts is in need of money and cannot find any bottomry, he may sell the cargo which he had on board . . ."

¹⁹⁴ T. J. Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England" (1975) 19 *American Journal of Legal History* 95.

¹⁹⁵ *Id.* 97.

¹⁹⁶ *Supra* n. 157.

¹⁹⁷ Twiss *op. cit. supra* n. 17 Vol. 3 La Chartre D'Oleroun des Jugemens de la Mer Art. 1.: ". . . if he has need of money for his expenses, he may put some of the ship's apparel in pledge upon consultation with the ship's company . . ." See Twiss, Vol. 4; Laws of Wisbury Art. 13.

¹⁹⁸ It is exactly copied in the earliest Scottish Book on the area Welwod, *The Sea Law of Scotland* (1590) reprinted with introduction by Wade in Scottish Text Society Miscellany 1933. See Welwod Tit. 3.2. Of the Maister of the Schip, his power and dutie anent the Schip. See generally Hamilton-Grierson ed., *Habakkuk Bisset's Rolment of Courtis* (1622) reprinted in Scottish Text Society Vol. 2 1922 Book 4, tit.5, 241 "bof gif he have need of money for the expensis of the schip, he may lay in gadge sum of the taikling be the counsall of the maryeris of the schip."

the general power which came to be recognized in the Court of Admiralty in England. Although now caught under the rubric of agency of necessity¹⁹⁹ it is suggested that the ship-master's powers are directly attributable to a civilian origin.²⁰⁰

ENGLISH CASES

That the position of master was characterized in civilian terms in the early law is clear from *Morse v. Slue*.²⁰¹ The issue of the master's exact status arose in an action on the case for loss of goods by theft. Hale, C.J. encapsulated the possibilities:

'Tis objected, that the master is but a servant to the owners. Answer. The law takes notice of him as more than a servant. 'Tis known that he may impawn the ship if occasion be, and sell *bona peritura*: he is rather an officer than a servant . . . by the civil law the master or servant is chargeable at the election of the merchant.²⁰²

"This rule of the Law of England agrees with the law of other commercial nations"²⁰³ and the *locus classicus* is the judgment of Lord Stowell²⁰⁴ in *The "Gratitudine"*,²⁰⁵ where the power of a master to hypothecate his cargo for repairing damage incurred at sea was extensively canvassed. His Lordship makes the fundamental observation²⁰⁶ that authority on this point will necessarily be exiguous since the question arises through necessity and it is unlikely that precise directions will have been formulated to deal with it. As to the origins of the doctrine, Bynkershoek's explanation is adopted viz "origo huius contractus ex jure Romano, sed quae ibi legimus vix trientem absolvunt totius argumenti".²⁰⁷

Further light on this "superinduced authority"²⁰⁸ as Story terms it, is cast by the decision in *The Gaetano and Maria*²⁰⁹ where Brett, L.J. adverted to the origin of the doctrine.²¹⁰ He makes the initial obligatory comment on jurisdiction:

The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty

¹⁹⁹ *Infra*.

²⁰⁰ See generally Green (ed.) *Story's Law of Agency* (8th ed. 1874) s. 36 at 43.

²⁰¹ (1669) 1 Vent. 190, 86 E.R. 129, 238 at 159.

²⁰² *Ibid.* The earliest recorded instance would appear to be *Thorne v. Vincent, The "St. Michael"* (1541) Selden Society. Vol. 6.92; and see *Draper v. The "Busbye"* (1569) where a ship was "tacite hypothecata" for necessities.

²⁰³ J. Story, *Abbott's Law Relative to Merchant Ships and Seamen* (2nd ed. 1810) at 133.

²⁰⁴ For a biographical note see Sankey, "Lord Stowell" (1936) 52 *Law Quarterly Review* 327.

²⁰⁵ (1801) 3 C. Rob. 240; 165 E.R. 450.

²⁰⁶ *Id.* 267, 459.

²⁰⁷ *Ibid.* "The origin of this contract is from Roman law, but what we read there scarcely covers a third of the whole area" (author's translation).

²⁰⁸ Story, *op. cit. supra* n. 200 at s. 118.

²⁰⁹ (1882) 7 P. & D. 1, 137 (C.A.).

²¹⁰ *Id.* 142.

either by Act of Parliament or by reiterated decisions and *traditions and principles has adopted as the English maritime law . . .* (emphasis supplied)²¹¹

As his Lordship went on to add, the power to hypothecate is known to the mercantile law of every country.²¹² Moreover, it owes nothing to principles of agency in any accepted sense since the master is not in any such relationship with the cargo-owner.²¹³ Bisset in the Scottish *Rolment of Courtis*²¹⁴ makes the obvious statement that at common law "the action of doing of uthir mennis erandis called in latyne De negotiis gestis, can nocht be persewed, against the guidis, or besynes solisted."²¹⁵ However, he goes on to particularize the "apperelling and reparatioun of one schip, and outredding of hir"²¹⁶ as one case in which the lender *can* recover for his action. The identical fact is stressed by Brett, L.J. in *The Gaetano*.²¹⁷

Significantly the *fons et origo* of the maritime law involved, the Rolls of Oleron,²¹⁸ distinguished between the *mandate* which the master enjoyed from the owners, and the *power* in extraordinary circumstances to pledge some of the ship's apparel.²¹⁹ The same ability is attested to by the Laws of Wisbury.²²⁰ Such a distinction suggests that the two were always regarded as separate potentialities of the office of master and indeed make the power of pledging *in extremis* more closely allied to the Roman *actio exercitoria* and its companion the *actio de in rem verso*.²²¹ The latter in Roman law was closely allied to *negotiorum gestio*, indeed was merely a species of it, whereby expenses incurred by a ship-master beyond the scope of his mandate could be recouped provided the requirements of the normal *actio contraria* were satisfied.²²²

The dichotomy between express and emergency power is exemplified by one of the first Admiralty cases on the subject of hypothecation, *Bridgeman's Case*²²³ of 1614 where counsel for Bridgeman remonstrated that "by *the civil law* the master of the ship hath power to impawn the

²¹¹ *Id.* 143.

²¹² *Id.* 145.

²¹³ *Ibid.* This idea of absence of any antecedent connection is explicated fully *infra* where the concept of "agency of necessity" is explored.

²¹⁴ Hamilton-Grierson, *op. cit. supra* n. 198.

²¹⁵ *Id.* 255.

²¹⁶ *Ibid.*

²¹⁷ *The Gaetano and Maria* (1882) 7 P. & D. 137 at 145: "Now this authority of the master of the ship to hypothecate the ship or cargo is peculiar. It does not arise merely out of a contract of bailment, for that contract gives no such right. It does not arise even out of a contract of carriage on land. I doubt whether it arises on a contract of sea carriage . . .".

²¹⁸ See generally Holdsworth, *op. cit. supra* n. 16 Vol. V at 123.

²¹⁹ Twiss, *op. cit. supra* n. 17 Vol. 3. Art. I of La Ghartre D'Oleroun des Jugemens de la Mer; and see Art. XXIII.

²²⁰ *Id.* Vol. 4 Laws of Wisbury Arts. XIII, XXXV.

²²¹ See generally J. C. Ledlie (trans.), *Sohm's Institutes of Roman Law* (3rd ed. 1935) 430-430.

²²² *Id.* 431. "If the contract, though concluded without authority, was nevertheless entered upon in the interest of another party—such as a contract by a *negotiorum gestor*—the creditor with whom the contract was concluded may sue the other party by the *actio utilis de in rem verso*."

²²³ (1614) Hobll; 180 E.R. 162.

ship and tackle in case of necessity, and he hath no other means to provide such things, as are necessary for her."

This distinction between the civil and common law powers of the master is further exemplified by *Boson v. Sandford*²²⁴ where Eyre, J. pointed out that "the master of a ship was no more than *a servant to the owners in the eye of the law, and that the power he has of hypothecation etc is by the civil law*" (emphasis supplied).²²⁵ Clearly the power of hypothecation for necessaries was regarded as an importation of civil law and explicable on that basis. It was an anomalous power for the ship-master to possess when his general status as a servant of the owners was considered.

The normal position of a servant is put succinctly by *Doctor and Student*:²²⁶

if a Servant makes a contract in his Master's name, the Contract shall not bind his Master unless it were by his Master's Commandment or that it came to his Master's Use by his Assent.

Yet, although the master could hypothecate the ship from the earliest times, his power to *sell* it was much slower in evolving:

le question que occasion, leux suites et que fuit refer fuit le quel le master d'un niefte que vient del foraine kingdom poet sans ses owners in case de inevitable danger vend [re] le niefte et tackling battue et infringe, et nul part de ceo in probability del e [s] tea [n] t save partim in respect del tempest et partim in respec del barbarity del inhabitants queux deprent ceux chose que fuer [unt] ject sur le shore.²²⁷

Although this situation would seem to be *a fortiori* hypothecation of the ship and cargo, Hales, C.B. was of the opinion that such a sale could not be permitted,²²⁸ even though it was pointed out in argument "que le niefte est liable . . . a paier pur repairs fait a luy en la voyage et nient obstant le owners ne consent a ceo."²²⁹ This last suggests that necessitous hypothecation had become so much of a commonplace as to require no discussion whatsoever.

This appears from the argument in *Cary v. White*²³⁰ and the cases therein cited. Although the note in *Equity Cases Abridged*²³¹ is quite correct as far as it goes, it blurs the crucial distinction, adverted to above,

²²⁴ (1689) 2 Salk 440; 91 E.R. 382.

²²⁵ *Ibid.*

²²⁶ St. Germain, *Doctor and Student* (1721) Dialogue 2. 42 at 284.

²²⁷ *Anonymous* (1669) Sid.453; 82 E.R. 1213. Note to *Tremenhere v. Tresillian*.

²²⁸ *Ibid.*, "Mes uncore le Chief Baron Hales deliver son opinion que le master sans les owners ne poet in le principle case vend [re] le niefte."

²²⁹ *Ibid.*

²³⁰ (1710) 5 Brown P.C. 325; 2 E.R. 708 Parker and Jekyll *arguendo*.

²³¹ 2 Eq. Cas. Ab. 722 Ca.1; 22 E.R. 608: "In a voyage the Master of a Ship is the Owners' Servant, and his Duty requires him to provide necessaries for his Ship, and it is the Owners' Interest that they should be provided; therefore what the Master *necessarily* takes up . . . and employs for that purpose, the owners must pay."

between the powers of the captain as servant and those he possessed through the civil law. As the note to *White's Case* points out "a captain of a ship is at law the servant only of the owners, and . . . his right to hypothecate is derived from the civil law."²³²

This power cannot be exercised in port in England;²³³ it is an "extraordinary power"²³⁴ exercisable only in cases of direst necessity.

"Even now the master cannot sell except in a case of inevitable necessity."²³⁵ Lord Stowell gives, as an example of circumstances justifying sale a ship in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her in repair."²³⁶ All the early cases recognize that such a right of hypothecation and (sale which later evolved) are derived purely from the civil law, the *actio exercitoria*, which is itself tied to *negotiorum gestio* as we have seen.

Strange, M.R. puts the matter clearly in *Samson v. Braginton*²³⁷ decided in 1750:

This power of hypothecating has nothing to do with, nor is it by virtue of the common law, but from necessity and the law of nations.
(emphasis supplied)²³⁸

Although it involves a breach of normal English rules of privity of contract, in that the master can bind people with whom he has no prior relationship whatsoever viz the cargo-owners, this civil law importation is permitted on grounds of need:

The principle, upon which he can hypothecate the ship, is, that the necessity of acting by an agent justifies the captain acting as an agent.²³⁹

Lord Eldon's summation captures the essence of the matter and yet explains at the same time why such a notion of "agency", as we will see in the next section, has remained so restricted. For if "necessity" were to be our criterion then notions of privity etc could be swept aside. The concept that the ship-master's powers exemplifies, that one can act for another without prior request,²⁴⁰ is inimical to basic premises of the common law. This is why the common law has so rigorously demarcated even this maritime exception—any chance not taken of complying with accepted

²³² *Supra* n. 230. Cf. the explanation in *Speerman v. Degrave* (1709) 2 Vern. 643; 23 E.R. 1020; "the master was but a servant to the owners; and where a servant buys the master is liable."

²³³ ". . . the master [has] no power to hypothecate the ship in port, before she set out upon her voyage": *Lister v. Baxter* (1726) 2 Stra. 695; 93 E.R. 789.

²³⁴ Holdsworth, *op. cit. supra* n. 16 Vol. VIII at 248.

²³⁵ *Per Park, J. in Cannan v. Meaburn* (1823) 1 Bing. 243; 130 E.R. 98 at 247, 100.

²³⁶ *The Fanny and Elmira* (1809) Edw. 117; 165 E.R. 1052 at 118, 1053.

²³⁷ (1750) 1 Vez. 443; 27 E.R. 1132.

²³⁸ *Ibid.*

²³⁹ *Hussey v. Christie* (1807) 13 Ves. 594; 33 E.R. 417 at 599, 419 *per* Eldon, L.C.

²⁴⁰ "Certainly, by the maritime law, the master has power to hypothecate both the ship and cargo for repairs during the voyage" *per* the Lord Chancellor in *Buxton v. Snee* (1748) 1 Ves. 154; 27 E.R. 952. (emphasis supplied).

common law principles, by communication and obtaining of instructions for instance, deprives the master of his power.

In other words, the common law is only willing to tolerate the master's power in a situation in which it itself is impotent. Without an importation from the civil law, a situation of frequent occurrence in delays of expanding maritime trade and absence of expeditious communication, could not have been provided for.

As Holmes, J. once pointed out:

admiralty law has been a compound of doctrines springing from various stages of society, and cannot be understood except by the aid of history which will also help to rid it of its incongruities.²⁴¹

He went on to argue that, as we have seen, the *actio exercitoria* was an exception to normal Roman concepts which did not involve vicarious liability. The praetorian right derived from "special grounds of policy" viz necessity which knows no law and that, as a result, in medieval maritime law:

The master could bind the ship, although he was in no sense the agent of the owners to whom the ship belonged.²⁴²

It is suggested that Selden is absolutely correct in tying the medieval ship-master's power to the *actio exercitoria* which was itself merely a species of *negotiorum gestio*. Such a derivation was perceived by all the judges right up to the end of the eighteenth century. Such a right, giving a master power to bind those (the cargo-owners) with whom he had no prior relationship is antipathetic to "normal" common law principles and could only have survived as a anomalous potentiality in Admiralty. Negative proof for such an assertion is provided by the discussion in the next section which shows why "agency of necessity" cannot grow in common law, tied as it is to the ship-master exemplar which in itself encapsulates an idea of *negotiorum gestio* supported only through mercantile necessity.

AGENCY OF NECESSITY

Thus far an attempt has been made to trace the antecedents of four areas in English law whose basis is directly attributable to the civilian doctrine of *negotiorum gestio*. The connection between the four is jurisdictional and it is this very factor which at once accounts for the survival of the doctrine, and its very limited expansion in English law. It is that expansion, such as it is, that is the final object of examination in this essay.

"In all, it is . . . clear that 'agency of necessity' is both a marginal

²⁴¹ *Temple v. Turner* (1877) 123 Mass. 125.

²⁴² *Id.* 127.

and a motley subject."²⁴³ It has been twisted to contain actions which we have seen are derived from the civil law e.g. burial; "the respondent was an agent of necessity for the disposal of the body".²⁴⁴ From time to time judicial and judicious attempts have been made to extend its ambit by analogy with those areas already examined, but all have foundered on the intransigence of the judges.²⁴⁵

As was mentioned above "the earlier cases related exclusively to the power of a captain of a ship, in cases of emergency, to dispose of the cargo."²⁴⁶ However, as Bowstead²⁴⁷ points out, the term 'agency of necessity' is multi-purposive and covers a number of disparate situations. In our context the term connotes a situation in which a person not previously an agent is constituted agent for another.²⁴⁸ Such a relationship is, of course, almost identical with *negotiorum gestio*²⁴⁹ and in countries which have adopted civilian concepts more fully the parity, not to say interchangeability, has been long recognized.²⁵⁰

That there should be an affinity between agency and *negotiorum gestio* is not surprising since "in its original and primary function, *negotiorum gestio* was . . . close to express agency, for which separate rules were being formulated concurrently under the heading of mandate"²⁵¹ in Roman law. However, as Lawson has correctly stated, in most cases termed agency of necessity at common law there is already an agency relationship in existence and so "the party dealing with the agent of necessity recovers from the principal not the value of the service when it was rendered, but what is due under the contract . . .".²⁵² Thus the agent's action is explicable on the basis of an implied power inherent in the position he occupies or the business he transacts.²⁵³

²⁴³ S. Stoljar, *Law of Agency* (1961) at 150. See generally J. Archer, *Law of Agency* (1915) at 95 s. 83; T. Ferson, *Principles of Agency* (1954) at 244 s. 155; Bowstead, *op. cit. supra* n. 10 at 118; H. G. Hanbury, *Principles of Agency* (2nd ed. 1960) at 42; P. Mechem (ed.) *Mechem's Outlines of the Law of Agency* (4th ed. 1952) at 24-25 ss. 44-46; R. Powell (ed.) *Tiffany on Agency* (2nd ed. 1924) at 55-62; Green (ed.) *op. cit. supra* n. 200 at 141-142 ss. 118.

²⁴⁴ *Croskery v. Gee* [1957] N.Z.L.R. 586 at 589 *per* McGregor, J.

²⁴⁵ *E.g. Gwilliam v. Twist* [1895] 2 Q.B. 84 at 87 *per* Lord Esher, M.R. *obiter*; "This doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of a master of a ship or the acceptor of a bill of exchange to the honour of the drawer". (emphasis supplied)

²⁴⁶ W. M. Gloag, *Contract* (2nd ed., 1929) at 335 and citation in n. 6. "The doctrine of agency of necessity doubtless took its rise from marine adventure" *per* McCordie, J. in *Prager v. Blatspiel, Stamp and Heacock Ltd.* [1924] 1 K.B. 566 at 568.

²⁴⁷ *Op. cit. supra* n. 243 at 63 Art. 21, ". . . the courts have not usually distinguished between the different types of case, which has prevented clarification of the law in this area."

²⁴⁸ *Id.* 64; Archer *op. cit. supra* n. 243 at 95, s. 83; "Agency by necessity is a relation created by law without reference to the actual or implied consent of the principal, nor yet based upon the principal or estoppel."

²⁴⁹ Gloag *op. cit.* n. 246 at 335, "The principle of agency by necessity, in many respects analogous to *negotiorum gestio*, has been developed independently and on more narrow lines", n. 7; "There is no authority which would preclude, in Scotland, the application of the rules of *negotiorum gestio* to cases dealt with in England under the head of agency by necessity." See Wille, *Principles of South African Law* (3rd ed. 1949) at 462-464.

²⁵⁰ A. D. Gibb and N. M. L. Walker, *Gloag and Henderson's Introduction to the Law of Scotland* (4th ed. 1946) at 234, "the rule seems indistinguishable from the principle of *negotiorum gestio*."

²⁵¹ J. P. Dawson, *Unjust Enrichment* (1951) at 56.

²⁵² Lawson, *op. cit. supra* n. 93 at 336.

²⁵³ Mechem, *op. cit. supra* n. 243 at 24-25 "it seems simplest as well as most accurate to treat them [agents of necessity] as special instances of . . . 'incidental authority' . . . That is, it seems fair to think that it is an incident of every job to look after the principal's interest in an emergency."

In examining "agency of necessity" it is at once apparent that the rather shaky common law edifice has been erected on foundations which as has been demonstrated are fundamentally civilian in origin. It is no wonder that the doctrine has never flourished at common law—in its purest form it would be *negotiorum gestio*.

Nor have the jurisdictional and historical confines escaped the judges although the basis for restraint may not have been perceived as readily as the impossibility of any growth. As early as 1841, in *Hawtayne v. Bourne*²⁵⁴ the power of an agent to borrow money unauthorized to defray an expense of his principal was denied.²⁵⁵ Parke, B. specifically adverted to the civilian based doctrines in giving judgment; "no such power [to borrow] exists, except in the cases . . . of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer."²⁵⁶ It is noteworthy, however, that Parke, B. consubstantiates two completely different things for only a ship-master borrows; *an acceptance involves an unsolicited loan*. Clearly the civilian nexus escaped the court.

The possibility of analogy with the ship-master in particular was the key criterion in determining whether to extend the ambit of an agent's sanctioned action. It was to remain the dominant consideration. In *Great Northern Railway Co. v. Swaffield*²⁵⁷ a horse was maintained by a railway company after its owner failed to have it collected. In holding that recovery was possible for expenses incurred by the railway, Kelly, C.B. said:

My Brother Pollock has referred to a class of cases which is identical with this in principle, where it has been held that a ship-owner who, though some accidental circumstance, finds it necessary for the safety of the cargo to incur expenditure, is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. *That is exactly the present case.* (emphasis supplied)²⁵⁸

Much the same reasoning commended itself to the rest of the court.²⁵⁹ Yet it was aware it was breaking new ground since Pollock B. remarked on the absence of prior authority for such a claim.²⁶⁰ Stoljar has commented on the irrationality of restricting such extraordinary powers to the case of a ship-master "for an agent may be faced with the same necessity to act whether he finds himself on foreign waters or on land".²⁶¹

²⁵⁴ (1841) 7 M. and W. 595; 151 E.R. 905.

²⁵⁵ *Id. per* Parke, B. 599, 907 "the learned Judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in the cases of necessity, to raise money for that purpose. *I am not aware that any authority is to be found in our law to support this proposition.*" (emphasis supplied)

²⁵⁶ *Ibid.*

²⁵⁷ (1874) 9 L.R. Ex. 132.

²⁵⁸ *Id.* 136.

²⁵⁹ *Id.* 136 *per* Piggott, B.; Pollock, B. 138.

²⁶⁰ *Per* Pollock, B., 138. "As far as I am aware, there is no decided case in English law in which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. But in my opinion he is so entitled."

²⁶¹ Stoljar, *op. cit. supra* n. 243 at 154; the cases are usefully collected in W. B. Williston, "Agency of Necessity" (1944) 22 *Canadian Bar Review* 492.

True as this is in a strictly logical sense, the historical influences have severely delimited the growth of any land-based counterpart to the ship-master.

Sims v. Midland Railway Co.,²⁶² involving sale by a carrier of tomatoes deteriorating in a transport strike, demonstrates the constraint placed on the doctrine and "the necessary conditions giving rise to such a power and duty"²⁶³ of enforced sale, which were stated to be identical to those "laid down in the case of a carrier by sea",²⁶⁴ viz a real necessity and no possibility of receiving the owner's timeous instructions.²⁶⁵ "Those conditions do not arise if the carrier can communicate with the owners and get their instructions . . . If they show that, they must then show that a sale was in the circumstances the only reasonable course to take."²⁶⁶

While Scrutton, L.J. was perfectly amenable to an extension of the ship-master concept to an analogous case he balked, and rightly so, at any further development. Sir Henry McCardie has suggested²⁶⁷ that the doctrine of "agency of necessity is not confined to ship-master cases and to bills of exchange"²⁶⁸ and saw fit to extend it to a sale of furs in wartime. Unfortunately, his comments were only *obiter* as the sale was found not to be *bona fide*.

But as Scrutton, L.J., shortly after this climacteric, reminded,²⁶⁹ although the extension is viable in a pre-existing agency relationship "the position seems quite different when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals, and still more difficult when there is a pre-existing agency, but it has become illegal and void"²⁷⁰

His Lordship clearly thought that the ship-master was an example of a "pre-existing agency"²⁷¹ and that his actions were justified by an implied power. (Examples of such extensions of pre-existing agencies abound²⁷² and are outside the ambit of this essay. It is this finding of

²⁶² [1913] 1 K.B. 103.

²⁶³ *Id.* 112 *per* Scrutton, J. (as his Lordship then was). The action was one for damages for breach of contract to deliver.

²⁶⁴ *Ibid.*

²⁶⁵ His Honour quoted *Carver on Carriage by Sea* s. 297; see now R. Colinvaux and K. C. McGuffie, *Carver on Carriage by Sea* (12th ed. 1971) 754.

²⁶⁶ *Springer v. Great Western Railway* [1921] 1 K.B. 257, 267, *per* Scrutton, L.J.

²⁶⁷ *Prager v. Blatspiel, Stamp and Heacock* [1924] 1 K.B. 566.

²⁶⁸ *Id.* 569 *obiter*.

²⁶⁹ A point lost on the note-writer in (1926) 2 *Cambridge Law Journal* 241 who blithely stated that ". . . the law now recognises that an agency of necessity can arise in other cases than that of carriers by land or sea, of salvors, or of the acceptor of a bill of exchange for the honour of the drawer".

²⁷⁰ *Jebara v. Ottoman Bank* [1927] 2 K.B. 254 at 271 (reversed [1928] A.C. 269).

²⁷¹ *Ibid.* "The expansion desired by McCardie, J. becomes less difficult when the agent of necessity develops from an original and subsisting agency, and only applies itself to unforeseen events not provided for in the original contract, which is usually the case where a ship-master is agent of necessity". (emphasis supplied)

²⁷² E.g. the "railway accident" cases; *Walker v. Great Western Railway* (1867) L.R. 2 Ex. 228 at 229 *per totam curiam* "held that the general manager had implied authority to employ the plaintiff . . ."; *Langan v. Great Western Railway* (1874) 30 L.R. (n.s.) 173, *per* Denman, J.: "I think he had authority to do what was reasonable in the case of injured persons". See generally Archer *op. cit. supra* n. 243 98, n. 13; Ferson *op. cit. supra* n. 243 246 for citation of American authority.

implied power that separates *Montaignac v. Shitta*²⁷³ from *Hawatyne v. Bourne*.^{273A}

Certainly as Pollock, C.B. said in *Gibbs v. Grey*²⁷⁴ the question of the ship-master's authority "is one of considerable difficulty . . . especially so in the law of England, which regards with extreme jealousy: the permitting any man to be bound by the contract or act of another unless express authority be given to him."²⁷⁵

And as his Lordship went on to indicate there is no antecedent connection between the cargo owners and the master.²⁷⁶ Thus Scrutton, L.J. appears to be incorrect in *Jebara*^{276A} when he names the ship-master as being in the pre-existing agency category. In the words of the Solicitor-General *arguendo* in *Freedman v. East India*:²⁷⁷

It must be admitted that, though the captain is not agent of the owners of the cargo, and that he is to be considered, as to them, a mere depositary and common carrier; yet, under special circumstances, the character of agent and supercargo is forced upon him by the general policy of the law.²⁷⁸

But as Sir W. Scott had said, this does not occur "by the immediate act and appointment of the owner."²⁷⁹ The conceptual hiatus thus involved, in the sense that that the "agent" is not formally appointed at any stage, may be perhaps resolved if it is remembered that at an earlier stage the master and the owner would have been one and the same person²⁸⁰ and thus the master would have been in a direct consensual relationship with the cargo-owner. But this does not assist an understanding of the nineteenth century position where on a strictly technical basis²⁸¹ the "agency" of the master arises out of no antecedent consensus whatsoever.

This factor led to the problem Parke, B. experienced in *Vlierboom v. Chapman*²⁸² where it had been suggested that in an emergency

²⁷³ (1890) 15 App. Cas. 357 (P.C.) per Lord Herschell at 362: ". . . in the opinion of their Lordships the power which this agent possessed under this mandate from his principals would authorise his borrowing from such a source [native money-lenders] under such circumstances." [absence of means of raising money needed for a business by sale of bills or by obtaining accommodation].

^{273A} *Supra* n. 254.

²⁷⁴ (1857) 26 L.J. Ex. 286.

²⁷⁵ *Id.* 290.

²⁷⁶ *Id.* 291; "The master is placed in command of the ship, over whose appointment the merchant has no influence or control."

^{276A} *Supra* n. 270.

²⁷⁷ (1822) 5 B. and Ald. 617; 106 E.R. 1316.

²⁷⁸ *Id.* 618, 1317. This is a quote from *The "Gratitudine"* (1801) 3 C. Rob. 240; 165 E.R. 450; at 257, 456 per Sir W. Scott as Lord Stowell then was.

²⁷⁹ *The "Gratitudine"*. *Ibid.* cf. Pollock, C.B. in *Duncan v. Benson* (1847) 1 Ex. 537; 154 E.R. 229 at 557, 237, seems to endorse a view of the master's authority as an implied power although he immediately after refers to it as "an agency . . . created by . . . necessity, and given by the shipper to the master, to bind him by sale or pledge."

²⁸⁰ Abbott, *Law Relative to Merchant Ships and Seamen* (3rd ed. 1810) at 122, "It appears by the language of the ancient sea-laws and ordinances, that the master was formerly in almost every instance a part-owner of the ship, and consequently interested in a two-fold character in the faithful discharge of his duty." (emphasis supplied)

²⁸¹ *I.e.* the master is properly only agent of the ship-owner and the cargo-owner contracts with the owner alone.

²⁸² (1844) 13 M. and W. 230; 153 E.R. 96 at 239, 99.

situation the master could become agent for both owner and shipper.²⁸³ As the Baron of the Exchequer acidly remarked, "it is difficult to conceive any conjuncture . . ."²⁸⁴

It is clear then that the "agency of necessity" of the ship-master for the cargo-owner is pre-eminently a case of "necessity" and the "agency"²⁸⁵ element is conspicuously absent. On such a predication, *no* extension of true "agency of necessity"²⁸⁶ is justifiable since it by definition involves the promulgation of concepts inimical to English jurisprudence viz unsolicited intervention in another's business.

Even in cases of bailment, necessarily involving an antecedent relationship, the common law utilises the same criteria to assess necessity and generally denies possibility of disposal of goods without authorization, though this might be thought the best area for encouragement of the concept. Goddard, L.C.J., in *Sachs v. Miklos*²⁸⁷ applied the "ship-master test" to the question of emergency and was obviously unwilling to go beyond established examples, even had the need arisen to do so.²⁸⁸

That this lack of innovation had a doctrinal cause appears more clearly from the decision of Lynskey, J. shortly afterwards in *Munro v. Wilmot*.²⁸⁹ The bailee of a motor-car was held liable for conversion, as had the furniture-vendor in *Sachs*, for disposing of the bailed property without the bailee's leave.

His Honour was "very doubtful if the doctrine of agency of necessity can be applied to a case of goods of this character and not of a perishable nature . . ."²⁹⁰ The Rhodesian case of *Compagnie d'Elevage et d'Alimentation du Katanga v. Rhodesian Railways*²⁹¹ confirms this restrictive approach.

Agency of necessity stands revealed as little more than an excrescence on a basally unsympathetic common law.²⁹² The possibility of an implied 'emergency' authority in an agency agreement is easily reconciled with established doctrine; unsolicited action with only the most tenuous of prior

²⁸³ *Ibid.* It was said, that, where the goods were lawfully sold from necessity . . . necessity imposed upon the master the character of agent for the shipper, in addition to his ordinary one of agent for the ship-owner, and that, having that double agency, he might be presumed to have intended to make a reasonable contract between his two principals.

²⁸⁴ *Ibid.*

²⁸⁵ A point recognised by Bowstead *op. cit. supra* n. 10 at 63, Art. 21 who demonstrate that "the term 'agency of necessity' cover a number of cases which analytically are of different types . . . the courts have not usually distinguished between the different types of case, which has prevented a clarification of the law in this area."

²⁸⁶ *I.e.* In the sense noted in n. 285 *supra*.

²⁸⁷ [1947] 2 K.B. 23.

²⁸⁸ *Id.* 35-36. The Lord Chief Justice was spared the problem of deciding whether the doctrine was capable of extension since he held as a preliminary matter that there was no emergency.

²⁸⁹ [1949] 1 K.B. 295.

²⁹⁰ *Id.* 297.

²⁹¹ [1956] 1 S.A.L.R. 243 where stress was laid by Beadle, J. on the possibility of contracting the owners of some chilled meat being carried by the railway.

²⁹² H. C. Gutteridge and R. J. A. David, "The Doctrine of Unjustified Enrichment" (1935) 5 *Cambridge Law Journal* 204 at 223; "The explanation seems to be that our law of quasi-contract, such as it is, has developed along a channel which was carved out for it by *indebitatus assumpsit*, and that this has proved to be too restricted to permit of the growth of remedies of a non-contractual nature."

connections between "agent" and "principal" depends for its existence on a catena of disparate "civilian-spawned" precedents among which the ship-master is pre-eminent.

CONCLUSION

This essay has attempted to examine four separate situations in which the common law, contrary to its general principles, permits the recovery of expenses of those who have intervened without prior solicitation in the affairs of others.

The acceptor *supra* protest pays another's debt without request; the person who sees to burial performs a duty which lies primarily on the executor of the decedent's estate; the ship-master sells another's property without existing mandate; the salvor intervenes to preserve property and has a lien upon it for his reward. All of these examples in the context of the "normal" common law position are distinctly anomalous; being exceptions they prove the rule.

Goff and Jones, at the end of the chapter in which they examine these various actions amongst others express the pious hope that the English courts will "extend the principle of necessitous intervention" and "will generalise the nascent English development into a coherent and rational doctrine".²⁹³ It is suggested that a coherence among the four is already discernible and that the rationale of their existence is to be sought in their historical development.

Coherence comes from a recognition of two factors. First, that basally the common law does not recognise a doctrine of *negotiorum gestio*. Secondly, and more importantly, that secreted "in interstices of history" a pocket of authority which is related to the civilian doctrine has survived. It has survived exactly where one would expect it to in the Admiralty, a jurisdiction which was at once both controlled by civilian-trained and oriented jurists and was imbued with a more cosmopolitan outlook than its native counterpart. Ship-masters, bills of exchange and salvage all originally fell under its control.

The acceptor *supra* protect is justified by the continental jurists on the basis of *negotiorum gestio* and the paucity of records precludes a more definitive statement of its history. It is enough for our purposes that from its earliest appearance in English law the acceptor has been explicable, *and only explicable*, on such a ground. The salvor more exactly fits the parameters of the classical *gestor*. Once again proving a precise derivation is in the nature of things impossible. Once again it suffices that the right to reward has been explained, *and is only justifiable*, on a concept of *gestio*. Most significantly, although the extension appears eminently reasonable by analogy, the salvor only exists in Admiralty and nowhere else. So too, it might be remarked that the acceptor for honour is singular in his success at recovering for unrequested payment of another's debt.

²⁹³ Goff and Jones, *op. cit. supra* n. 4 at 247.

On land the intervener who buries a corpse performs a necessary and humanitarian task. As the early canon law controlling executors testifies, the right to recover for this service had close ties with the *actio funeraria* which was in itself merely a species of classical *gestio*. Finally the ship-master, regarded from his earliest appearances in the reports as having a connection with the *exercitor* of the civil law, is empowered to dispose of another's property without sanction.

That these four are at very best tolerated vestiges of *negotiorum gestio* is demonstrated by the complete lack of extension of the ship-master's powers to anything but a highly delimited sphere of analogy. True agency of necessity in English law has no real existence.

The reason for its lack of growth is the same as that explaining the historical fact that *negotiorum gestio* is represented by four tenuous examples in disparate areas rather than a doctrine of general application adaptable to a multiplicity of situations which might invoke its use—simply that the common law prefers to base its relationships on consensus and prior negotiation. To this basic stand-point unsolicited yet recompensable activity is anathema.

Yet it should at least be clear that the quote from Anson with which we began requires some exegesis.

The four do possess a unity and represent a catena of authority, exiguous as it is when viewed against the mass of the common law, which testifies to the existence of *negotiorum gestio* in our law. Such a recognition implicitly acknowledges that hopes expressed by some writers of an expansion of the concept of *negotiorum gestio* in our law will remain just that. We are fortunate that what remains can be vaguely delineated in that wasteland of historical cul de sacs, in which as wayfarers, we sojourn.