

THE PLACE OF NEGOTIORUM GESTIO IN ENGLISH LAW

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Semantics apart, the term *negotiorum gestio* has its closest affinities with that body of law labelled in textbooks as agency of necessity.¹ The term itself is borrowed from Roman law,² where much of the jurisprudence concerning the concept may be found. Buckland³ commences his account of it in this way: "[The concept of *negotiorum gestio*] may be described as looking after another man's affairs, without his authority The primary action was *negotiorum gestorum* against the gestor, who had the *actio negotiorum gestorum contraria* for reimbursement."⁴ Clearly, if the person who benefits from the action gave his authority, the basis for the claim would be mandate.⁵ The Quebec Civil Code, in Articles 1043-1046, enacts the concept of *negotiorum gestio* in the terms of an obligation arising out of quasi-contract. Describing these provisions of the Quebec Civil Code, Baudouin⁶ wrote:

La gestion d'affaires est donc une ingérence volontaire dans les affaires d'autrui, sans autorisation de la part du géré et sans qu'il existe une obligation légale ou contractuelle pour le gérant de s'immiscer. Cette ingérence peut consister soit à poser des actes matériels (ainsi celui qui arrête un cheval emballé, ou sauve une propriété de la destruction par le feu), soit à poser des actes juridiques (ainsi celui qui acquitte la dette d'un autre ou administre un patrimoine à la place d'un autre).⁷

In his introduction to *negotiorum gestio*, Powell formulates the concept in the following passage:

Both in Roman law and in many modern systems of law founded on the civil law, subject to the fulfilment of certain conditions, if X does an act for the benefit of Y in circumstances of necessity, even though Y has given X no authority and X is in no sense an agent or servant of Y, X may claim an indemnity from Y for his services, though he will be liable to Y for damage caused by his negligent or wilful mishandling of Y's property or affairs.⁸

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¹ R. POWELL, *THE LAW OF AGENCY* 410-32 (2d ed. 1969); G. FRIDMAN, *THE LAW OF AGENCY* 72-79 (4th ed. 1976).

² See R. POWELL, *id.* at 416, n. 1.

³ W. BUCKLAND, *A TEXT BOOK OF ROMAN LAW* (3d ed. P. Stein 1963).

⁴ *Id.* at 537.

⁵ W. BUCKLAND, *A TEXT BOOK OF ROMAN LAW* (3d ed. P. Stein 1963). See also W. GLOAG & R. HENDERSON, *INTRODUCTION TO THE LAW OF SCOTLAND* 143-44 (7th ed. 1968).

⁶ J. BAUDOUIN, *LES OBLIGATIONS* (1970).

⁷ *Id.* at 203. See generally at 203-209.

⁸ *Supra* note 1, at 416.

The case law of the common law provinces, following the path taken by the English law, rejects this concept.⁹ The reason for doing so springs from the principle enunciated by Lord Bowen in *Falcke v. Scottish Imperial Insurance Co.*¹⁰ The intention of this article is to demonstrate that despite the unequivocal statement of Lord Bowen in *Falcke*, the English law has always recognized the doctrine of *negotiorum gestio* under one heading or another. The inflexibility of the common law jurisdictions should therefore be tempered with reality, and the status of the doctrine should be reassessed.

The prevalent view is that *negotiorum gestio* as a principle has no status in the English law.¹¹ A number of reasons for this have been advanced. Firstly, it is said that English law, being so deeply immersed in the notion of contract, finds it difficult to accept that a person could be made liable other than in contract or in quasi-contract.¹² Secondly, it is said that although *negotiorum gestio* cannot be based upon contract or quasi-contract, it can be based upon a moral obligation to pay.¹³ But such a basis, it is argued, would be unacceptable to English law, especially after its rejection in the eighteenth century of the short-lived belief that moral obligations were legally binding.¹⁴ Thirdly, it is said that *negotiorum gestio* covers the type of transaction referred to by the civilians as unjust enrichment. The refusal of the English law to recognize that doctrine has had the concomitant effect of barring *negotiorum gestio* from the English legal system.¹⁵ Fourthly, it is said that recognition of *negotiorum gestio* by the English law may open the door to "a fluid, inchoate and dangerous doctrine".¹⁶

Therefore, where *A*, not having the authority of *B* nor being his servant or agent, does an act for the benefit of *B*, without the latter's request, knowledge or consent, English law will be unable to provide a basis upon which *A* could claim compensation from *B*. First, the facts do not present a basis for a contract. Second, there are no grounds upon which a contract may

⁹ *Samilo v. Phillips*, 69 D.L.R. (2d) 411, at 422 (B.C.S.C. 1968). See also G. FRIDMAN, *supra* note 1, at 77-78.

¹⁰ 34 Ch. D. 234, at 248, 56 L.T.R. 220, at 224 (C.A. 1886). See the passage quoted in full in text at note 82 *infra*.

¹¹ *Id.* at 248, 56 L.T.R. at 224 (Bowen L. J.); *Macclesfield Corp. v. Great Central Ry.*, [1911] 2 K.B. 528, 104 L.T.R. 728 (C.A.); *Hawtayne v. Bourne*, 7 M. & W. 595, at 599, 151 E.R. 905, at 906-907 (Ex. 1841); *Cox v. Midland Counties Ry. Co.*, 3 Ex. 268, at 277-78, 154 E.R. 844, at 847-48 (Ex. 1849). See also R. GOFF & G. JONES, *THE LAW OF RESTITUTION* 246-47 (1966) and S. STOLJAR, *THE LAW OF QUASI-CONTRACT* (1964).

¹² S. STOLJAR, *id.* at 187; P. WINFIELD, *THE LAW OF QUASI-CONTRACTS* 29-30 & n. 13 (1952).

¹³ R. POWELL, *supra* note 1, at 416-17; P. WINFIELD, *id.* at 82-84 & n. 33.

¹⁴ Lord Mansfield's views in support of a moral foundation for contractual obligations were advanced in *Pillans v. Van Mierop*, 3 Burr. 1663, 97 E.R. 1035 (K.B. 1765). Those views were rejected in *Rann v. Hughes*, 7 T.R. 350, 101 E.R. 1014 (K.B. 1778), and the rejection was confirmed in *Eastwood v. Kenyon*, 11 Ad. & E. 438, 113 E.R. 482 (K.B. 1840).

¹⁵ D. WATERS, *THE CONSTRUCTIVE TRUST* 24 (1964).

¹⁶ R. GOFF & G. JONES, *supra* note 11, at 246. However, the learned authors argue that such fears are totally misplaced. *Id.* at 246-47.

be implied, for the act was performed neither at the express request of *B*¹⁷ nor under circumstances which would enable the court to find a request by implication.¹⁸ Third, *A* cannot resort to Equity since the mechanism for effecting recompense, namely, the constructive trust, will not be available to him unless he can establish a fiduciary relationship between himself and *B*. And between *A* and *B* there can be no fiduciary relationship;¹⁹ the case law admits no such category in the relationships it recognizes as fiduciary.²⁰ Fourth, a remedy based upon subrogation may be unavailable, for there may not be a third party to whom *B* would become liable and to whose rights *A* could be subrogated. Besides, the services in question would have been performed neither in discharge of a subsisting obligation, as in subrogation, nor on request, as in quasi-subrogation. That completes the list of remedies that *A* could seek, and unless there is yet another remedy recognized by the English law, a person in *A*'s position will find no ground for redress.

At this point it is necessary to examine a recent development in the area of constructive trusts. The constructive trust, in the modern view, is not a trust but a remedial device fashioned by Equity. Professor Waters²¹ has shown, convincingly, that the trust element of the constructive trust is subordinate:

Surely the truth of the matter is that when we refer to duties attaching to the constructive trustee we are merely describing in the language of Equity the extent of the loss which the constructive trustee's wrong compels him to put right. So one would more correctly say, it is thought, that though the circumstances may apparently give a constructive trust more of the characteristics of the express trust, that result is purely accidental and does not mean that the constructive trust is imposed any the less for remedial reasons. The mala fide purchaser for value and the profiteering trustee are subject to "a full and complete trust" not because of the constructive trust that is imposed, but because restitution, once decreed, takes effect within the framework of an express trust.²²

¹⁷ It would then be a *quantum meruit* for services rendered or a *quantum valebat* for goods supplied. For either remedy the plaintiff must prove that the services were rendered or the goods supplied at the request of the defendant. See R. GOFF & G. JONES, *id.* at 3-4; J. MUNKMAN, *THE LAW OF QUASI-CONTRACT*: Ch. VII (1950); P. WINFIELD, *supra* note 12, at 51-60; S. STOLJAR, *supra* note 11, at 162-71.

¹⁸ Such circumstances would be the payment of money under compulsion or the defendant's knowledge of and acquiescence in the work done.

¹⁹ The following categories of relationships have been culled from decided cases: trustees *inter se*, executors *inter se*, tenants for life *inter se*, agents *inter se*, partners *inter se*, mortgagors and mortgagees, purchaser of reversions, banker and customer, directors and promoters and their companies, vendor and purchaser, spiritual adviser and devotee, solicitor and client, trustee and beneficiary, trustee and trust estate, bankrupt's estate and member of the committee of inspection, doctor and patient, guardian and ward, husband and wife, parent and child, fiancés *inter se*, employer and employee, and fiduciary agents and clients. See GARROW AND HENDERSON, *LAW OF TRUSTS AND TRUSTEES* 172-82 (3d ed. 1966); SNELL'S *PRINCIPLES OF EQUITY* 547-49 (27th ed. 1973); D. WATERS, *supra* note 15, at 68-69; VINTER, *A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIPS AND RESULTING TRUSTS* 21-222 (2d ed. 1938).

²⁰ See *infra*.

²¹ *Supra* note 15.

²² *Id.* at 16.

The constructive trust, therefore, appears to represent the restitutory character of Equity. Operating within the framework of the concept of trust, Equity, it is believed, puts her remedial propensities to work through a process which has earned the name of constructive trust. Professor Waters adds: "Surely the object of imposing what we will call the trust machinery is the same in all cases, namely, to compel one who has improperly gained a benefit to give it up."²³

The present-day characterization of the constructive trust has triggered a stimulating debate. That device, it is said,²⁴ is more remedial than institutional in character. But the mind of the English lawyer is so conditioned, according to Professor Waters, that he is unable to appreciate its remedial function.²⁵ Since the constructive trust was in origin a trust, the English mind continues to consider it so—a substantive institution. When it acts remedially, it is regarded by the English lawyer as so acting only by virtue of being a trust. It must therefore, even when performing its remedial functions, *behave* as a trust. Professor Waters says:

English law still creates the impression that such trusts are an appurtenance thereof to the law of trusts, and in the law of trusts constructive trusts, as at present taught, convey no shape to the student's mind. As an appendix to trusts of intention, they appear as a mere potpourri of uncertain situations.²⁶

The attitude taken by the American law towards the constructive trust is distinctly remedial. The American Law Institute, in its *Restatement of the Law of Restitution*,²⁷ defines subrogation as follows:

Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of obligee or lien-holder.²⁸

The learned editors²⁹ of the *Restatement* make the following comment on that passage:

Just as the establishment and enforcement of a constructive trust is a method of giving the plaintiff restitution where the defendant has acquired property from the plaintiff or through the disposition of the plaintiff's property, so where property of the plaintiff is used in discharging an obligation or lien he obtains restitution through subrogation. Where the plaintiff's property is used in purchasing a claim against a third person or a lien held by a third person, the person purchasing such a claim or lien holds

²³ *Supra* note 15, at 14.

²⁴ *Supra* note 15, at Ch. I; Pound, *Equity, The Progress of the Law*, 33 HARV. L. REV. 420 (1919). Cf. Maudsley, *Proprietary Remedies for the Recovery of Money*, 75 L.Q. REV. 234 (1959).

²⁵ *Supra* note 15, at 13-14.

²⁶ *Id.* at 20.

²⁷ AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW OF RESTITUTION* (1937).

²⁸ *Id.* at 653.

²⁹ Warren A. Seavey and Austin W. Scott of Harvard University.

it upon a constructive trust for the plaintiff; but where the plaintiff's property is used in discharging such a claim or lien, a court of equity gives analogous relief by allowing the plaintiff to be subrogated to the position which the obligee or lien-holder occupied prior to the discharge.³⁰

Both passages strongly suggest that the devices of the constructive trust and subrogation perform a remedial role in the American law. Each device has its own area of operation, and each supplements the other in their respective restitutory activities. The passages further suggest that at the core of the two remedies is a policy against unjust enrichment, something which separates the American jurisprudence from the English.

Whether these divergent attitudes towards the character of the constructive trust are due to the different attitudes taken towards unjust enrichment by the two legal systems is a question that may be put aside for the moment. However, Dean Pound has advanced the powerful thesis that the constructive trust was basically remedial, right from its very inception in the Courts of Equity:

An express trust is a substantive institution. Constructive trust, on the other hand, is purely a remedial institution. As the chancellor acted in personam, one of the most effective remedial expedients at his command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly. Thus constructive trust could be used in a variety of situations, . . . sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment. In the latter case, constructive trust appears as what might be called a remedial doctrine, alongside of election, subrogation, contribution, and exoneration.³¹

Formidable though these views are, they have little or no bearing upon the pattern set by the English law. One of the difficulties with the English law is its failure to accept the breadth of the doctrine of unjust enrichment. Because of this failure, English law does not accommodate claims arising from *negotiorum gestio* or from any other sources of unjust enrichment, unless they are at the same time able to raise a fiduciary relationship.³² The resultant unwillingness of Equity to decree restitution,³³ except in so far as a fiduciary relationship could be found, has halted the movement of the English constructive trust away from being an institution and towards being a remedy.

However near the English constructive trust has come to being a remedy, it is now conceded that unless there is a movement away "from

³⁰ *Supra* note 27, at 654.

³¹ Pound, *supra* note 24, at 420-21. See also Scott, *Trusts, The Progress of the Law*, 33 HARV. L. REV. 688 (1919).

³² Note the treatment of *In re Hallett's Estate*, 13 Ch. D. 696, 42 L.T.R. 421 (C.A. 1880), and *Sinclair v. Brougham*, [1914] A.C. 398, 111 L.T.R. 1 (H.L.), by the Court of Appeal in *In re Diplock*, [1948] 1 Ch. 465, at 540-44, [1948] 2 All E.R. 318, at 357-59 (C.A.) and in D. WATERS, *supra* note 15, at 33-43, 67-72.

³³ Either by way of constructive trust or by way of equitable tracing.

relationship to event”³⁴ the English constructive trust can, unlike its American counterpart, never provide a remedy for unjust enrichment.

However, Professor Waters argues³⁵ that the requirement of a fiduciary relationship in the English law appears, from the analysis undertaken by the Court of Appeal in *In re Diplock*,³⁶ to be tenuously based. It appears from their analysis that the very slightest evidence would lead the courts to find a fiduciary relationship, so as to enforce a constructive trust or an equitable tracing order.³⁷ For this reason Professor Waters suggests that:

English law stands at the gateway of making this move to the remedial constructive trust. The trust in both sale and mortgage . . . is just so much deadwood for modern law, and these aside the scene is set for the realization that as actual fraud is an event which Equity is content to remedy as an event, so there lies within all the other relationships an event which is in fact at the heart of the English constructive trust.³⁸

The position therefore appears to be quite clear. If it could be found in the English law that restitutionary remedies were available on the basis of “an event” rather than a relationship, then the English law would have arrived at the point where American law has always been; that is, it would have accepted that the constructive trust is one of several remedies directed against unjust enrichment.³⁹

Whatever the validity of these views, Professor Waters has established that in the English common law a defendant must pay for “an event” which results in a benefit or an advantage to him. Even in the absence of a fiduciary, contractual or quasi-contractual relationship, there are times when a person may be required to pay for certain benefits that have come his way. The “funeral” cases to be discussed in this paper fall under that classification and, as will be seen, agree in principle with the civilian concept of *negotiorum gestio*. An examination of that case law is now in order.

Jenkins v. Tucker,⁴⁰ one of the oldest decisions, is a convenient starting point. While the husband was abroad in Jamaica, his wife died in England. Her father paid for the funeral and claimed a sum of £100 by way of recompense from his son-in-law, the defendant. The court allowed his action for the following reasons:

[T]here was a sufficient consideration to support this action for the funeral expenses, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the plaintiff paid on this account, was paid to the use of the defendant.⁴¹

³⁴ *Supra* note 15, at 43-73.

³⁵ *Supra* note 15, at 70-72.

³⁶ [1948] 1 Ch. 465, [1948] 2 All E.R. 318 (C.A.).

³⁷ *Id.* at 540-44, 2 All E.R. at 357-59.

³⁸ *Supra* note 15, at 43.

³⁹ *Supra* note 15, at 24-26.

⁴⁰ 1 H. Bl. 90, 126 E.R. 55 (C.P. 1788).

⁴¹ *Id.* at 93, 126 E.R. at 57.

The performance of a duty by one person in place of another amounts to that person's rendering a service for the other. The service in this case having been performed without the husband's request, assent or even knowledge, there could, however, be no contractual or even quasi-contractual relationship. Moreover, the position occupied by the defendant in relation to the plaintiff does not create a fiduciary relationship. It merely results in "an event" causing an advantage or a benefit to the husband. The judgment of the court must rest upon that basis. From a later passage in Lord Loughborough's judgment it appears that such a basis would not lack precedent: "there are many cases of this sort, where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid."⁴²

In *Rogers v. Price*,⁴³ the deceased died at his brother's house. The brother arranged with the plaintiff for the deceased's burial. The plaintiff then brought an action for the funeral expenses against the executor of the deceased's will. He was unsuccessful at first instance, but the Court of Exchequer allowed his appeal for the reasons found in Baron Garrow's judgment:

The simple question is, notwithstanding many ingenious views of the case have been presented, who is answerable for the expenses of the funeral of this gentleman. In my opinion, the executor is liable. Suppose a person to be killed by accident at a distance from his home; what, in such a case, ought to be done? The common principles of decency and humanity, the common impulses of our nature, would direct every one, as a preliminary step, to provide a decent funeral, at the expense of the estate; and to do that which is immediately necessary upon the subject, in order to avoid what, if not provided against, may become an inconvenience to the public. It is necessary in that or any other case to wait until it can be ascertained whether the deceased has left a will, or appointed an executor; or, even if the executor be known, can it, where the distance is great, be necessary to have communication with that executor before any step is taken in the performance of those last offices which require immediate attention?⁴⁴

The case makes a number of passing references to an implied contract.⁴⁵ It must, however, be stressed that such a contract would have to spring from the defendant's performance of an act which discharged an existing obligation of the executor without the latter's knowledge, acquiescence or request. Clearly, English law will not imply a contract in such circumstances.⁴⁵

⁴² *Id.*

⁴³ 3 Y & J 28, 148 E.R. 1080 (Ex. D. 1829).

⁴⁴ *Id.* at 34, 148 E.R. at 1082.

⁴⁵ "This obligation does not arise in respect of an act during the life-time of the testator, but of an implied obligation arising out of the situation of the executor with reference to his character and the estate of his testator." *Id.* at 36, 148 E.R. 1083 (Hullock, B.).

⁴⁶ CHESHIRE & FIFOOT'S LAW OF CONTRACT (9th ed. Furmston 1976).

In *Tugwell v. Heyman*,⁴⁷ the plaintiff performed the funeral rites of the deceased without having been asked to do so and later sued to recover the funeral expenses from the defendants, the executors of the deceased's will. Lord Ellenborough allowed the claim on the grounds of implied contract. But the implied contract, it must again be stressed, was based on the fact that the plaintiff had rendered a service to the defendant without the latter's knowledge, request or acquiescence, that service being the burial of the testator, a duty which did indeed rest on the executor.

The defendants do not deny that they have assets. Then will not the law imply a promise on their part to satisfy this demand? It was their duty to see that the deceased was decently interred; and the law allows them to defray the reasonable expense of doing so before all other debts and charges It became necessary that someone should see it consigned to the grave; and I think the executors, having sufficient assets, are liable for the expense thus incurred.⁴⁸

In *Shallcross v. Wright*,⁴⁹ the plaintiff, a stranger with whom the deceased had lodged, recovered both the funeral expenses and the expenses incurred to fumigate his premises. Lord Langdale said: "Considering all the circumstances, I think that this was a case of necessity; for reasons of an important nature required that the dead body should be buried without delay, and if this had been done by a stranger, there would have been a sufficient consideration, from which a contract to pay would have been implied."⁵⁰ The implied contract is clearly a useful device on which to base the plaintiff's claim, but the necessity of using it in such cases⁵¹ shows the lack of a recognized contractual or quasi-contractual basis for restitution. The fact remains that these services were rendered in the absence of any request from the defendant, and so could give rise neither to a *quantum meruit* nor to a *quantum valebat*, the quasi-contractual remedies.

The inapplicability of implied contract to cases such as these appears to have been conceded in the cases that followed *Shallcross v. Wright*. In *Ambrose v. Kerrison*,⁵² the defendant and his wife were separated. During the period of their separation, Mrs. Kerrison died. The plaintiff, a friend of the family, arranged and performed the funeral of Mrs. Kerrison. Ten days thereafter, the plaintiff informed the deceased's husband, the defendant, of the events and claimed a sum of £23.13.0d. by way of expenses. The court allowed his claim for the following reasons:

There can be no question that an undertaker who performs a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral, without any specific contract. That liability in the executor is founded upon the duty which is imposed upon

⁴⁷ 3 Camp. 298, 170 E.R. 1389 (N.P. 1812).

⁴⁸ *Id.* at 299, 170 E.R. at 1389.

⁴⁹ 12 Beav. 558, 50 E.R. 1174 (R.C. 1850).

⁵⁰ *Id.* at 561, 50 E.R. at 1175.

⁵¹ See *supra* note 43, at 28, 148 E.R. at 1080; *supra* note 47, at 298, 170 E.R. at 1389; *supra* note 49, at 558, 50 E.R. at 1174.

⁵² 10 C.B. 776, 138 E.R. 307 (C.P. 1851).

him by the character he fills, and a proper regard to decency, and to the comfort of others. And I think that the same reasons which call upon the executor to perform that duty, cast at least an equal responsibility upon the husband of a deceased wife, and, without any express authority or request on his part, compel him to recoup one who has performed the funeral. I see no difference in principle between the case of an undertaker and that of a third person who takes upon himself to employ and to pay the undertaker.⁵³

There is no reference to a contract, implied or express, or to any strictly legal grounds for allowing the plaintiff's claim. The defendant is made liable to the plaintiff simply because the latter performed an act for his benefit, and notwithstanding the lack of any request to do so.

Similarly, in *Bradshaw v. Beard*⁵⁴ the defendant was found liable to reimburse the brother of his deceased wife for the funeral expenses which the brother had incurred by her burial. At the time of her death she had left the defendant and was living with the plaintiff, her brother. The court found that the defendant had not requested the plaintiff to perform the burial. In allowing the plaintiff's claim, Mr. Justice Willes observed:

The law, therefore, has provided not only for the place where the burial is to take place but also who shall be charged with the performance of the duty. Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the laws of nature and society make a moral duty. And, upon his default, the law obliges him to recoup the reasonable expenses of the person who performs it for him.⁵⁵

In none of these cases was there any foundation for a contract, whether express or implied. The absence of a request, it is submitted, was fatal for a quasi-contractual remedy. Nor was there any foundation for a fiduciary relationship whereby the husband or the executor of the deceased could be regarded as a constructive trustee for the plaintiff; none of the relationships between the parties succeeded in creating a position of trust. Finally, there was on the facts no possibility of a right arising from subrogation. The fact of the payment itself appears to have given rise to the right to a recompense from the person benefiting from it. However, examination of a further category of cases will be necessary before formulating a definite principle.

These are cases in which *A*, not being a servant or an agent of *B*, and without *B*'s knowledge, consent or request, renders services for the benefit of *B*'s property. The question before the courts is whether *B* is liable to reimburse *A* for his services. An ancillary question is whether *A* has a lien over *B*'s property until reimbursement is made.

As far back as the early seventeenth century the courts in England appear to have recognized the right of one who renders a service for the benefit of another's property to claim recompense from that person. This

⁵³ *Id.* at 779, 138 E.R. at 308.

⁵⁴ 12 C.B. (N.S.) 344, 142 E.R. 1175 (C.P. 1862).

⁵⁵ *Id.* at 348, 142 E.R. 1177.

right has been conceded to him in circumstances in which there has been neither a request⁵⁶ nor a contract to justify the claim. *Robinson v. Walter*⁵⁷ affords a convenient starting point. There the plaintiff sued the defendant in trover for the detention of his horse. It was alleged by the defendant that some third parties had ridden the plaintiff's horse to his inn, there abandoning it. The defendant claimed a lien over the horse until his expenses for the horse's keep were met. The court allowed the lien. "[H]e only detains the horse, till he be satisfied for his meat", said Chief Justice Montague, "and so he may well do by the law; he may keep him till he be paid for his meat, because he is compellable at the first to receive him."⁵⁸

Although the defendant in *Robinson v. Walter* succeeded both in his right to recompense and to a lien, the courts in the succeeding centuries were not prepared to concede a lien to the rescuer of another's property. This may have been due to the fear shared by the courts that salvors of goods would begin to hold their owners to ransom. Lord Eyre⁵⁹ thought: "[I]t is better for the public that 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."⁶⁰ Lord Eyre's authority was *Binstead v. Buck*.⁶¹ In that case the plaintiff, having lost his pointer dog, found it a year later in the defendant's possession. After a demand for its return the defendant said that the dog had strayed into his premises, and he claimed 20 shillings for the 20 weeks keep. The defendant further refused to let the plaintiff take the dog away until his claim was met. In an action for trover, raising the issue of the defendant's right to a lien, the court awarded the dog to the plaintiff subject to determination of the issue of whether the defendant's refusal to hand over the animal amounted to a conversion. The report is not clear as to the disposition of the defendant's claim to the 20 shillings; the case is therefore no authority for any proposition beyond that of denying the right to a lien in such circumstances.

However, *Binstead v. Buck* was treated as the only authority for the decision in *Nicholson v. Chapman*.⁶² There the defendant, having saved the plaintiff's timber, which had floated down a river, claimed a sum of £6.10s.4d from the plaintiff. He further claimed a lien over it and refused to hand over the timber to the plaintiff until it was paid. The plaintiff sued the defendant in trover. The issue before the court was whether the defendant had the right of lien over the timber. The court, following *Binstead*

⁵⁶ Without a request, neither a *quantum meruit* nor a *quantum valebat* may be brought. At one time, *indebitatus assumpsit* was possible where *quantum meruit* would otherwise have been available. In either case there must at least be a request from one party to another to perform the services or supply the goods.

⁵⁷ 3 Bulst. 269, 81 E.R. 227 (K.B. 1616).

⁵⁸ *Id.* at 270, 81 E.R. 228.

⁵⁹ *Nicholson v. Chapman*, 2 H. Bl. 254, 126 E.R. 536 (C.P. 1793).

⁶⁰ *Id.* at 259, 126 E.R. at 539.

⁶¹ 2 Black. W. 1117, 96 E.R. 660 (K.B. 1776).

⁶² 2 H. Bl. 254, 126 E.R. 536 (C.P. 1793).

v. Buck, concluded that the defendant had no such right. The inevitable result, therefore, was that the plaintiff succeeded in his action in trover. On this occasion the court found the time, as it did not in *Binstead v. Buck*, to deal with the question of recompense. Lord Eyre, referring to the defendant's claim for £6.10s.4d., said: "[A]t any rate, it is fitting that he who claims the reward in such a case should take upon himself the burthen of proving the nature of the service which he has performed, and the quantum of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover."⁶³ Indirectly, though, the right to compensation for those who act to save the property of another, without that other's consent, knowledge or request, was vindicated. That is the significant aspect of the case, bringing it into line with *Robinson v. Walter*.

This position appears to have remained unchanged for almost three and a half centuries. When the Court of Appeal came to decide *Sorell v. Paget*,⁶⁴ it recognized the right of a rescuer to claim compensation from the owner of the property rescued for reasonable expenses incurred in doing so. The defendant in that case rescued the plaintiff's heifer from the railway tracks on to which she had strayed. After rescuing her, the defendant provided her with "bales of hay" and kept her in secure captivity. The plaintiff demanded the return of the heifer, and the defendant claimed a lien over her for a sum of "£2 for salvage, 1s. per day keep".⁶⁵ This refusal to hand over the heifer until the payment was made gave rise to the present action in conversion. The court unanimously held for the defendant, as regards both his claim for compensation and his right to retain the heifer until the claim was satisfied. The right of retention in this case, it has been argued, was not a true lien, but the common law right of "distress damage feasant".⁶⁶ Be that as it may, what is important is the vindication of the defendant's right to claim compensation for services rendered in the absence of a request, consent or knowledge. This appears to be a principle of general application in the English law.

In *The Great Northern Railway v. Swaffield*,⁶⁷ the plaintiff railway company transported a horse consigned to the defendant. The defendant failed to receive the horse on arrival, and the plaintiff was therefore compelled to stable him until he was collected. The defendant ultimately collected the horse, but refused to meet the stabling expenses. The plaintiff paid them and brought an action for reimbursement. He succeeded in his claim for the following reasons, as enunciated by Chief Baron Kelly:

I am clearly of opinion that the plaintiffs are entitled to recover. 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, through some

⁶³ *Id.* at 259, 126 E.R. 539.

⁶⁴ [1950] 1 K.B. 252, [1949] All E.R. 609 (C.A.).

⁶⁵ *Id.* at 254, [1949] All E.R. 611.

⁶⁶ R. POWELL, *supra* note 1, at 422-23.

⁶⁷ L.R. 9 Ex. 132, L.J. Ex. 89 (1874).

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.⁶⁸

The parallel drawn to the relationship between shipowner and cargo owner is significant; it emphasizes that the right to compensation does not arise from the owner's request, consent or knowledge.

In *Munro v. Wilmott*,⁶⁹ the defendant sold the plaintiff's car, of which he was bailee, for £105. It was found as a question of fact that the defendant had spent a sum of £85 to make it saleable. Both the sale and the repairs were carried out by the defendant without the plaintiff's knowledge, consent or request. The plaintiff brought an action in conversion. The court, while giving judgment for the plaintiff, set off the £85 spent by the defendant in assessing damages.

It is as a result of the £85 which he spent in repairs and renewals and as a result of his own expenditure of time, labour and materials in painting and renovating the outside of the car that that price was realizable at all. If he had not spent that money, I am quite satisfied, this car would probably have realized £20 to £25 as scrap. The result is, I think, that the defendant is entitled to credit, not from the point of view of payment for what he has done, but in order to arrive at what is the true value of the property which the plaintiff has lost: that is to say, the car was so much improved by the defendant's expenditure on it that it realized £120, but it would not have realized anything like that amount had his money not been spent. In my view, the value of the property which the plaintiff has lost is approximately £35, and there will be judgment for her for that amount.⁷⁰

Later in the judgment Mr. Justice Lynskey expressly rejected the suggestion that the defendant was an "agent of necessity".⁷¹ The court was apparently anxious to prevent the plaintiff from acquiring a benefit at the expense of the defendant,⁷² notwithstanding that the latter's activity was unsolicited by the plaintiff.

The following principle may be extracted from the foregoing cases: an act performed by one person to the benefit of another person's property, but without the request, knowledge or acquiescence of that other person, nevertheless makes him (*i.e.* the owner) liable to pay for the services rendered. This principle is valid not only for cases concerning the rendering of services for the benefit of another's property, but also for the funeral cases (previously discussed). Beyond even these two categories of cases, the principle appears to have a wide applicability.

In *Nelson v. Duncombe*,⁷³ the defendant, while serving as one of the trustees of a trust fund of which the plaintiff was the beneficiary, spent his

⁶⁸ *Id.* at 136, L.J. Ex. 90-91.

⁶⁹ [1949] 1 K.B. 295, [1948] 2 All E.R. 983 (K.B.).

⁷⁰ *Id.* at 299, [1948] 2 All E.R. at 986-87.

⁷¹ *Id.* at 297, [1948] 2 All E.R. at 985-86.

⁷² See D. WATERS, *supra* note 15, at 425.

⁷³ 9 Beav. 211, 50 E.R. 323 (R.C. 1846).

own money in maintaining the plaintiff at a lunatic asylum and in proceedings before a commission to have the plaintiff declared sane. Subsequently, the plaintiff sought an accounting from the defendant, who thereupon pleaded a set-off in the amount of the moneys spent for the plaintiff's benefit. The court, while recognizing that the expenses claimed by way of set-off were unauthorized, nonetheless allowed them on the grounds that they were incurred for the benefit of the plaintiff:

And if Mr. Duncombe has done no more than that which he would have been directed to do, upon the facts appearing in a suit properly instituted, can there be any good reason why, in such a case as this, he should not have the like allowance? The circumstances are not precisely the same, because Mr. Duncombe, by acting for himself without first obtaining the sanction of the Court, has necessarily assumed the burden of proving the propriety of all that he did. But, supposing him to do this, can any sufficient reason be given why he should not be allowed, in account, the money which he has properly expended for the protection and benefit of Mr. Nelson, at the time when Mr. Nelson was incapable of acting for himself? ⁷⁴

Again, in *Schneider v. Eisovitch*,⁷⁵ the plaintiff successfully sued the defendant in negligence for causing a motor accident in which the plaintiff was injured and her husband was killed. The damages awarded included inter alia a sum of £110, representing the expenses incurred by the plaintiff's brother-in-law in rendering necessary services to her. These services were neither requested nor consented to. Commenting on this aspect of the case, Professor Powell wrote: "There was no request for these services by the plaintiff; there was no express or implied contract to pay for them. The plaintiff later promised to repay her relatives if she recovered the expenses from the defendant, but that was a moral obligation and there was no legal liability to pay." ⁷⁶

The recognition of such a claim by the court supports the general proposition that the rendering of services without the knowledge, consent or request of the recipient creates a legal obligation for reimbursement. The conclusions arrived at thus far may be summarized as follows:

- (1) In the foregoing cases services were rendered by one party to another without request, consent or knowledge.

⁷⁴ *Id.* at 230-31, 50 E.R. 331.

⁷⁵ [1960] 2 Q.B. 430, [1960] 1 All E.R. 169 (Q.B. 1959).

⁷⁶ R. POWELL, *supra* note 1, at 424. The *Schneider* case may be distinguished from *In re Rhodes*, 44 Ch. D. 94, 62 L.T.R. 342 (C.A. 1890), on the grounds that there the persons rendering the services did not intend the money they spent to be returned at some later date. Such an intention could have created a debt in their favour. The court held, as a question of fact, that the failure to keep accounts of the sums of money advanced to the lunatic was evidence that the relatives did not intend to charge for the necessities supplied. This is clear from the judgment of Lindley L. J.; *id.* at 106-108, 62 L.T.R. at 343-44. In *Schneider*, however, there is no evidence to suggest that the brother-in-law of the plaintiff had any intention of not charging for the necessities supplied. This is clear from the judgment of Paull J.: [1960] 2 Q.B. at 437-40, [1960] 1 All E.R. at 172-74 (Q.B. 1959).

- (2) The relationship between the person rendering the service and the person receiving it did not create a position of trust which could give rise to a fiduciary relationship.⁷⁷
- (3) The facts did not give rise to a right of subrogation⁷⁸ or quasi-subrogation.⁷⁹
- (4) Notwithstanding the absence of an accepted legal basis⁸⁰ for such remuneration, the courts have recognized the right of a person rendering unsolicited services to be compensated by the person who received them.
- (5) If the courts had failed to do so, the result would have been one party's acquisition of a benefit to the other's impoverishment.

The question remains: what is the rationale for this right to reimbursement? Most of the treatises⁸¹ have been content to treat the cases discussed above as exceptions to the rule that "work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create a lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure".⁸² The above passage from *Falcke's Case* has been widely referred to,⁸³ but it is merely obiter dicta. That case decided no more than that a mortgagor may not defeat the prior claims of the mortgagee where the proceeds from the sale of mortgaged property were insufficient to meet all claims.⁸⁴ Moreover, the dictum cannot claim any authority from the cases either preceding or succeeding it—the very same cases that have been the subject of this paper. English law does not in fact deny a remedy in circumstances where the civilian doctrine of *negotiorum gestio* would apply. The fact that these remedies have had an assortment of grounds that in themselves are often difficult to accept⁸⁵ has led academics to the conclusion that these cases were an exception to the alleged rule that "unsolicited",⁸⁶ "voluntary",⁸⁷ or "necessitous"⁸⁸ services created no liability for reimbursement in

⁷⁷ *Supra* note 19.

⁷⁸ In none of the cases were the services rendered in discharge of a subsisting obligation; for subrogation to apply, the services performed must discharge such an obligation.

⁷⁹ In quasi-subrogation cases, there is always a request for the services in question.

⁸⁰ *Viz.*, in contract, quasi-contract or subrogation.

⁸¹ P. WINFIELD, *supra* note 12; J. MUNKMAN, *supra* note 17; S. STOLJAR, *supra* note 11; and R. GOFF & G. JONES, *supra* note 11. R. POWELL, *supra* note 1, is alone in recognizing that some of these cases could be evidence of the presence of *negotiorum gestio* in the English law.

⁸² *Falcke v. Scottish Imperial Insurance Co.*, 34 Ch. D. 234, at 248, 56 L.T.R. 220, at 224 (C.A. 1886). See also, S. STOLJAR, *supra* note 11, at 171-86; P. WINFIELD, *supra* note 12, at 84-88; and R. GOFF & G. JONES, *supra* note 11, at 231-47.

⁸³ S. STOLJAR, *supra* note 11, at 135, and R. GOFF & G. JONES, *supra* note 11, at 239.

⁸⁴ *Supra* note 82, at 248, 250-51, 254. See also, S. STOLJAR, *supra* note 11, at 135.

⁸⁵ Note particularly the funeral cases.

⁸⁶ S. STOLJAR, *supra* note 11, at 160-94.

⁸⁷ P. WINFIELD, *supra* note 12, at 84.

⁸⁸ R. GOFF & G. JONES, *supra* note 11, at 14.

the English law. But once one becomes aware of the origin of the constructive trust put forward by Waters, namely as the remedy for an "event" which gives rise to a benefit or an advantage, then the foregoing cases do become explicable—free from the trappings of the fiduciary relationship of Equity and the *quantum meruit* and the *quantum valebat* of quasi-contract.

The result is that whatever name one chooses to give to the remedy, there is a right to restitution in the English law in cases where the civilians would grant the *actio negotiorum gestorum contraria*. In English law the remedy can be justified as flowing from "an event" giving rise to a benefit or advantage. That the recipient must pay for the benefit is clear from the case law, and if recognized in principle, would mark a new chapter in the English law of restitution.