AGENCY OF NECESSITY *

The common law, although sometimes generous in determining what things are the necessaries of life, has always been politely sceptical that the doing of an act could be a necessity. We also find the courts upholding the notion that while a man must not deliberately cause injury to another, he need not strive efficaciously to give aid to some other human being. In a United States case the matter is put thus: "Those duties which are dictated merely by good morals or by human considerations are not within the domain of the law. Feelings of kindliness and sympathy may move the Good Samaritan to minister to the needs of the sick and the wounded at the roadside, but the law imposes no such obligation; and suffering humanity has no legal complaint against those who pass by on the other side."

It cannot be surprising, therefore, that until very recently English jurists insisted that there was no English law corresponding to the Roman negotiorum gestio and that "this

*A prize Essay in the Wallace Nesbitt Prize Essay Competition for 1944 at the Osgoode Hall Law School.


2For example: necessity arising from hunger does not excuse a crime—R. v. Dudley (1884), 14 Q.B.D. 273. Nor is compulsion an excuse for committing a heinous offence—See s. 20 of the Criminal Code. Lord Hale laid down the stern rule: "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself than kill an innocent man." Similarly, it is said that the defence of irresistible impulse is no part of English law—R. v. Coelho (1914), 10 Cr. App. R. 210.


4The doctrine of the "Negotiorum Gestio" is well demonstrated by the following excerpt from Justinian: "If one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission to do so, and that other is thereby laid under legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning anyone to look after and manage their affairs, the result of which would be that during their
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."

In 1924, however, McCardie J. in the case of Prager v. Blatspiel taking the view that law should be expanded to meet the needs of a growing society, stated: "There is nothing in the existing decisions which confines the agency of necessity to carriers whether by land or sea, or to the acceptor of bills of exchange. The basic principle I think is a broad and useful one. It lies at the root of the various classes of cases of which the carrier decisions are merely an illustration." His Lordship laid it down that the conditions which entitle an agent to exceed his authority under this doctrine were (a) that the agent could not communicate with his principal, (b) that there must be an actual or commercial necessity for the act, and (c) that the alleged agent of necessity must satisfy the Court that he was acting bona fide and in the interests of the parties concerned.

But McCardie J.'s dicta did not pass unchallenged. In Jebara v. Ottoman Scrutton L.J. sought to confine agency of necessity to situations 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." He went on to say that the position seemed quite different "when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals.""^a

In order to appreciate what is involved in these two decisions it is necessary to distinguish and consider the following types of situations which are generally referred to as involving agency of necessity:

I. Where an agent because of some unforeseen emergency assumes powers, which, except for the exigency, would be beyond his authority.

II. Where one person fails to fulfil a legal obligation to another and the obligee then does or causes to be

absence those affairs would be entirely neglected; and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing." Justinian, Inst. lib. III, tit. xxvii, s.1.

^a Per Lord Esher in Gwilliam v. Twist, [1895] 2 Q.B. 84 at 87.

^b [1924] 1 K.B. 566.

^c At p. 570.


^e Notes on these two cases will be found in 2 Cambr. L.J. 241; 71 Sol. J. 376; 37 Yale L.J. 379; 164 L.T. 277.
done some act to protect himself from the consequences of the failure. (This type of case is herein referred to as "quasi-agency.")

III. Where a stranger without any authority, but because of some emergency, does some act for the benefit of another. (This type of case is herein referred to as "negotiorum gestio.")

I.

In dealing first, then, with the case where there is a pre-existing agency, it cannot be doubted that certain classes of agents such as masters of ships or salvors have authority in certain emergencies to take exceptional steps. It is submitted, however, that these exceptional powers are not derived as stated by Parke B. in *Hawtayne v. Bourne*9 "from the peculiar character of the office of the agent" but are instances of the proposition of law that an agent has actual authority to do acts which he reasonably believes his principal has authorized. If authority has been given to an agent to perform certain prescribed duties or services, ordinarily he has power to do things incidental to the performance thereof.10 And when, in carrying out his instructions an exceptional circumstance develops or an unexpected emergency arises, the agent may not only be entitled but may be bound11 to use extraordinary means to cope with the unforeseen difficulty. In so doing, he may subject his principal to liability in tort12 as well as in contract and have a right to compensation13 for his extra services.

It would be impossible to exhaust this field of enquiry. It is not intended to discuss particularly those special cases such as the master of a ship or a salver where the power to take exceptional steps in emergencies has long been undisputed. Rather, it is proposed to give a few cases which it is felt support the submission regarding the basis of this power.

A good example is afforded by the case of *Sims v. Midland Railway*14 where perishable goods were sold by a carrier owing to the delay in transit caused by a strike. The Court upheld the carrier's action since it was practically impossible to get

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9 (1841), 7 M. & W. 595.
14 [1913] 1 KB. 106.
instructions from the owner. Scrutton J. stated that the doctrine of a sale by an agent of necessity applied to a carrier by land as well as by sea. A similar case is Great Northern Railway v. Swaffield.\textsuperscript{15} There a railway company was held to be entitled to place a horse with a livery stable keeper and recover the reasonable charges thereof from the owner when the horse was not met at its place of destination and the railway company had no safe accommodation for it.

Cases on the agent’s power to sub-delegate should also be noted. The law on this topic is summed up by Thesiger L.J. as follows:\textsuperscript{16} “As a general rule, no doubt, the maxim ‘delegatus non potest delegare’ applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third party . . . . we are of the opinion that an authority to the effect referred to may and should be implied . . . . where in the course of the employment unforeseen emergencies arise which impose on the agent the necessity of employing a substitute.” In the case of Gwilliam v. Twist the Court of Queen’s Bench\textsuperscript{17} decided that the conductor of an omnibus had authority in the case of a sudden emergency to appoint a bystander to drive the motor vehicle and thereby render his principal liable for the negligence of the stranger. The Court of Appeal\textsuperscript{18} reversed this decision but on grounds which did not impugn the proposition of law laid down in the lower court. The majority of the Court of Appeal said that there was no “necessity” in the particular case as there “was an obvious possibility of communicating with the employers and by a reasonable endeavour obtaining their directions as to what was to be done.” In Hollidge v. Duncan\textsuperscript{19} a servant in an emergency needed “another hand” and asked a passer-by to help him. The master was held responsible for the negligence of the stranger.\textsuperscript{20}

In the case of Tetley & Co. v. British Trade Corp.\textsuperscript{21} an agent to save his principal’s goods from invading forces deviated from his principal’s instructions by removing the goods to another country. The principal claimed damages for breach of duty or conversion and the agent counterclaimed in respect of

\textsuperscript{15} (1874), L.R. 9 Ex. 182.
\textsuperscript{16} In re Bussche v. Alt (1878), 8 Ch. D. 286 at 311.
\textsuperscript{17} [1895] 1 Q.B. 557.
\textsuperscript{18} [1895] 2 Q.B. 84.
\textsuperscript{19} 199 Mass. 121.
\textsuperscript{20} See also: Harris v. Fiat Motors (1906), 22 T.L.R. 556. Cases on this topic are collected in 50 Am. State Rep. 110.
\textsuperscript{21} 10 Lloyd’s List Rep. 678.
the charges he had incurred. Bailhache J. said: "I have come to the conclusion on the whole that the defendants in this case were agents of necessity and they acted reasonably. . . . . The goods were removed by the defendants acting reasonably and I am afraid that the costs of that removal must be on the plaintiffs." Similarly, in the United States case of Perez v. Muranda an agent, who had been directed by his principal to deposit funds at a certain place, was held justified in sending them to another place when reasonable ground for alarm prevented him from following his instructions.

The Privy Council in Montaignac v. Shitta held that an agent may have power to borrow on exceptional terms and outside the ordinary course of business under circumstances of emergency. And in the case of Wolfe v. Horncastle it was said that an agent not generally authorised to insure, might, in unforeseen exigencies to prevent irreparable loss, acquire a right to insure for his principal.

Another line of cases is the "arrest" cases. A good example of these is March v. Stimpson where it was held that an employee who ordinarily had no authority to arrest might have such authority "in cases of emergency when the exigency of the occasion required it."

A case which might well have come from the annals of the corpus juris is the United States case of Williams v. Shachelford. Here the principal authorized his agent to receive a slave who had just completed a term of service at a distant place and to sell him for a certain cash price. The agent was unable to make a cash sale and could not take the slave with him without incurring heavy expenses, so he left the slave with the defendant service free. The owner of the slave brought an action to recover the value of his services. The Court held that the agent had acted within his authority and dismissed the action.

The powers of an agent of necessity are sometimes demonstrated by cases where the agent employs medical assistance in an emergency. The best known of these cases is Langan v. Great Western Railway where a sub-inspector of railway police was held to have authority to pledge the credit of the railway

22 7 Mart. N.S. 493.
23 (1890), 15 App. Cas. 357.
24 1 Bos. & Pull. 316 at 323.
26 16 Ala. 316.
27 Many of the American cases are collected in: 7 H.L.R. 49; 13 H.L.R. 603; 29 H.L.R. 547; 31 H.L.R. 797; 20 L.R.A. 695; 75 Pa L.R. 101.
28 (1874), 30 L.T. (n.s.) 173, esp. at p. 177.
company for board and maintenance of persons injured in a railway collision. It was there said that in order to fulfil his duty to protect the interests of his principal, the agent is not merely entitled but bound to take such measures as are calculated to keep down the damages for which it may possibly be found upon further investigation that the principal is liable. A similar case is Walker v. Great Western Railway where it was held that the general manager of a railway company had authority to bind a company to pay for the surgical attendance on a servant injured in a railway accident.

The right of a doctor to exceed his instructions during the process of an operation if unforeseen difficulties arise came up in the case of Marshall v. Curry where Chisholm C.J. quoting from the American case of Pratt v. Davis stated: “Where the patient desires or consents that an operation be performed and unexpected conditions develop or are discovered in the course of the operation, it is the duty of the surgeon in dealing with these conditions to act on his own discretion, making the highest use of his skill to meet the exigencies which confront him, and in the nature of things he must frequently do this without consultation or conference with anyone, except perhaps, other members of his profession who are assisting him. Emergencies arise, and when a surgeon is called it is sometimes found that some action must be taken immediately for the preservation of the life of the patient, where it is impracticable to obtain the consent of the ailing or injured one or anyone authorized to speak for him. In such event the surgeon may lawfully and it is his duty to, perform such operation as good surgery demands, without such consent.”

The problem now arises: What are the limits of this strange doctrine, that in certain cases of exigency an agent has actual authority to exceed his instructions? The conditions enunciated by McCardie J. as the “features” of agency of necessity have already been referred to. It will be seen, however, that they do not form a complete solution to the problem but are successful in suggesting further questions.

“In the first place,” McCardie J. says “it is of course clear that agency of necessity does not arise if the agent can communicate with his principal.” We are, thus, at once confronted

29 (1867), L.R. 2 Ex. 268.
30 For a case to the contrary see Cox v. Midland (1849), 3 Ex. 268.
31 [1933] 3 D.L.R. 260, esp. at p. 266.
32 224 Ill. 300.
33 See also: per Smith L.J. in Gwilliam v. Twist, [1895] 2 Q.B. 84: “The impossibility of communicating with the principal is the foundation of the
with the query as to whether with the advent of the telegraph, the telephone and the radio this condition can ever be fulfilled. The answer, however, can probably be found in the words of Scrutton J. that all that is meant is "it must be practically impossible to get the owner's instructions in time as to what shall be done." Also, it was said in the case of *The Margaret Mitchell* that it was the "impracticability" of communicating with the owner that was the test. Nor is there any obligation to attempt to communicate unless there is a reasonable chance of getting a reply in time. In the *Tetley* case Bailhache J. said: "I have come to the conclusion that under the circumstances there never was a point of time that I can put my finger on and say 'Here the defendants ought to have communicated...'." and if they had done so at that particular date there was a reasonable chance of getting a reply." But, it must be remembered that the circumstances may be such that the prudent course would be to notify the principal and secure additional instructions even though loss is occasioned by the delay.

The second condition put forward by McCardie J. was that it is essential for the agent to prove that the act was necessary. Thus we are plunged into the nebulous discussion of "What is necessity?" To this enquiry it is not possible to give a definite answer as the question is one of fact dependent on all the circumstances of any given case. Or as put by Lindley L.J.: "By... 'necessity' is meant... reasonably necessary and in considering what is... reasonably necessary every material circumstance must be taken into account—e.g. danger, distance, accommodation, expense, time and so forth. None of these can be excluded." Probably, the best definition of necessity is given by the Privy Council in *Australia Steam Navigation Company v. Morse* where Sir Montague Smith says: "This necessity is equivalent, for

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doctrine of agency by necessity." And in *Hawtayne v. Bourne*, 7 M. & W. 595 Alderson B. said of the agent's alleged power to borrow because of an emergency suddenly arising, that there was no such power because "there was ample time and opportunity for him to have applied to his principal."

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31 7 L.T. 803.
32 10 Lloyd's List L.R. at p. 681.
33 *Bernard v. Maury*, 20 Grant (Va) 484. And see: *The Bonaparte* 8 Moo. P.C. 459, "If according to the circumstances in which he (the Master) is placed it be reasonable that he should—or it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case there, it must be taken upon authority and principle that it is the duty of the master to do so or at least make the attempt."
the purpose of the present enquiry, to a high degree of expediency, in other words, that the course which was clearly highly expedient will be considered to have been pressingly necessary. . . . the word ‘necessity’ when applied to mercantile affairs, where the judgment must in the nature of things be exercised, cannot of course mean an irresistible compelling power: what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, when by force of circumstances a man has a duty cast on him of taking some action for another, and, under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the person for whom he acts in a given emergency, it may be properly said of the course so taken that it was, in a mercantile sense, necessary to take it.”

It is interesting to note that seven years later Sir Montague Smith somewhat restricted his definition of necessity. In New South Wales v. Owsten he said: “An authority to be exercised only in cases of emergency is evidently a limited one, and before it can arise, a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present.”

A problem somewhat undecided is whether this “authority to be exercised only in cases of emergency” is confined to allowing an agent in certain circumstances to exceed his instructions or whether he is ever actually entitled to act contrary to them.

It is, of course, fundamental that when an agent has received definite orders, it is his duty to exercise his authority exactly in the terms in which it was given. An agent is bound to obey positive instructions. Sir John Romilly put the proposition in these words: “It is quite clear that [the agent] is bound to follow the instructions of his principal, and is not answerable for any injury which may occur, if he strictly and directly follow the instructions that are given him. . . . he never can be blamed for acting as directed by his principal and he is liable for action if he should not.” There is one exception to this rule in the case where strict obedience has become impossible.

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40 L.R. 4 P.C. 222; 27 L.T. 357 at 359.
41 (1879), 4 App. Cas. 270 at 290.
43 Comber v. Anderson (1808), 1 Camp. 523.
44 Pariente v. Lubbock (1855), 20 Beav. 588 at 592.
45 In Hill v. Wilson, 41 L.T. 412 Lindley J. said that the necessity which would justify the termination of a voyage elsewhere than the point of destination must be caused by the “occurrence of circumstances beyond the control of the contractor and such as renders the completion of the voyage on the terms originally agreed upon physically impossible or so clearly unreasonable as to be impossible in a business point of view.”
in doubt is whether or not there is another exception where peculiar circumstances not contemplated by the parties arise so that an exact compliance with the instructions would result in disaster for the principal.

There is one line of English cases which seems to hold that an agent has no discretion to disregard the express instructions of his principal no matter what the necessity. So, in *Howard v. Tucker*\(^4\) a principal in India shipped goods to his London agent with instructions to receive the goods and sell them but not to pay the freight as it had been paid in Bengal. The agent sold the goods but when called upon for delivery he found them stopped for freight which the principal had neglected to pay. The agent paid the freight in order to obtain possession of the goods. The Court held that the agent could not recover this advance.\(^4\)

Many of the American Courts, however, approach the problem quite differently.\(^4\) For instance Story J. in *Forrestier v. Bordman* states: “Now I take it to be clear that if, by some sudden emergency, or supervening necessity or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions or a literal compliance therewith would frustrate the objects of the owner and amount to a total sacrifice of his interests, it becomes the duty of the supercargo under such circumstances to do the best he can in the exercise of sound discretion to prevent a total loss to his owner; and if he acts bona fide and exercises a reasonable discretion his acts will bind the owner.”\(^4\)

Another leading United States case is *Greenleaf v. Moody*,\(^5\) where it was held that, in unforeseen circumstances of necessity or great urgency, a factor has implied authority to act for his principal irrespective of his instructions or the ordinary usages of the trade and that a factor who so acted in good faith and with a sound discretion was not liable for the consequences, although it turned out that his course was disadvantageous to his principal. An English case to take this liberal approach is *Tetley v. British Trade Corporation*\(^6\) where it was held that an agent was entitled to disregard the orders of his principal and remove his goods to another country where he “felt that it was no longer safe” to leave the goods where they were.

\(^{4}\) (1831), 1 B. & Ad. 712.

\(^5\) For cases to the same effect see: Anonymous 2 Mod. 100; Chapman v. Morton, 11 M. & W. 534 and Wright J. in Gwilliam v. Twist, [1895] 1 Q.B. 559: “Provided that he violates no express limitation of his authority.”

\(^6\) The American cases which hold that an agent may disregard orders owing to unexpected emergencies are collected in 6 Am. State Reports at p. 37.
The third condition to becoming an agent of necessity suggested by McCardie J. was that "an alleged agent of necessity must satisfy the Court that he was acting bona fide in the interests of the parties concerned." This premise involves two issues. Firstly, the agent must be acting for the benefit of the principal. Sir William Scott maintained that it was the prospect of benefit to the principal that was the foundation of the authority. Or, as put by Sir John Romilly, "An agent is bound to do the best he can for his principal and in matters which are left to his discretion he can only act for the benefit of his principal." Secondly, there is the question of bona fides.

To McCardie J.'s three conditions there might well be added another. The agent must have pursued a course which a reasonable man would have done in his own case. Or, as sometimes said, the acts done must be prudent ones.

II. Quasi-Agency

In certain situations where one person owes an obligation to another and fails to fulfil it, the obligee is entitled to see to the fulfilment of the duty himself and render the obligor liable therefor. In these cases, though there is seldom even any pretence of authority, the obligee is sometimes spoken of as the "agent of necessity" of the obligor. For example, when a wife has been deserted by her husband and left without provision for maintenance it is generally stated that she is an agent of necessity to supply her needs upon the credit of her husband.

As this topic has been dealt with at length elsewhere, it is not intended to discuss it here in detail. Suffice it to say that the right of the wife to bind her husband in these circumstances does not rest upon any presumption of authority. It is an irrebuttable presumption of law. Thus in Bolton v. Prentice a husband who drove his wife out of his house by cruelty and refused to provide for her was held liable to pay a merchant who had supplied her with necessaries even though the merchant had been expressly forbidden by the husband to do so.

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63 In The Gratitude (1801), 3 Hob. 240.
64 In Pariente v. Lubbock (1855), 20 Beav. 588 at 592.
65 See Broom v. Hall (1859), 7 C.B. (n.s.) 503.
66 Also a mortgagee's right to claim money paid by him to redeem mortgaged land from taxes and add it to the mortgage debt, has at times been referred to as that of an agent of necessity.
67 2 Strange 1214.
John S. Ewart suggests that it is not accurate to say that in these circumstances the wife is acting as an agent of necessity. To use his exact words: “I presume that the ‘necessity’ is that of ascertaining some legal basis upon which to found liability. No man can be made liable for what neither he nor his agent orders; the deserted wife was not an agent; therefore — What? therefore the fact must be changed, and the wife must have been an agent. Can anything be more absurd? Why did not the writers question the validity of the major premise? Do not tell me that one hundred and seven years ago a judge spoke of ‘an agent of necessity’. I know that. But the judge is dead, and the evil which he did ought to have been buried with his bones. ‘Why did the writers overlook such a glorious opportunity for the introduction of the ‘quasi’ idea? Why not say that the wife was an ‘as-if’ agent? That looks like burlesque; but quasi-agent is quite as respectable a conception as quasi-contract.”

While it is recognized that it may be highly confusing to speak of one being an “agent” in situations where no question of authority is involved, the use of the expression “agent of necessity” can be defended if it is realized that it is used merely as a “term of art”. It is only harmful if it leads the unwary to apply the same law as he would do if there were in fact an agency relationship.

III. NEGOTIORUM GESTIO

Story in his Commentaries on the Law of Agency in 1882 after stating that an agent may be justified in assuming extraordinary powers in emergencies goes on to say: “The same doctrine would seem to apply to the case of a mere stranger, acting for the principal without any authority, under circumstances of positive necessity; as, for example, in the case of a stranger interfering to prevent irreparable injury to perishable property, occasioned by fire, shipwreck, inundation, or other casualties, or found without any known owner or agent, in order to its due protection or preservation. In such cases he performs the functions of the negotiorum gestor of the civil law; and seems justified in doing what is indispensable for the preservation of the property or to prevent its total destruction.”

59 33 Harv. L.R. at 627.
59 The Civil Law of the Negotiorum Gestio is discussed in 7 Tul. L.R. 253. Reference to note (4) supra.
60 Ninth edition sec. 142 at p. 166.
Subsequent text-writers and judges have not accepted this statement as law. The objection in allowing a stranger to become an agent of necessity is set forth by Scrutton L.J. in the *Jebara* case. "But considerable difficulties arise on the question of agent of necessity in English law. Until recently it was treated as limited to certain classes of agents of whom masters of ships were the most prominent. High authorities doubted whether it could be extended. I refer to the observations of Lord Esher M.R. in *Gwilliam v. Twist*; to the judgment of Parke B. in *Hawtayne v. Bourne*, but especially to the careful judgment of Eyre C.J. in *Nicholson v. Chapman*. Many of the authorities are collected in the recent judgment of McCardie J. in *Prager's case*. He finds the facts so as not to raise any question of action by an agent of necessity, but discusses what the law would be if he had found the facts differently. He takes the view that judges should expand the common law to meet the needs of expanding society, and proceeds to expand the doctrine of agent of necessity without clearly defining the limits, if any, of its expansion. The difficulty may be seen by considering the case of the finder of perishable goods or chattels which need expenditure to preserve them. If the finder incurs such expenditure, can he recover it from the true owner when he finds him as his 'agent of necessity'? Eyre C.J. raises this difficulty in the case above cited, and cites *Binstead v. Buck*, the case of the pointer dog. The dog was lost, and his finder fed him for twenty days, and claimed the cost from his owner when he appeared, but the claim was treated as unarguable."

It might be worth while to examine briefly the authorities to which Scrutton L.J. refers. It is submitted that the cases of *Binstead v. Buck* and *Nicholson v. Chapman* do not establish that a finder of lost goods has no claim against the owner for compensation. The *Binstead* case was an action for trover to recover a pointing dog. The plaintiff proved the dog was his property and that it was found at the defendant's house twelve months after it was lost. The defendant said that the dog had strayed there casually and demanded 20s. for twenty weeks' expenditure. See for example: Anson on *Contracts* 17th ed. p. 408: "There is certainly in English law nothing that corresponds with the negotiorum gestio of Roman law." Halsbury's *Laws of England* (Hailsham edition) Vol. 1, p. 208 note (o); Wright, *Principal and Agent*, 2nd edition, p. 51; Bowstead on *Agency*, 8th edition, p. 15, note (e).
keep before he would deliver up the dog. The claim treated as unarguable was, not the defendant's demand for compensation, but his right to retain the dog until he was paid. In other words, all that the case decided was that a finder of a lost dog had no lien on him for the price of his keep. It may be pointed out that in English law the claim for a lien on property is a highly specialized one which is in no way conterminous with a right to compensation.

Nicholson v. Chapman was a case where the defendant rescued some of the plaintiff's logs out of a navigable river. He refused to let the plaintiff take possession of them unless he was paid for his services. The Court decided that, as the defendant could not be classed as a salvor, he had no right of lien on the timber for his trouble and expense in the rescue of it. But Eyre C.J. was careful to point out that the defendant might in fact have a claim to compensation: "It is therefore a case of mere finding, and taking care of the thing found . . . for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused a court of justice would go as far as it could go, towards enforcing payment. So it would if a horse had strayed and . . . was taken by some good-natured man and taken care of by him, till at some trouble and perhaps expense, he had found the owner. So it would be in every case of finding that can be stated (the claim to the recompense differing in degree, but not in principle)."

It may be noted in passing that in the United States it is fairly clear law that a finder of lost goods is entitled to recover from the owner his necessary and reasonable expenses incurred in the successful recovery and preservation of the goods.

With reference to the judgment of Lord Esher M.R. in Gwilliam v. Twist, it is sufficient to say that his opinion was not concurred in by the majority of the Court.

Thus it is suggested that in considering the weight to be attached to the oft quoted judgment of Scrutton L.J. in the Jebara case, there should be taken into account the facts that not only were his conclusions reversed on appeal, but his

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65 At p. 258.
66 Tome v. Flour Crib of Lumber, 24 F. Cas. no. 14, 083; Reeder v. Anderson, 4 Dana 198; Chase v. Corcoran, 106 Mass. 286; Amory v. Flyn, 10 Johns. 102.
67 See supra.
remarks on agency of necessity were obiter and based on authorities which, it is submitted with great deference, he did not wholly appreciate.

The general rule of English law undoubtedly is that a person who voluntarily expends money, labour and materials in the preservation or improvement of the property of another has no claim to compensation in the absence of contract. There is, however, an exception to the rule where the stranger acts not out of sympathy but from compulsion, in which case he can recover from the person benefited. The compulsion need not amount to duress. It is sufficient if he acts from threat or reasonable apprehension of proceedings or legal restraint of goods. It is contended that there is also authority for the proposition that if one person acts on behalf of another in an emergency so great as to render his interference not mere officious meddling but a moral duty, he has a legal claim to be compensated by the party benefited even in the absence of any contract, express or implied, if he acted with intent to charge for his services.

The best known instance of this proposition is in the case where a person in circumstances of necessity has undertaken charges in connection with a deceased person’s funeral. In such a situation it is clear law that the person can recover his reasonable expenses from the deceased’s estate. In Ambrose v. Kerisson Jervis C.J. said: “There can be no question that if an undertaker had voluntarily buried a deceased person, that person’s executor with assets is primarily liable to the undertaker for the expenses without any specific contract and the undertaker may recover them from him. How is that obligation founded? Because there is a duty imposed on the executor, having regard to common decency and the public health to perform the last offices of the deceased. For the same reason that the law casts this duty upon an executor, I think, the same duty is imposed upon the husband of a deceased wife to pay the expenses of her funeral without any specific contract with the person who provides it. If then, an undertaker is entitled to recover such expenses, I can see no difference between the man

69 Falcke v. Scottish Imperial Insurance (1888), 34 Ch. D. 248; Macclesfield Corp. v. G. C. Rly, [1911] 2 K.B. 528 (for a criticism of this last mentioned case see 25 Harv. L.R: 77-79; and see: anon Y.B. 21 Hen. VII 27 (circ. 1580) where it was held that it was a trespass for one to go on another's land in order to save the other's corn from being eaten by cattle.
70 See Duncan v. Benson, (1847) 3 Exch. 644.
71 See article by E. W. Hope entitled Officiousness in 15 Corn L.R. 25, 205.
72 17 O.S. 41.
who has voluntarily undertaken this duty on behalf of the husband and employed another person to conduct the funeral and an undertaker who incurs the expenses by virtue of his own original employment."73

Another example is in the case of Shallcross v. Wright.74 Here, a man while on a visit to friends died of malignant typhus. Medical attendants advised that the bed and furniture of the room in which he died should be burnt. An action was brought to recover for the damage thereby incurred. It was argued on behalf of the executor that "the act at the utmost was a mere work of charity, and which, even if the party were morally bound to perform, still created no legal obligation." Lord Langdale held otherwise: "Here it was not only necessary to remove the dead body, but to destroy the bed and furniture and other things which surrounded this gentleman, who, it appears from the evidence, died of a fever so highly contagious that not only the safety of the persons in the house but the protection of the neighbourhood absolutely required that it should be done. There was, therefore, both the necessity to do it in order to prevent probable mischief, and there was also a duty on the persons surrounding this gentleman to perform it. . . . . The necessity and the duty co-existing, I think that he is entitled to be re-imbursed out of the estate of the testator."

So also, where, in a proper case, a physician renders aid to a person without his request or consent, as when medical attention is given to an injured person while he is unconscious, the doctor is generally held to be entitled to recover for his services from the person benefited.75 In Matheson v. Smiley76 the Manitoba Court of Appeal held that a surgeon was entitled to recover from the deceased man's estate reasonable remuneration for his services when he had, without request, given aid to a man who had attempted suicide.77 Per Robson J.A.: "There was no allegation by the plaintiff of any status to sue, or as I read the claim, of any

74 12 Beav. 558.
75 See Cotnam v. Wisdom, 83 Ark. 601; Pray v. Stinson, 21 Me. 402.
76 [1932] 2 D.L.R. 781.
77 In the facts of this case a physician was summoned by two friends of the deceased. The physician in turn called in the surgeon. But these facts do not alter the law to be applied. In Scoenberg v. Rose, 145 N.Y.S. 881 it was pointed out that there is no distinction as to the right of recovery where the physician is called by a stranger or spectator and one where he proceeds to treat such a case without being asked to do so.
request by Smiley, now deceased, upon which to base a contract creating an obligation against the estate. . . . The defendant here says there was no request to plaintiff binding upon the defendant. There had been no promise by the defendant for past consideration even if that would be of any avail to plaintiff. Smiley was conscious and did say something to plaintiff but it is clear that he was in such an extreme condition that no words of his then would be construed as a request for the plaintiff's services or as an acquiescence in their being rendered on a contractual footing. Smiley was in no shape for that. But that does not seem to me to end the matter. I think it is not within reason that even in such circumstances as are revealed here a person in such a plight should simply be allowed to die without an effort being made by those in contact with him and without resort to all reasonable means to secure his recovery that may be at hand to them. And surely the person to pay should be the person for whose benefit the service is rendered.”

The duty to interfere with another's property may arise from some previous relationship of the parties. In the Lincolnshire County Court a case arose over a dispute about the price of strawberries delivered by a grower to a retailer. A large proportion of the strawberries when delivered were unfit for eating. The retailer thereupon sold this portion to a jam-maker. The Court decided that the retailer was justified in constituting himself an “agent of necessity” in selling the fruit for the best price obtainable. In the much older case of Kemp v. Pryor Lord Eldon put the proposition in this way: “I have a strong conviction upon sound principles, confirmed by my short experience at Guildhall, that, if a man under a contract to supply one article supplies another, under such circumstances, that the party, to whom it is supplied, must remain in utter ignorance of the change, until the goods are under circumstances, in which it would be against the interest of the other to return or reject them, instead of doing what is best for him, selling them immediately, a jury would have no hesitation in saying, he ought to be considered, if he pleased, not as a purchaser, but as placed by the vendor in a situation in which acting prudently for him he was an agent.” Similarly, in the case of Cornwall v. Wilson where a foreign factor exceeded the price limited for a purchase of hemp, Hardwicke L.C. said: “A merchant here refusing the goods sent over by his factor in a foreign country, having advanced and paid

78 This case is not reported, but a note of it will be found in 76 Sol. J. 663.
79 (1802), 7 Ves. Jr. 240.
80 (1750), 1 Ves. Sr. 509.
his money on these goods, may be considered as having an interest in the goods as a pledge, and may act thereon as a factor for that person who broke his orders, and may therefore insure these goods, as he has done: which might be reasonable, as it was war-time."

The duty to act on behalf of another may also arise from the nature of the office a person holds. A good example of this type of case is The Cynthia. In this case the crew of a British ship mutinied and killed the master and officers. The ship was then brought into the port of Campeachy where the British Consul took possession of the vessel and then gave a bottomry bond on her to cover the sums advanced for the purchase of stores and necessaries. Dr. Lushington rendered the following judgment: "It is difficult to conceive circumstances of greater destitution than those in which this vessel was now placed. There was no person who in the slightest degree represented the owners, and had it not been for the consul she might have rotted, and the whole cargo have been lost. Under these circumstances what was his duty? I have always entertained the opinion that it is the duty of a British consul to preserve and protect the property of British owners. . . Now, under these circumstances, the money having been bona fide advanced, is the Court to reject this bond, and hold that Mr. Shiels was not the agent of the owner for the purpose of signing this bond? I confess I think that the Court should look at the justice of the case. Seeing how necessary it is for the salvation of British commerce that the acts of those who represent it should be upheld, I am the more inclined to think that in justice and equity, I ought not to pronounce against the validity of the bond."

These cases, we believe, justify the submission that, while English law has not adopted the rule of the negotiorum gestio in its entirety, it is not hostile to it in principle. The chief difference between the two is that the Roman law takes no cognizance of the possible officiousness of the action of a stranger who interferes with the affairs of another. Under English law a man who so interferes must show that he has some moral duty so to do.

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31 (1852), 20 L.T. (O.S.) 54.